
CANADA / JUDGMENT

R. v. Hecimovic

2017 BCSC 398

COURT

Supreme Court of British Columbia

DECIDED

16 January 2017

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2017 BCSC 398 R. v. Hecimovic

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hecimovic,

2017 BCSC 398

Date: 20170116

Docket: X076149

Registry: New Westminster

Regina

v.

Andelina Kristina Hecimovic

Before: The Honourable Mr. Justice Harvey

Oral Reasons for Judgment

Counsel for the Crown:

A. Blunt

Counsel for the Accused:

D. Kontou

K. Cronin

Place and Date of Trial:

New Westminster, B.C.

November 14-18, 21-23,

25 and 29, 2016

Place and Date of Judgment:

New Westminster, B.C.

January 16, 2017

- [1] THE COURT: The accused, Andelina Hecimovic, is charged with two counts of dangerous driving causing death.
- [2] Just prior to midnight on October 19, 2010, a Toyota Paseo driven by the accused was proceeding eastbound on Lougheed Highway towards Harris Road in Pitt Meadows, B.C.
- [3] The decedents, John Manuel De Oliveira and Rebecca Cassandra Dyer, were travelling westbound on Lougheed Highway in the left-hand turn lane, intending to make a left-hand turn at Harris Road. They were driving a red Suzuki Swift.
- [4] Prior to the intersection, the accused's vehicle moved from one of the three eastbound through lanes on Lougheed Highway into what was a restricted right-hand turn only lane and proceeded through the intersection of Harris Road as the light was red for eastbound traffic.
- [5] Because of the placement of a concrete pedestrian island located in the southeast corner of the intersection blocking the lane of travel in which the accused was proceeding, she aggressively steered her vehicle to the left so as to avoid hitting the island. As a result, she lost control of her vehicle.
- [6] I will describe in greater detail the evidence respecting what then happened, but the effect was to cause the accused's vehicle to go into an uncontrolled yaw, eventually striking the median dividing the eastbound from westbound lanes of traffic.
- [7] The speed of the accused's vehicle, coupled with the engineering characteristics of the median, resulted in the accused's vehicle being launched airborne into the westbound lanes of travel.
- [8] While airborne, her vehicle struck the Suzuki Swift being driven by John Manuel De Oliveira. The combined effect of the speed and the weight of the Paseo driven by the accused was sufficient to shear the roof off of the Suzuki, thus causing fatal injuries to Mr. Oliveira and Ms. Dyer. Thereafter the Paseo continued to proceed in a north-easterly direction, ending up eventually against the northernmost curb of the eastbound lanes.
- [9] The elements of the offence of dangerous driving causing death are succinctly set out in *R. v. Roy*, 2012 SCC 26, at paras. 1 and 2 as follows:

- [1] Dangerous driving causing death is a serious criminal offence punishable by up to 14 years in prison. Like all criminal offences, it consists of two components: prohibited conduct -- operating a motor vehicle in a dangerous manner resulting in death -- and a required degree of fault -- a marked departure from the standard of care that a reasonable person would observe in all the circumstances. The fault component is critical, as it ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. While a mere departure from the standard of care justifies imposing civil liability, only a marked departure justifies the fault requirement for this serious criminal offence.
- [2] Defining and applying this fault element is important, but also challenging, given the inherently dangerous nature of driving. Even simple carelessness may result in tragic consequences which may tempt judges and juries to unduly extend the reach of the criminal law to those responsible. Yet, as the Court put in *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, at para. 34, "If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy." Giving careful attention to the fault element of the offence is essential if we are to avoid making criminals out of the merely careless.
- [10] The Crown, as always, bears the onus of proving all elements of the offence, including the actus reus and the mens rea, beyond reasonable doubt. Here it is conceded by the defence that the accused's driving in the short period prior to the collision with the Suzuki constitutes the actus reus of the offence. It is the mens rea which the defence argues that the Crown has not proven.
- [11] Events giving rise to the charge emerged from the evidence as follows.
- [12] The scene of these events, Lougheed Highway at or near Harris Road, is a controlled intersection. Lougheed Highway is an arterial road flowing from Vancouver to the Fraser Valley.
- [13] Harris Road is a main artery through Pitt Meadows and is surrounded on four sides at the intersection by commercial outlets.
- [14] The speed limit in place for Lougheed Highway at the time of the accident was 80 km/h. The evidence allows me to conclude that the highway approaching the intersection of Harris Road from both sides is flat and straight.
- [15] Police evidence confirmed that it is common for drivers to exceed the speed limit, and that speeds of 100 km/h usually fail to attract the attention of police officers performing traffic duty, as such vehicles are more or less keeping up with the flow of traffic. Lougheed Highway leading to Harris Road from the west has five lanes. There is a left-hand turn lane, a right-turn-only lane, and three lanes of through traffic proceeding eastbound. Harris Road has four lanes of traffic on the north side of the highway and five on the south side. The following facts were admitted as to conditions relating to eastbound traffic on the Lougheed Highway leading to the collision site where the accident occurred and as to the condition of

the accused:

- 1) one right-turn arrow sign located approximately 58 metres west of the centre of the intersection of Lougheed Highway and Harris Road;
 - 2) one "Right-hand must turn right" sign located approximately 50 metres west of the centre of the intersection of Lougheed Highway and Harris Road;
 - 3) one overhead traffic advisory sign located west of the intersection of Lougheed Highway and Harris Road at approximately 125 metres west of the centre of the intersection, it displays the caption "prepare to stop when flashing lights are activated";
 - 4) one "Maximum 80 km/h" speed sign located 579 metres west of the centre of the intersection of the Lougheed Highway and Harris Road;
 - 5) on October 19, 2010, at approximately 11:44 p.m., a motor vehicle accident occurred between two vehicles (the "Accident"), approximately 100 metres to the east of the intersection of Lougheed Highway and Harris Road (the "Intersection") in Pitt Meadows, British Columbia;
 - 6) as a result of the Accident, both Mr. De Oliveira and Ms. Dyer died immediately from multiple blunt force injuries;
 - 7) both the Paseo and Suzuki vehicles were in good mechanical and physical condition prior to the collision, neither displayed evidence of any sudden mechanical failure or malfunction which may have contributed to the Accident;
 - 8) there are a variety of other signs displayed on Lougheed west of Harris to attract the attention of eastbound drivers, including a "Pitt Meadows Community Police Station" sign, golf club signs affixed to the light post some 286 metres before the centre of the Intersection, a truck route sign approximately 261 metres before the centre of the Intersection, and a Blue Heron Fruit Winery sign approximately 235 metres before the centre of the Intersection;
 - 9) it is admitted that the right-hand-turn-only lane allowing eastbound traffic to turn onto Harris Road has been there since 2005, is approximately 34 metres across the Intersection of Harris Road and Lougheed Highway;
 - 10) there is no evidence that the accused consumed alcohol or drugs prior to the Accident.
- [16] I now turn to the evidence. The following facts are common to the evidence of those who observed the Accident and the accused. The accused, at some unknown point, entered into the right-hand turn only lane and was travelling at a speed higher than the speed limit proceeding eastbound towards Harris Road. Witness estimates as to the accused's speed as it neared or entered the Intersection varied from the accused's self estimate of 80 to 90 km/h, to well over 100 km/h from others who observed the events as they unfolded.

- [17] The accused's vehicle travelled for a period in the right-hand-turn-only lane before entering into the Intersection at Lougheed Highway and Harris Road as against the red light controlling traffic for eastbound traffic.
- [18] On entering into the Intersection, the accused's vehicle veered suddenly to the left, so as to avoid the concrete pedestrian island which juts into the right-hand-turn-only lane, and thereafter lost control and went into a counter-clockwise yaw, which is a rotational turn. The vehicle moved across through the three lanes eastbound of traffic, east of Harris Road, eventually hitting the centre median before going airborne and striking the Suzuki.
- [19] None of the witnesses observed the accused's vehicle for a sustained period of time. All agreed when they observed it, it was going fast. Those in position to see testified the light was red for eastbound traffic when the accused entered the Intersection and that she attempted evasive manoeuvres once in the Intersection in an effort to avoid colliding with the pedestrian island.
- [20] Duncan Buss was driving alone in an eastbound lane on Lougheed Highway and was approaching Harris Road at a speed he estimated was 80 to 85 km/h. As he approached the Intersection proceeding east, he observed the warning lights from the traffic advisory sign and began slowing. As he was slowing, he noticed the accused's vehicle coming up behind him in the right-hand-turn-only lane and it passed him at "a high rate of speed". He formed the opinion that the vehicle would neither be able to stop for the red light nor turn right at Harris Road, given its rate of speed.
- [21] He then observed the Paseo continue on in the right-hand-turn-only lane and go through the red light. Thereafter it lost control as it swerved to avoid striking the pedestrian crossing island. He described it as swerving back and forth until it hit the median and shot into the air. He then heard the sounds of glass shattering.
- [22] He estimated he was 100 metres from the Intersection when the accused passed him, but acknowledged that that was more of a guess than a firm estimate.
- [23] He said that the light was red for eastbound traffic when the accused's vehicle entered the Intersection and had been so for two to three seconds. He estimated the vehicle's speed at 110 km/h as against his estimate of 85 km/h. The vehicle never slowed down prior to going into the Intersection, and he noticed no change in its speed until it swerved to miss the pedestrian island.
- [24] After the light turned green for eastbound traffic, he went forward and pulled his car over. He phoned 9-1-1, requesting both police and ambulance. Mr. Buss eventually attended at both vehicles, that of the two deceased and that containing the accused. He acknowledged that he originally, because both vehicles were red, thought it was the vehicle containing the decedents which had travelled past him through the red light, but corrected this when he spoke to police the next day.

- [25] The Crown called two expert witnesses, Sergeant Jewers and Harvey West. The expertise of both in traffic accident reconstruction was acknowledged by the defence.
- [26] Sgt. Jewers arrived at the Accident scene at approximately 12:20 a.m. on October 20. He performed a series of measurements and placement markers depicting a variety of indicators, including where the accused's vehicle first went into yaw, where it struck the median, and debris from the Suzuki vehicle, indicating the general area in which the Accident between the accused's vehicle and the Suzuki took place.
- [27] He measured the slope of the median so as to obtain the variables for the trajectory of the vehicle as it went airborne, and performed drag tests so as to determine the coefficient of friction where the scuff marks on the road began.
- [28] Measurements were taken with a precise laser-measuring instrument so as to prepare scale diagrams.
- [29] A series of photographs of the Accident scene were taken. Sgt. Jewers, by self-acknowledgment, was unable to estimate the accused's maximum speed, but only its minimum speed as it came into contact with the median. Such was well under the speed limit but made no allowance for the velocity necessary for the accused's vehicle to launch over the median, strike the decedents' car and travel further on to the northeast of the intersection.
- [30] Harvey West, an engineer specializing in accident reconstruction, utilized the scene measurements and documentation taken by Sgt. Jewers and others to provide an opinion as to the speed of the accused's Paseo upon its entry into the Intersection. He offered an opinion of a range between 100 to 130 km/h with a "probable speed" of 100 km/h. That estimate was achieved by using what he described as the Monte Carlo technique, which involves computer modelling, taking known information, as well as "probable information", and providing ranges of values from computer analysis to come up with the probability distribution of the information inputted.
- [31] He then performed a second analysis based upon the curvature of the Paseo's yaw, noting the radius of curvature is less at higher speeds. He used calculations based on the demonstrated curvature of the yaw and the known coefficient of friction, and provided an opinion the range for the Paseo's speed was 107 km/h to 116 km/h. The 107 km/h estimate was made using the precise coefficient of friction determined by Sgt. Jewers. The higher speed was obtained when using a different coefficient of friction.
- [32] In opining the Paseo's speed, Mr. West made no allowance for any loss of speed prior to the vehicle going into yaw as a result of fishtailing. Others who observed the accused's vehicle had less time to observe it, but all confirmed the Paseo's lane of travel and the accused's entry into the Intersection as against the red light, and speed uniformly described as above the posted limit of 80 km/h.

- [33] Two employees from the accused's then employer described her shifts during the months she worked at Eagleridge Hospital, and described the chain of command in the emergency ward where the accused was working the night of the collision. Her shift the evening in question was from 3:30 p.m. until 11:30 p.m. The emergency ward was one of the hospital's busiest departments.
- [34] The accused testified. At the time of the Accident she was 23 years old and a recent graduate of a one-year practical nursing course at Kwantlen College. She had recently obtained her N driver's designation and the Paseo vehicle she was driving on the evening of the Accident was purchased by her sometime in August of 2010.
- [35] On the evening of the Accident, she was working at Eagleridge Hospital in the emergency ward. She described a busy and emotionally-charged shift which focused upon the admission of a young man who had apparently attempted suicide. While attending to him and taking his vital signs, the young man vomited on the accused, all over her pants. She later had to go to the staff room and obtain spare pants and clean up.
- [36] She carried on with her shift until it slowed around 11:00 p.m. Although the shift did not actually end until 11:30 p.m., she testified that she checked with another nurse whom she identified as Vonda, who authorized the accused to leave earlier than 11:30 p.m. The accused was uncertain as to the exact time she left the hospital.
- [37] She then got into her vehicle, and having concluded she was exhausted but "okay", she considered herself composed and did not tell anyone of her feelings surrounding the events earlier in the evening.
- [38] She was driving to her boyfriend's home who lived east of Harris Road, just off of Lougheed Highway on Meadow Gardens Way.
- [39] Contrary to her usual practice, she said she went along the Lougheed Highway towards Harris, as opposed to taking the more circuitous route via Dewdney Trunk Road, which is a more leisurely route but less busy than that of Lougheed Highway.
- [40] She testified she had used Lougheed Highway "once or twice during the day before October 19" when driving, but on October 19, she took the shortest route. Earlier when she travelled on Lougheed Highway, she said she stayed in the far left or middle lanes. As she was approaching Harris Road, she began focusing on the young man and how sad he must have been and what he was going through and what his family was going through. She described herself as being on the verge of tears, but containing things.
- [41] As she came to the area before Harris Road, she saw what she said was "an open lane" and went into it. She did not initially explain why she felt it was necessary to change lanes, given she testified she did not notice traffic in front of her slowing or stopped. She thought she was keeping up with traffic at maybe 90 kilometres an hour or so. She then noticed an odour. She did not know where it was initially but then observed her shirt and saw vomit on it.

- [42] She then described herself as being overwhelmed by the events involving the young man earlier in the evening and burst into tears and continued to drive as she wiped away the tears. She testified she began crying after entering the right-hand-turn-only lane.
- [43] The events that followed happened quickly. She thought she was travelling in a through lane, although she acknowledged she did not know where it began. As she entered the Intersection, she realized that the light was red and that the pedestrian island was immediately in front of her. She neither accelerated before she entered the Intersection nor did she brake. She swerved to avoid a pole that is situated on the pedestrian island. She denied that she was hurrying or trying to beat the traffic lights.
- [44] She panicked and turned the wheel hard to her left so as to avoid the pole, and then lost control of her vehicle.
- [45] Cross-examination of the accused focused on the fact that she was a frequent attendee at her boyfriend's residence who had lived a mile or so east of Harris Road for close to 20 months prior to the evening in question, and that she frequently slept over there whilst attending school, and then later while working at Eagleridge Hospital.
- [46] While in the ambulance, the accused told Constable Condon that she was on her way home when the Accident happened. The accused testified she had a number of homes at the time of the incident, including her aunt's and her parents', as well as her boyfriend's on Meadow Gardens Way. Her driver's licence gave her address as that of her boyfriend on Meadow Gardens Way.
- [47] At her earlier trial, she testified that her shift commenced at 3:15 p.m. and ended at 11:15 p.m. In the Crown's case, evidence was called noting that the shift started at 3:30 p.m. and 11:30 p.m. was its end point on October 19, 2010. The accused explained this discrepancy by saying that she always arrived early and on that evening was able to leave early, despite the shift carrying on until 11:30 p.m., because it had quieted down.
- [48] She agreed ultimately there was no evidence at the first trial about the start and end of her shift, and that she answered questions in the earlier trial that she had spent the whole of her shift in the emergency intake ward. In her earlier testimony, the accused acknowledged she never mentioned getting off earlier or that things slowed down later in the shift. She said the conversation leading to her earlier departure was with a nurse named "Vonda", not Denise Dejuan, the charge nurse called by Crown who was on duty and supervising the emergency room staff the night of October 19, 2010.
- [49] The accused was steadfast in her denial of any familiarity with the physical layout of the Intersection at Harris Road and Lougheed. She described the route she normally took driving as along Dewdney Trunk Road, down Harris, then across Lougheed Highway south into a subdivision, also as to avoid Lougheed Highway and the busy traffic thereon. When she took the bus or was driven by her boyfriend, she said she paid little attention to her surroundings.

- [50] The route she described as her usual route when driving herself likely added some 10 minutes or so to her commute each way, according to police evidence. She was inconsistent about the number of times she had driven down Lougheed and whether she had driven it herself during nighttime hours before October 19, 2010. Despite passing by the pedestrian island when she took Harris Road from Dewdney Trunk Road as the way to her boyfriend's, she denied knowing of its presence or that the lane to the far right of eastbound traffic was a turn lane only.
- [51] She acknowledged she was familiar with the Intersection's location, but not its physical layout, specifically the right-hand-turn-only lane and the pedestrian island to the east of Lougheed. In cross-examination, she acknowledged that there was a vehicle ahead of her when she moved her vehicle into the right-hand-turn-only lane and that there were multiple vehicles ahead of her before she went into that open lane. She acknowledged ultimately that she must have noticed that they were slowing, because she drove by them.
- [52] The defence called one other witness, Dr. Mistlberger. At the invitation of the Crown, Dr. Mistlberger was qualified as an expert in circadian rhythms, and after opining that the accused was not in sleep deficit at the time of the collision, offered an opinion that "at this biological time of night, after an intense shift in hospital emergency that required sustained attention to task, Ms. Hecimovic would, as a matter of normal human brain biology, have been at increased risk of distraction and emotional dysregulation". Such, he said, would not have been apparent to her when she made the decision to drive home.
- [53] In arriving at his opinion, Dr. Mistlberger met with the accused at a Starbucks a month or so prior to trial, and in combination with an interview, had her fill out or assisted her in filling out several self-report tests about her sleep patterns. What emerged from his report was an opinion that the accused, despite providing very few details about the shift which preceded the Accident, suffered what he described as an "emotional convulsion" immediately before the accident leading to a distraction and thus the dangerous driving resulting in the fatal aftermath.
- [54] Dr. Mistlberger's opinion, in my view, is of no assistance in determining the guilt or innocence of the accused. The history he took from the accused was insufficient to provide anything other than a boilerplate opinion which is, simply put, that shift workers, particularly those working in what is colloquially called the graveyard shift, suffer attention deficits from time to time and are more likely than colleagues working days or afternoons to be involved in motor vehicle accidents as a result.
- [55] The accused never provided Dr. Mistlberger with the details she provided in her evidence about the young man in the hospital, but rather he obtained the information about the circumstances of a challenging shift preceding the Accident from a friend or newspaper reports. The only reference in her interview testing with Dr. Mistlberger to an upsetting event while she was driving was an excerpt from notes he took that she began thinking of the death of her brother's friend and became upset. Given the context in which that remark

came up, it is hard not to fathom how the accused could have understood it as a reference to anything but the events leading up to the happening of the Accident.

- [56] Dr. Mistlberger ultimately agreed in cross-examination that the accused was not suffering from a sleep deficit at the time of the Accident. However, he continued to insist her circadian rhythm was still a factor in its happening, without providing any scientific basis upon which such could be concluded given the paucity of his investigation and the actual responses of the accused to the tests he administered.
- [57] Given the timing of the disclosure of Dr. Mistlberger's interview notes to the Crown, I allowed an application to have the accused recalled for the purposes of dealing with her statement to Dr. Mistlberger. While maintaining it was the incident from her shift earlier in the evening that precipitated her breakdown, the accused acknowledged making the remark attributed to her by Dr. Mistlberger regarding the death of her brother's friend.
- [58] The Crown argues two separate theories which it says leads to conviction. Firstly, it says the accused on the evidence was attempting, by the manoeuvres she took, to jump the traffic light at the Intersection of Lougheed Highway and Harris Road because she was in a hurry to get home. Alternatively, it says that the actions of the accused when measured as against that of a reasonable person in the accused's circumstances constitute a marked departure from the norm and are not as a result of a momentary lapse.
- [59] The defence argues the Crown has failed to prove the essential elements of the offence. While acknowledging the establishment of the actus reus and the driving described, the defence argues the Crown has not proven, by either standard, the necessary mens rea to establish that the accused is guilty of the offences with which she is charged beyond a reasonable doubt.

Discussion

- [60] As I earlier noted, the leading decision on the requisite elements to establish dangerous driving causing death are set out in *R. v. Roy*. In *Roy*, Mr. Justice Cromwell summarized the two elements as follows, at para. 28:
- [28] The actus reus of the offence is driving in a manner dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably have been expected to be at that place (s. 249(1)(a) of the Criminal Code). The mens rea is that the degree of care exercised by the accused's was a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances (Beatty, at para. 43). The care exhibited by the accused is assessed against the standard of care expected of a reasonably prudent driver in the circumstances. The offence will only be made out if the care exhibited by the accused constitutes a marked departure from that norm. While the distinction between a mere departure from the standard of care, which would justify civil liability, and a marked departure justifying criminal punishment is a

matter of degree, the lack of care must be serious enough to merit punishment (para. 48).

- [61] The actus reus has been established by the accused's driving; specifically, the combination of speed, her failure to obey the traffic controls, specifically the red light for eastbound traffic and the signage requiring drivers in the right-hand-turn-only lane of travel to turn right onto Harris Road. The issue before me is whether the Crown has proven the necessary mens rea beyond a reasonable doubt.
- [62] Returning to Roy, Cromwell J. made the following comments concerning the mens rea element under the modified objective test:
- [36] The focus of the mens rea analysis is on whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances (Beatty, at para. 48). It is helpful to approach the issue by asking two questions. The first is whether, in light of all of the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the second question is whether the accused's failure to foresee the risk and take steps to avoid it, if possible, was a marked departure from the standard of care expected of a reasonable person in the accused's circumstances.
- [37] Simple carelessness, to which even the most prudent drivers may occasionally succumb, is generally not criminal. As noted earlier, Charron J., for the majority in Beatty, put it this way: "If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy" (para. 34). The Chief Justice expressed a similar view: "Even good drivers are occasionally subject to momentary lapses of attention. These may, depending on the circumstances, give rise to civil liability, or to a conviction for careless driving. But they generally will not rise to the level of a marked departure required for a conviction for dangerous driving" (para. 71).
- [38] The marked departure from the standard expected of a reasonable person in the same circumstances -- a modified objective standard -- is the minimum fault requirement. The modified objective standard means that, while the reasonable person is placed in the accused's circumstances, evidence of the accused's personal attributes (such as age, experience and education) is irrelevant unless it goes to the accused's incapacity to appreciate or to avoid the risk (para. 40). Of course, proof of subjective mens rea -- that is, deliberately dangerous driving -- would support a conviction for dangerous driving, but proof of that is not required (Charron J., at para. 47; see also McLachlin C.J., at paras. 74-75, and Fish J., at para. 86).
- [63] Firstly, the Crown says that the evidence demonstrates subjective intent beyond a reasonable doubt that the accused was hurrying and attempting to jump the light so as to reach home and her boyfriend's residence. In the alternative, the Crown submits the accused's driving in the moments leading up to the Accident must be considered in combination with one another, not in isolation, and that over a relatively protracted period

of time, the accused was inattentive to a number of circumstances, including slowing traffic, signage warning of the requirement for right turn from her lane of travel, the flashing traffic advisory lights, the red light itself, and finally the placement of the pedestrian traffic island which jutted well into the accused's lane of travel and was visible, given the lighting of the Intersection, at a significant distance.

- [64] According to Crown, the totality of those actions are more than mere oversights or momentary lapses, and occurred over a considerable period of time and distance, thus leading to the only conclusion that such was a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances.
- [65] As I noted, it is not necessary to find the accused has the subjective intent to provide the required mens rea for driving dangerously. As stated in *R. v. Beatty*, 2008 SCC 5:
- [48] However, subjective mens rea of the kind I have just described need not be proven to make out the offence because the mischief Parliament sought to address in enacting s. 249 encompasses a wider range of behaviour. Therefore, while proof of subjective mens rea will clearly suffice, it is not essential. In the case of negligence-based offences such as this one, doing the proscribed act with the absence of the appropriate mental state of care may instead suffice to constitute the requisite fault. The presence of objective mens rea is determined by assessing the dangerous conduct as against the standard expected of a reasonably prudent driver. If the dangerous conduct constitutes a "marked departure" from that norm, the offence will be made out. As stated earlier, what constitutes a "marked departure" from the standard expected of a reasonably prudent driver is a matter of degree. The lack of care must be serious enough to merit punishment. There is no doubt that conduct occurring in a few seconds can constitute a marked departure from the standard of a reasonable person. Nonetheless, as Doherty J.A. aptly remarked in Willock, "conduct that occurs in such a brief time frame in the course of driving, which is otherwise proper in all respects, is more suggestive of the civil rather than the criminal end of the negligence continuum" (para. 31). Although Willock concerned the offence of criminal negligence, an offence which is higher on the continuum of negligent driving, this observation is equally apt with respect to the offence of dangerous operation of a motor vehicle.
- [66] In *Beatty*, the court unanimously held a momentary lapse of attention without anything more cannot establish criminal responsibility sustaining a conviction for dangerous driving if the accused's driving does not amount to a marked departure from the standard of care of a reasonable person in the circumstances.
- [67] Having acknowledged not all instances of bad driving with tragic consequences will attract criminal liability, the court in *Beatty* noted that it is not open to an accused to say they gave no thought to their manner of driving so as to avoid criminal liability, because the fault lies in the failure to bring their dangerous activity within the expected degree of thought and attention that is required.

- [68] The defence says although the accused's driving, while objectively dangerous, was as a result of a momentary lapse for which no criminal liability attaches.
- [69] In Beatty, the court said again at para. 43:
- [43] In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances.
- [70] Because the accused testified, I am obliged to consider her testimony in light of *R. v. W.(D.)*, [1991] 1 S.C.R. 742. Such instructs me that if I believe the accused, I must acquit. Even if I do not believe her testimony, if it raises a reasonable doubt, I must acquit. Finally, even if I am left in no doubt by the evidence of the accused, the Crown must still establish the elements of the offence beyond a reasonable doubt.
- [71] In my view, the same analysis must be formed with respect to each pathway to conviction:
- 1) did the accused have the subjective mens rea such as to sustain a conviction; or
 - 2) in light of all of the relevant evidence, would a reasonable person have foreseen the risk and taken steps to avoid it if possible.
- [72] If so, the second question in this pathway is whether the accused's failure to foresee the risk and take steps to avoid it, if possible, was a marked departure from the standard of care expected of a reasonable person in the accused's circumstances.
- [73] Specifically, would a reasonable person in the accused's circumstances have appreciated the significance of slowing traffic before and the sudden appearance of a new lane of travel on the right, observed the warning lights 125 metres in advance of the Intersection, and recognized the significance of the road signs directing traffic in her lane of travel to turn right on Harris Road.
- [74] I agree that only infrequently there will be evidence sufficient to establish the degree of subjective mens rea. That is, that the accused intended to drive in a manner that was dangerous. Such will usually emerge after observations of the accused's driving pattern over a considerable period of time involving a number of dangerous actions. Such, in my view, was not the case here.
- [75] There were no prolonged observations of the accused's driving over an extended period of time so as to conclude her driving in the timeframe before the Accident was a deliberate choice to try and beat the red light at the Intersection or time her entry into it so as to coincide with the light changing green. Most of the witnesses saw the accused fleetingly in a compressed timeframe. Mr. Buss saw her for the longest period from the time she passed him some 100 yards or so approximately before the Intersection and then her entry into it and the events which followed.

- [76] The accused was moments away from her destination, belying to some extent, at least, the need to race the red light which the Crown theorizes was the basis for subjective intent. The accused denied that she was trying to beat the red light. I will momentarily deal with the weight I afford her testimony, but in all of the circumstances, being the absence of a prolonged period of observation and the proximity of the accused to her intended destination, I maintain a reasonable doubt that the accused deliberately drove in the fashion described by the witnesses resulting in the tragic death of two young persons.
- [77] That finding does not end the inquiry. I must still consider the accused's testimony and indeed the rest of the evidence as it relates to the modified objective test enunciated in *Roy*, and then apply *R. v. W.(D.)*.
- [78] The Crown argues that I should view the evidence of the accused with skepticism and ultimately reject it based on what the Crown argues are internal inconsistencies, conflicts between her evidence in this trial and the one which preceded it, and a general lack of cohesion and sensibilities to some of her assertions.
- [79] The accused's explanation for the inattentiveness leading to the fatal collision is that she was distraught by events at work which culminated with her smelling or seeing vomit on her shirt, resulting in an emotional outburst which resulted in a "momentary lapse of attention" giving rise to the driving described by the witnesses, including the accused, and resulting in the collision causing the deaths of Mr. De Oliveira and Ms. Dyer.
- [80] As against this, the Crown notes that the accused changed at work in a lit environment without seeing or smelling vomit on her shirt. She neither noticed nor smelled vomit during the duration of her work shift as it became less busy towards the end of the shift. No other employee observed or mentioned anything to her. She was able to drive from Eagleridge Hospital to a point at or near the Intersection in the confined space of her automobile without smelling the odour of vomit. The interior of her vehicle was unlit save for the dashboard.
- [81] Crown argues that it is inconceivable that such became apparent to her only as she approached the Intersection with a red light. That same smell was not noticed by Constable Condon, who was in close quarters for the accused for an approximate 20-minute trip to the hospital in the back of the ambulance. He was alive to the possibility of impairment and/or alcohol use as a cause of the collision. He made no mention in his evidence of any smells.
- [82] The accused testified that despite the dark interior of her vehicle, she was actually able to see something on her shirt that she had not noticed previously in the well-lit emergency ward.
- [83] Crown argues that the accused's evidence regarding her shift time and leaving early on the night of the Accident ought to be rejected because of her prior inconsistent statements as to the timing of her shift during her testimony at her first trial. None of her shifts, on the evidence before me, commenced at 3:15 p.m. or ended at 11:15 p.m. The evidence before

me was that the shift started at 3:30 p.m. and ended at 11:30 p.m. She raised her early departure from the hospital only after the Crown tendered evidence of the shift times in the second trial.

- [84] The Crown posits that the accused offered the earlier time for the completion of her shift without any further detail at the earlier trial so as to expand the timeframe between the end of her shift and the Accident at 11:44 p.m. At her earlier trial, the accused testified she spent the whole of her shift at the hospital, the complete shift. The Crown notes the compressed timeframe in which I am asked to conclude the Accident occurred leads to an inevitable conclusion that the accused was indeed hurrying as she, prior to her departure, would have had to collect her belongings from her locker in the staff room, walk to her car parked in the roadway outside the hospital, text message her boyfriend that she was on her way, and then driving to the Accident scene some 12.6 kilometres from the hospital.
- [85] Denise Dejuan, the charge nurse on shift the evening of October 19, 2010, in the emergency ward, was supervising the accused on the night in question. She testified that as a registered nurse, she was not usually out of the ward until 20 minutes after her shift, and that a charge nurse would be aware of what was going on in the department. She described the emergency department as one of the busiest, and when asked about nurses leaving earlier than the end of their shift, she answered she had never heard of that.
- [86] The Crown suggests the accused tailored her evidence as to the department slowing down around 11:00 p.m., once aware that evidence for her shift times would be before the court.
- [87] In her earlier trial, the accused testified that her shift on October 19, 2010, was chaotic and that everyone was busy and that the department was understaffed. Those remarks, according to the Crown, make it inconsistent with her leaving earlier than described.
- [88] The Crown also challenges the veracity of the accused's testimony as to the normal route she took when driving. Such, argues the Crown, was to deflect attention from her familiarity with an Intersection which she regularly travelled through many times in the preceding months. Her unfamiliarity with the Intersection, given the number of times she had travelled through it from whatever direction, whether as a driver or a passenger, is another indication, argues the Crown, that she should not be believed as to the events leading to the Accident.
- [89] Finally, the Crown notes that in her testimony before me, the accused did not testify she was blinded by her tears or that her crying interfered with her ability to see or think. The Crown notes she kept her car travelling straight along the right-hand-turn-only lane, because she thought it was a through-lane. Further, the fact that she teared up in close proximity to the Intersection offers up no explanation for her failure to see the traffic advisory light warning of the impending red light which was visible to Mr. Buss, as the accused was behind him.

- [90] Although not articulated by Crown, I observe that the explanation offered at trial for the inattentiveness flies in the face of that recorded by Dr. Mistlberger, who noted in answer to Question 9 of what he described as the Pittsburgh Sleep Quality Index, "enthusiasm was fine", "being quiet and alone in the car lost composure", "was thinking about her brother's friend who had died", "the first time she ever felt loss of control, she didn't realize how powerful her emotions are".
- [91] Dr. Mistlberger testified that he recorded those comments, which he attributed to the accused, when he met with her in September of 2016. Those remarks never found their way into his report, but only came to light upon production of his file. The remarks in the context of the investigation by Dr. Mistlberger lend themselves to no other explanation but that they were provided in the context of the investigation he was making as to her emotional state at the time of or immediately prior to the Accident. The accused admitted that she made the statement, although she attempted to put them into a different context than a response to the circumstances leading to the Accident.
- [92] The totality of the Crown's observations about the accused's testimony cause me to disbelieve the accused as it relates to the events leading up to her entry into the Intersection against the red light. As a result of that conclusion, there is nothing in the circumstances of the accused immediately prior to the Accident which resulted in her entry into the Intersection which lead me to believe, or leave me a reasonable doubt, that she was unable to identify the risks I have earlier referenced, specifically the fact that traffic was slowing in front of her, the lights warning of the impending traffic signal change at the Intersection, and the appearance to her right of a free lane which had just come into being some 300 metres before the Intersection. These, coupled with the signage advising that the accused's lane of travel was a restricted right-hand-turn-only lane, the pedestrian island blocking the right-hand-only lane of travel, and the red light prohibiting her entry into the Intersection were all risks which she ought to have identified and responded to. Regrettably, she did not.
- [93] In an assessment of the care exhibited by the accused and whether it constitutes a marked departure, I am obliged to measure those actions in their totality and not as isolated events. The accused acknowledged leaving lanes of travel with which she had familiarity so as to enter the eastbound right-hand-turn-only lane. She said she thought it was a through-lane, but that has to be seen in light of the evidence that the lane did not start until approximately 300 metres before the Intersection. She entered the right-hand-turn lane only because cars ahead of her were blocking the passage in the three through lanes. Such, I find, was a conscious decision made well in advance of any emotional outburst which she testified caused her to lose focus. Those vehicles ahead of her had either stopped or were in the process of stopping, and such was apparent from their brake lights and positioning relative to the accused's vehicle.

- [94] Mr. Buss testified, and I accept, that he slowed because of the warning lights advising of the upcoming traffic control device. The accused passed by him at a high rate of speed after the lights had begun flashing. The only conclusion to be drawn from that is that he began to slow in advance of the advisory sign's location, 125 metres to the west of the Intersection. The accused was behind him as he commenced slowing.
- [95] Nothing in the accused's testimony, even if believed, explains why she failed to see the overhead flashing lights located 125 metres in advance of the traffic control, or react to the slowing vehicles in front of her. Accepting that 80 km/h, although the speed limit was not the usual rate of travel for vehicles on Lougheed Highway, I find the accused's speed, which was no less than 100 km/h as opined as the lowest speed by Mr. West, was excessive for the conditions prevailing, those being the slowing or stopped traffic ahead of her, the approaching controlled intersection, the clearly visible signage cautioning eastbound drivers of the restricted use of the right hand lane and her admitted unfamiliarity with the layout of the approaching Intersection.
- [96] I conclude that the light for eastbound traffic was yellow then red for the accused's vehicle as she approached the Intersection and the traffic island blocking the right-hand lane turn only was visible for a considerable distance from the Intersection. The actions of the accused were not a momentary lapse which took place over a span of five or six seconds or more, depending on the time she entered into the right-hand-turn-only lane. I conclude such from the evidence of Constable McGhee who testified that the time required to travel the whole of the 300 metres of the right-hand lane at a speed of 100 kilometres is 10.8 seconds. Given the evidence of Mr. Buss, I conclude the accused entered the right-hand-turn-only lane either before or as he began to slow in front of her, which was well beyond 125 metres west of the Intersection where the traffic advisory lights were positioned.
- [97] Prior to her early entry into the Intersection against the red light, the accused passed by some 50 metres or so before the Intersection two signs, one affixed to a pole to her right, the other overhead, advising her the lane of travel was for right-turning vehicles only. She failed to notice the pedestrian island jutting into the lane of travel at any point prior to her actual entry into the Intersection.
- [98] Most importantly, she failed to see the traffic control device which she knew, from her previous use of the highway, governed the flow of east and west traffic on Lougheed. Her evidence as to when she became overwhelmed by the events of the earlier shift at the emergency ward, again I say, even if believed, does not explain the change of lanes, does not explain her passing by cars that were slowing, or her lack of appreciation for the events that were taking place around her.
- [99] In isolation, one of these actions might properly be considered a momentary lapse. In combination, they constitute the requisite marked departure from the standard of care that a reasonable person would have observed in all of the circumstances.

[100] As such, I am satisfied that the Crown has discharged its burden of proving the accused's guilt beyond a reasonable doubt in respect of both counts and accordingly convict her.

"Harvey J."

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