
CANADA / JUDGMENT

R. v. Kowal

2013 BCSC 520

COURT

Supreme Court of British Columbia

DECIDED

8 March 2013

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2013 BCSC 520 R. v. Kowal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kowal,

2013 BCSC 520

Date: 20130308

Docket: 21603-2

Registry: Salmon Arm

Regina

v.

Jean-Paul Kowal

Before: The Honourable Mr. Justice Dley

Oral Reasons for Judgment

Counsel for the Crown:

A. Ross

Counsel for the Accused appearing via teleconference:

R. T. Gill

Place and Date of Trial/Hearing:

Kamloops, B.C.

January 21-25, 28 and 29, 2013

Place and Date of Judgment:

Kamloops, B.C.

March 8, 2013

Introduction

- [1] THE COURT: Mr. Kowal caused a head-on collision by travelling in the wrong lane after rounding a gentle curve on Highway 97A near Enderby.
- [2] A blood sample taken from Mr. Kowal about two and a half hours after the collision disclosed that his blood alcohol concentration was well over the legal limit of .08.
- [3] Mr. Kowal says that he fell asleep just before the collision. Mr. Kowal says that as a result of the pain he was in, he drank a large volume of alcohol moments after the crash. He says that the alcohol detected in his body was likely the result of that drinking.
- [4] Mr. Kowal has been charged with dangerous driving, impaired driving, and driving with a blood alcohol concentration in excess of the legal limit. All of those charges relate to and with respect to the death of Donovan Pippus.
- [5] This case is a determination of the facts and whether the Crown has proven the allegations beyond a reasonable doubt.

Background Facts

- [6] Mr. Kowal was working for a logging firm out of Drayton Valley, Alberta. His home was in Kelowna.
- [7] He had started the employment in early July 2010. His schedule required him to work four to six weeks straight, after which he would get several days off. The typical day was 13 to 14 hours, out of which he operated a machine for 11 hours. He received a half hour for lunch, during which he took a nap. The balance of the day was travel time.
- [8] Mr. Kowal usually slept for seven to eight hours at night.
- [9] On September 1, Mr. Kowal was to start his three days off. Mr. Kowal had slept for eight hours the night before. He planned to drive home to spend the following day with his partner, before turning around and heading back to Drayton Valley on Day 3.
- [10] He left Drayton Valley at 10:00 a.m. B.C. time for the ten-hour drive home. He stopped after an hour in Rocky Mountain House to have his truck serviced and to replenish his liquor cabinet. He bought six bottles of Crown Royal, four bottles of wine, two bottles of vodka, and a bottle of peach Schnapps. The liquor was placed in the rear of the crew cab.
- [11] At about 3:00 p.m., he stopped at a pullout before reaching Lake Louise. He went for a walk, drank about three ounces of Schnapps and rested.

- [12] Mr. Kowal stopped for gas in Golden and Revelstoke.
- [13] He continued along the Trans Canada Highway to Sicamous, where he turned off onto Highway 97A. He intended to follow that highway, travelling southbound through Grindrod and Enderby.
- [14] Highway 97A is a two-lane rural road. The highway is intercepted by a number of driveways and access roads to various businesses. From Grindrod to the junction of Highway 97B, the speed limit is 80 kilometres per hour ("kph"). The road is divided by double solid lines and there are no stretches for passing. From Grindrod to the crash location is about a five-minute drive at the posted highway speeds.
- [15] After the junction of Highway 97B, the road allows for passing in designated areas, and the speed limit increases to 90 kph.
- [16] There are curves in the road that are preceded by speed warning signs.
- [17] Mr. Kowal was familiar with the highway.
- [18] Mr. Kowal passed through Grindrod shortly after 11:30 p.m.
- [19] Mr. Kowal came up behind a vehicle driven by Mr. Gerlach, in which Ms. Pauquette was a passenger. Mr. Kowal backed off and waited for an opportunity to pass.
- [20] Mr. Kowal passed the Gerlach vehicle on a double solid line approaching a corner that was marked with a speed warning of 60 kph. Mr. Kowal went into a subsequent tight left corner marked by a 40 kph speed warning where he passed by a semi tractor-trailer unit travelling north.
- [21] Shortly thereafter, Mr. Kowal came out of a gentle right corner in the oncoming northbound lane and collided head on with Donovan Pippus. Mr. Pippus died from the injuries sustained in the impact.
- [22] Just before the collision, Mr. Kowal tried to steer back into his own lane.
- [23] The collision occurred at about 11:42 p.m.
- [24] At some point in the corner, Mr. Kowal was travelling at 113 to 114 kph. There was no sign of Mr. Kowal braking.
- [25] At the point of collision, Mr. Kowal was travelling at 102 to 105 kph. Mr. Pippus' speed at impact was 40 kph.
- [26] Mr. Luttmerding had been following Mr. Pippus' car northbound. The head-on collision drove Mr. Pippus' car back into Mr. Luttmerding's path. He was caught up in the initial crash and was pushed into a telephone pole. The three vehicles came to rest in close proximity to each other.

- [27] Mr. Kowal suffered various injuries, with the most painful being a broken arm. He was attended to by paramedics and taken to Vernon Jubilee Hospital.
- [28] Mr. Kowal was asked to provide a sample of his breath. Mr. Kowal had cut his lower lip and indicated that he would not be physically able to provide a breath sample, but would be willing to give a blood sample.
- [29] Dr. Croft was the emergency room physician. She thought that Mr. Kowal's behaviour was difficult and concluded that he was intoxicated. Dr. Croft ordered a blood test to be taken. Blood was taken at 2:05 a.m. The alcohol content of 71 millimoles was considered to be a critically high reading.
- [30] Dr. Croft indicated that a level of 71 millimoles of alcohol would make a person very drunk, and she viewed Mr. Kowal's behaviour to be consistent with that.
- [31] Seventy-one millimoles is equivalent to 273 to 297 milligrams of alcohol in 100 millilitres of blood. For the purposes of this decision, I will refer to the measurements of blood alcohol concentration using the designation .08 as being the legal limit under the Criminal Code. Accordingly, the blood alcohol concentration at 2:05 a.m. was .273 to .297.
- [32] If Mr. Kowal had not consumed any alcohol 30 minutes prior to or 30 minutes after driving, and allowing for elimination, his blood alcohol concentration at the time of driving at about 11:42 p.m. would have been .297 to .345.

Discussion

- [33] Whether or not the Crown has proved its case is a factual issue.
- [34] I will deal with each count separately, starting with the impaired driving and over .08 charges.

Impaired Driving

- [35] In order to prove that Mr. Kowal's ability to operate a motor vehicle was impaired by alcohol, the Crown need only prove that there was impairment by alcohol; the impairment may be slight to great: *R. v. Stellato*, [1994] 2 S.C.R. 478.
- [36] Any number of indicia can provide evidence of impairment. The commonly mentioned indicia include bloodshot, watery eyes, slurred speech, poor balance, odour of liquor, and erratic driving.
- [37] In this case, there is a glaring absence of indicia indicative of impairment.
- [38] Police officers were alive to the possibility of alcohol being a factor in the collision. None of the officers detected signs of impairment.

- [39] In particular, Constable Ilic was directed to maintain continuity of Mr. Kowal within the context of an impaired driving investigation. Constable Ilic was in close contact with Mr. Kowal in the back of the ambulance. He was within a foot of Mr. Kowal's face. The officer detected no odour of liquor.
- [40] Mr. Kowal was polite, coherent, and cooperative with the officer. During their conversations, Constable Ilic did not detect any slurred speech.
- [41] Constable Ilic made an informal demand for a roadside sample of Mr. Kowal's breath. Mr. Kowal did not comply because he was physically unable to. However, Mr. Kowal indicated that he was quite prepared to provide a blood sample.
- [42] It is apparent that at the time the demand for the breath sample was made, there would have been no suspicion that Mr. Kowal had alcohol in his system. There were no signs of impairment and there was no smell of liquor from his breath. The only admission as to the consumption of alcohol was the drinking of two glasses of wine some six hours prior.
- [43] Experienced paramedics were alive to the issue of alcohol consumption and they did not detect any signs of impairment.
- [44] Mr. Gerlach saw Mr. Kowal seated in the driver's seat with a blank look and glazed eyes. Mr. Kowal was mumbling and wondering what was going on. However, that was in the immediate aftermath of a violent collision and those observations do not prove impairment.
- [45] Mr. Schmidt was a volunteer firefighter stationed in Enderby. He arrived at the scene about 10 minutes after the collision.
- [46] After assisting Mr. Luttmerding, Mr. Schmidt got into the back of Mr. Kowal's truck and immobilized Mr. Kowal's neck. Inside the truck, he was overcome by the smell of alcohol. Mr. Schmidt saw a full case of Crown Royal, most of the bottles broken on the floor behind the driver's seat.
- [47] Mr. Schmidt noted that Mr. Kowal seemed to be in shock and unaware of what had occurred. Mr. Kowal was polite and cooperative, and was complaining of extreme pain in his left arm.
- [48] Mr. Schmidt held Mr. Kowal's neck for 10 to 15 minutes. He did not see Mr. Kowal drink anything. Mr. Kowal did not seem to be impaired by alcohol.
- [49] Mr. Ryde was driving towards Salmon Arm. He came upon the accident scene almost immediately after it had occurred. Mr. Ryde assisted in disconnecting the vehicles' batteries and rendering assistance as one of the first responders.
- [50] Mr. Ryde spoke with Mr. Kowal briefly. He described Mr. Kowal's speech as slurred, slow, and awkward. Mr. Ryde believed that Mr. Kowal was impaired.

- [51] From the very brief and limited interaction that Mr. Ryde had with Mr. Kowal, I place no weight on his evidence regarding Mr. Kowal's impairment, particularly because his observations were not confirmed by others who had much more interaction with Mr. Kowal within the same general time span.
- [52] Dr. Croft did not see Mr. Kowal until 1:40 a.m. Her observations do not assist in determining whether Mr. Kowal's ability to operate a motor vehicle at the time of driving was impaired.
- [53] The driving described by Mr. Gerlach and Ms. Pauquette and the circumstances of the head-on collision do not, by and of themselves, prove that Mr. Kowal's ability to drive was impaired.
- [54] Having reviewed all of the evidence, I conclude that I am left with a reasonable doubt as to whether Mr. Kowal's ability to operate a motor vehicle was impaired by alcohol.

Driving with a Blood-Alcohol Concentration of Over .08

- [55] In order to prove the allegations in Count 3, the Crown must prove that Mr. Kowal's blood alcohol concentration at the time of driving exceeded the legal limit of .08.
- [56] Based on the evidence of Ms. Montpetite, the forensic alcohol specialist, Mr. Kowal's blood alcohol concentration was in excess of the legal limit at the time of driving. That opinion was based on the premise that Mr. Kowal had not consumed alcohol within 30 minutes before or after the time of driving.
- [57] Mr. Kowal attacks the reliability of the opinion. He says that in the five minutes when he was left unattended at the accident scene, he drank a large quantity of vodka and peach Schnapps. Mr. Kowal argues that the volume of alcohol in his system at 2:05 a.m. was a result of that consumption.
- [58] The Crown acknowledges that it bears the burden of proving its case beyond a reasonable doubt. The burden of proof never shifts to Mr. Kowal. However, the Crown argues that there is no air of reality to Mr. Kowal's assertions that he drank after the collision.
- [59] In order to assess credibility and reliability, it is necessary to examine all of the evidence. If I am left with a reasonable doubt after examining all of the evidence, I must acquit Mr. Kowal, even if I do not believe his evidence: *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at pp. 757-758.
- [60] It took a period of time before Mr. Kowal was extricated from his truck. Mr. Kowal testified that during this period he was in such excruciating agony from his injuries, particularly his fractured left arm, that he needed something to dull the pain. There was no one around, so he reached into the back of the cab and grabbed a bottle of vodka. He drank from the bottle until he was nauseous, screwed the cap back on, and tossed it into the back. When the nausea passed, he again reached back and this time secured a bottle of peach Schnapps from which he drank until he was nauseous. He screwed the cap back on and tossed it into the back. He was then attended to by the firefighters and paramedics.

- [61] Mr. Kowal told the paramedics and Constable Ilic that he had drunk two glasses of wine at about 6:00 p.m. and nothing since. Mr. Kowal says that he was confused when he made those comments and was referring to a previous trip when he had stopped in Salmon Arm and consumed two glasses of wine with dinner.
- [62] Mr. Kowal knew that he had to tell the paramedics about his drinking so that he could be given the appropriate treatment. He did not say anything about consuming alcohol to kill his pain. If he had drunk the amount of alcohol that he says he did, it would have been a relevant detail to disclose then. His failure to mention the drinking leads me to disbelieve his assertion that he drank a large volume of vodka and Schnapps.
- [63] Mr. Kowal gave a lengthy statement to Constable Coles upon his release from the hospital on September 2. Mr. Kowal did not refer to his consumption of alcohol after the collision. Mr. Kowal says that he was still suffering from the effects of the collision, was traumatized, and was unable to recall all of the relevant events. However, he shows as a careful, coherent, and thoughtful party to the interview.
- [64] Mr. Kowal says that during the interview, he never had the chance to tell Constable Coles that he had napped for three hours. He said that the nap was not disclosed because he thought it was irrelevant at the time.
- [65] A few days later, Mr. Kowal says that he told an insurance adjuster that he had consumed alcohol after the collision.
- [66] I conclude that the omissions in the statements were deliberate and intended to preserve Mr. Kowal's opportunity to reconstruct a version of events that would be most favourable to him.
- [67] I watched Mr. Kowal as he gave his evidence. During his examination-in-chief, Mr. Kowal turned his torso to his right and extended his arm, reaching back, as he explained how he secured the vodka and Schnapps. During cross-examination, Mr. Kowal admitted that any movement caused explosions of pain, requiring him to remain still. He then demonstrated reaching back without moving his torso.
- [68] The change in his testimony as to how he reached back to get the bottles is an indication of his unreliability. Until he was confronted with the inconsistency of claiming to be both immobilized with pain and yet capable of reaching into the back of the truck for a bottle, Mr. Kowal did not show his movements in securing the bottles from the back of the cab as restricted.
- [69] Mr. Kowal said that it was dark and he could not see the bottle that he had thrown in the back. As a result, he just reached back and the Schnapps came into his hand. I infer from that evidence that Mr. Kowal turned to look in the back when he decided to have a second drink. Turning to look into the back is inconsistent with his assertion that the pain had immobilized him.

- [70] The photographs taken of Mr. Kowal's truck cab after he was removed show a bottle of open vodka in a box behind the driver's seat. It would be a remarkable coincidence if Mr. Kowal had thrown the vodka bottle into the back of the cab and landed it in the box and broken it. When the box was photographed, the police had removed other items that had been over top of the box. Even though the firefighter may have moved some of the items in the back of the box, I am not convinced that Mr. Kowal threw the bottles into the back as he has described.
- [71] Mr. Kowal says that he was left unattended and this would explain why no one saw him drink. However, that does not accurately reflect the inferences to be drawn from the evidence of the witnesses who were on the scene immediately after the collision.
- [72] Mr. Ryde was not with Mr. Kowal at all times until the police arrived, nor was Mr. Gerlach watching closely over Mr. Kowal. However, both men were within close proximity to Mr. Kowal and I infer that they likely would have seen Mr. Kowal drinking.
- [73] The evidence indicates that Mr. Kowal was pinned in his truck, and I infer that he moved little, if at all.
- [74] The conclusion which I draw is that there is no air of reality to Mr. Kowal's evidence and I reject it.
- [75] However, the rejection of Mr. Kowal's evidence does not answer the question of whether the evidence proves beyond a reasonable doubt that Mr. Kowal's blood-alcohol content exceeded .08 at the time of driving.
- [76] Ms. Montpetite testified as to the physical symptoms that would be expected based on various levels of blood-alcohol concentration. At the time of driving, Mr. Kowal did not match any of the descriptions coinciding with the respective alcohol levels. Not even basic indicia such as odour of liquor, flushed face, slurred speech, or poor balance were apparent at the collision scene.
- [77] Dr. Croft was adamant that Mr. Kowal was intoxicated and that he was sobering up as the hours passed. Those observations are consistent with Mr. Kowal drinking a large volume of liquor, the impact of which reached its peak after he arrived at the hospital. That would be an indication that Mr. Kowal, who showed no signs of impairment at or close to the time of driving, could not have had the range of blood-alcohol concentration opined by Ms. Montpetite.
- [78] I was impressed with the evidence of Dr. Croft. She has regular exposure to intoxicated people as an emergency room physician. She did not exaggerate or speculate. Dr. Croft was sure that Mr. Kowal's behaviour was the result of intoxication and that his level of intoxication was declining as the hours passed.

- [79] Dr. Croft's evidence casts a doubt on the reliability of the evidence suggesting that Mr. Kowal's blood-alcohol concentration at the time of driving exceeded the legal limit. That is not to suggest that the testing, methodology, or interpretation of the results was unreliable.
- [80] The complete lack of symptoms that would be expected of a person having the blood-alcohol concentration alleged to be in Mr. Kowal's body causes me to have a reasonable doubt about the reliability of the estimated alcohol levels at the time of driving. Even a heavy drinker would be expected to show some symptoms at the alcohol levels attributed to Mr. Kowal.
- [81] I, therefore, conclude that there is a reasonable doubt as to whether Mr. Kowal's blood-alcohol concentration exceeded the legal limit at the time of driving.

Dangerous Driving Causing Death

- [82] The offence of dangerous driving requires the Crown to prove that Mr. Kowal's driving was, in all of the circumstances, a marked departure from the norm.
- [83] In *R. v. Beatty*, 2008 SCC 5, the Supreme Court of Canada explained the critical difference between civil and criminal negligence. At paras. 7-8 of that decision Madam Justice Charron said the following:
- [7] The modified objective test established by this Court's jurisprudence remains the appropriate test to determine the requisite mens rea for negligence-based criminal offences. As the label suggests, this test for penal negligence "modifies" the purely objective norm for determining civil negligence. It does so in two important respects. First, there must be a "marked departure" from the civil norm in the circumstances of the case. A mere departure from the standard expected of a reasonably prudent person will meet the threshold for civil negligence, but will not suffice to ground liability for penal negligence. The distinction between a mere departure and a marked departure from the norm is a question of degree. It is only when the conduct meets the higher threshold that the court may find, on the basis of that conduct alone, a blameworthy state of mind.
- [8] Second, unlike the test for civil negligence which does not concern itself with the mental state of the driver, the modified objective test for penal negligence cannot ignore the actual mental state of the accused. Objective mens rea is based on the premise that a reasonable person in the accused's position would have been aware of the risks arising from the conduct. The fault lies in the absence of the requisite mental state of care. Hence, the accused cannot avoid a conviction by simply stating that he or she was not thinking about the manner of driving. However, where the accused raises a reasonable doubt whether a reasonable person in his or her position would have been aware of the risks arising from the conduct, the premise for finding objective fault is no longer sound and there must be an acquittal. The analysis is thus contextualized, and allowances are made for defences such as incapacity and mistake of fact. This is necessary to ensure compliance with the fundamental principle of criminal justice that the innocent not be punished.

[84] At para. 34, Madam Justice Charron explained the reasoning behind the marked departure requirement that forms part of the mens rea analysis:

Therefore, as noted by Cory J., the difficulty of requiring positive proof of a particular subjective state of mind lends further support to the notion that mens rea should be assessed by objectively measuring the driver's conduct against the standard of a reasonably prudent driver. In addition, I would note that the automatic and reflexive nature of driving gives rise to the following consideration. Because driving, in large part, is automatic and reflexive, some departures from the standard expected of a reasonably prudent person will inevitably be the product, as Cory J. states, of "little conscious thought". Even the most able and prudent driver will from time to time suffer from momentary lapses of attention. These lapses may well result in conduct that, when viewed objectively, falls below the standard expected of a reasonably prudent driver. Such automatic and reflexive conduct may even pose a danger to other users of the highway. Indeed, the facts in this case provide a graphic example. The fact that the danger may be the product of little conscious thought becomes of concern because, as McLachlin J. ... aptly put it in *R. v. Creighton* ... "The law does not lightly brand a person as a criminal." In addition to the largely automatic and reflexive nature of driving, we must also consider the fact that driving, although inherently risky, is a legal activity that has social value. 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. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty.

[85] Madam Justice Charron went on to summarize the test for conviction of the offence of dangerous driving at para. 43:

(a) The Actus Reus

The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place".

(b) The Mens Rea

The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required mens rea. 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. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

- [86] The test outlined in Beatty, therefore, requires a step-by-step analysis. The first inquiry is to determine whether the driving was objectively dangerous. It is only if the answer to that question is "yes" that the court then moves on to determine whether the required mens rea can be regarded as a marked departure from the reasonable standard of care of the driver in the circumstances of Mr. Kowal.
- [87] Mr. Kowal traced his route from Drayton Valley. He said that he slept for three hours (from 4:00 to 7:00 p.m.) during his rest stop just outside Lake Louise. That was something he did not tell the police during the interview of September 2.
- [88] When Mr. Kowal testified, it was apparent that the three-hour nap was not at the forefront of his memory. When he first described his time at the rest stop, he did not mention the nap. He was prompted to give that evidence by a suggestion from his counsel, who said, "Did I hear you say that you had taken a nap?" There was no such comment made by Mr. Kowal and it could not have been heard as such by anyone in the courtroom.
- [89] Mr. Kowal recalled coming upon the Gerlach vehicle. He said that he stayed back about four car lengths so that his headlights would not bother the car in front. He waited for an opportunity to pass.
- [90] Mr. Kowal passed Mr. Gerlach on a straight stretch marked by a double solid line. Mr. Kowal says that he completed the pass well before the corner.
- [91] Mr. Kowal recalled a semi tractor-trailer unit going by him northbound at the corner by the Fas Gas bar. He recalled that the corner was marked by a 40 kph speed advisory sign. Mr. Kowal said that he was not in the oncoming lane and there was nothing out of the ordinary as the vehicles passed each other.
- [92] Mr. Kowal remembers little after proceeding through the junction of Highway 97B.
- [93] His next specific memory is that of a flash of headlights. Mr. Kowal says that he fell asleep and entered the oncoming lane. He was knocked unconscious. He remembered being told that he had killed someone.
- [94] Mr. Kowal testified that after his three-hour nap, he felt extremely refreshed and at no time felt as if he was going to fall asleep.
- [95] If I accept Mr. Kowal's evidence, then I must conclude that his driving was not dangerous to the extent that it is a criminal offence. The driving may have been negligent, but that does not prove a dangerous driving offence. A momentary lapse is not sufficient to constitute dangerous driving.
- [96] The examination of Mr. Kowal's evidence must be done in the context of all the evidence. That analysis requires a review of the evidence given by Mr. Gerlach and Ms. Pauquette.
- [97] Mr. Gerlach and Ms. Pauquette were travelling south along Highway 97A from Sicamous through Grindrod and toward Enderby, with the ultimate destination of Kelowna.

- [98] Mr. Gerlach was driving. He was familiar with the road, having driven it two or three times per year over the past 30 years. He described the night being clear and bright, and there being "great road conditions". There was very little traffic.
- [99] Shortly after leaving Grindrod, Mr. Gerlach noticed the headlights of Mr. Kowal's pickup truck behind him and catching up quickly. Mr. Gerlach was travelling at about 90 to 100 kph. He thought Mr. Kowal's speed was in the range of 130 to 140 kph.
- [100] After clearing a rise in the road, Mr. Gerlach noted that Mr. Kowal's vehicle had closed quickly to the point where he felt as if he was going to be rear-ended. Mr. Kowal then backed off to a distance of about 20 car lengths.
- [101] As Mr. Gerlach approached a right-hand curve, Mr. Kowal passed him on the double solid line. Mr. Gerlach noted Mr. Kowal was swerving a bit in the northbound lane before the passing manoeuvre was completed. Mr. Kowal pulled back into the southbound lane at the beginning of the corner.
- [102] The approach to the curve was highlighted by a warning sign indicating a speed of 60 kph.
- [103] Mr. Gerlach was shocked when he was passed. He commented to Ms. Pauquette that the driver must be "shit-faced" and likely to be found in the ditch somewhere ahead.
- [104] Mr. Gerlach was about 10 car lengths behind as Mr. Kowal came to the tight left-hand turn near the Fas Gas bar. As Mr. Kowal entered the corner, he was occupying both lanes, causing the northbound tractor-trailer unit to move to the shoulder of the highway. Mr. Gerlach said that it appeared as if Mr. Kowal was sliding around the corner sideways. Mr. Gerlach was surprised that Mr. Kowal did not collide with the tractor-trailer unit. The tractor-trailer unit was about two-thirds of the way through the corner when it and Mr. Kowal passed each other.
- [105] A few minutes later Mr. Gerlach came upon the accident scene. As he came around a corner, he could see smoke, steam, and dust billowing from the location of the vehicles.
- [106] Mr. Gerlach stopped and told Ms. Pauquette to remain in their vehicle while he went to render assistance. In referring to Mr. Kowal, Mr. Gerlach commented to Ms. Pauquette that it was the "same dickhead" who had passed them.
- [107] Mr. Gerlach gave a statement to one of the officers at the scene.
- [108] In assessing Mr. Gerlach's reliability, I have taken the following factors into account.
- [109] Mr. Gerlach told the first officer he saw at the scene that Mr. Kowal had passed him; there was no mention of any bad driving.

- [110] In his statement, Mr. Gerlach did not mention the semi tractor-trailer unit having to veer onto the shoulder. He did not say that Mr. Kowal was taking up both lanes at the corner near the Fas Gas bar. He did not say that Mr. Kowal was travelling at 130 to 140 kph. He did not say that he was being tailgated by Mr. Kowal.
- [111] In his statement to the police, Mr. Gerlach said that Mr. Kowal had passed him before the corner that was covered by a 40 kph speed warning. In fact, the corner was actually marked by a 60 kph warning.
- [112] Mr. Gerlach told the police that he did not speak with Mr. Kowal because he was very upset with him.
- [113] Mr. Gerlach conceded in cross-examination that if someone was going to pass on a corner, the location where Mr. Kowal passed him was not a bad place to make such a manoeuvre, because there was no traffic and there was good lighting. Mr. Gerlach indicated that the pass would not have been objectionable had it occurred on a straight stretch rather than on the corner.
- [114] I conclude that Mr. Gerlach was an impressive and reliable witness.
- [115] He was forthright in conceding that he was upset with Mr. Kowal's manner of driving. He agreed that his negative attitude toward Mr. Kowal was the cause of him not speaking with Mr. Kowal at the scene.
- [116] Mr. Gerlach's evidence did change somewhat during cross-examination. For example, he agreed that Mr. Kowal had passed him just before the corner and that the pass had not occurred within the corner.
- [117] Mr. Gerlach did not say in his initial statement to the police that the tractor-trailer unit had to avoid colliding with Mr. Kowal. He says that the omission was because the incident did not involve him directly and, therefore, he did not mention it at the scene. I accept that explanation. Just because he did not mention it in his statement does not mean that the event did not occur. I find his description of the tractor-trailer unit avoiding Mr. Kowal to be accurate and reliable. His description was confirmed by Ms. Pauquette.
- [118] Mr. Gerlach's comment that he thought Mr. Kowal was "shit-faced" is also compelling. The comment does not go to the issue of whether Mr. Kowal was impaired. The comment reflects upon Mr. Gerlach's reaction to Mr. Kowal's driving. Similarly, Mr. Gerlach's comment that he expected to find Mr. Kowal in the ditch was a reaction to the driving.
- [119] I conclude that the following incidents caused Mr. Gerlach to be concerned about Mr. Kowal's driving:
- (1) the sudden approach from the rear and the tailgating at a high speed;
 - (2) the passing on the double solid line just before the right-hand curve; and

- (3) the occupying of the northbound lane resulting in the tractor-trailer unit taking evasive action.
- [120] Mr. Gerlach was careful in giving his evidence in an objective manner. He was prepared to make concessions during cross-examination. Those concessions may have changed some of the evidence that he gave in-chief, but did not detract from the overall reliability of his testimony.
- [121] I conclude that Mr. Gerlach changed his evidence to ensure that he gave an accurate description of the events he saw, and not as a result of being unsure or unreliable.
- [122] Ms. Pauquette confirmed some of Mr. Gerlach's testimony. She saw Mr. Kowal pass their vehicle and described him as fishtailing and swerving at a high rate of speed. She, too, was surprised that there was no collision between the tractor-trailer unit and Mr. Kowal.
- [123] Ms. Pauquette was a reliable witness. She agreed that she was not sympathetic to Mr. Kowal, but that does not detract from her evidence. I conclude that Ms. Pauquette was reliable in her description of Mr. Kowal's driving.
- [124] I do not accept Mr. Kowal's description of his driving.
- [125] He says that he fell asleep just before the collision. That explanation is not supported by his evidence. He said that he had slept for eight hours the night before. He was very well rested when he left Drayton Valley. He had slept for a further three hours during the drive. He was very refreshed after his nap. He had no concerns about falling asleep. He had never before suddenly fallen asleep when operating machinery.
- [126] I do not believe Mr. Kowal's testimony and there is no reasonable possibility that he would have fallen asleep at the very moment the collision occurred.
- [127] To the contrary, Mr. Kowal's driving at the point of collision was consistent with the manner in which he had been driving previously, when there was no suggestion that he was fatigued or sleepy. He had passed Mr. Gerlach on a double solid line coming into a corner, and he had crossed into the oncoming lane and into the path of a semi tractor-trailer unit on a sharp curve.
- [128] Mr. Kowal says that he passed the Gerlach vehicle on the straight stretch and well before the corner. However, he also conceded that when he made the pass, he did not know where the curve was. From that concession, I infer that Mr. Kowal did not know how close he was to the corner when he passed on the double solid line.
- [129] At the time he made the pass, I infer that he was frustrated at being held up by a vehicle that was travelling near the speed limit. Mr. Kowal was trying to get home as fast as he could. I infer that those factors motivated Mr. Kowal to pass the Gerlach vehicle when it was illegal to do so, while knowing that shortly ahead the road markings changed to allow for passing.

- [130] I prefer the evidence of Mr. Gerlach as to where the passing took place. Mr. Gerlach was alarmed at the pass coming so close to the corner. His reaction was best caught in his comments when he thought the driver was "shit-faced" and likely to end up in the ditch. If the pass was as benign as described by Mr. Kowal, Mr. Gerlach's reaction would have been unwarranted. I did not view Mr. Gerlach as a witness who was prone to over-reacting, exaggerating, or being dramatic.
- [131] I also prefer the evidence of Mr. Gerlach and Ms. Pauquette that Mr. Kowal was in the oncoming lane at the Fas Gas corner, causing the semi tractor-trailer unit to take evasive action to avoid a collision. They were in a good position to see the driving. Their recollection was clear and unshaken. They had no motive for manufacturing that evidence. It was an event that stood out for them.
- [132] I, therefore, find that Mr. Kowal almost rear-ended the Gerlach vehicle, passed on a double solid line close to a corner where a sign warned vehicles to slow down, travelled in the oncoming lane around a sharp corner causing oncoming traffic to pull over to the shoulder to avoid a collision, and was in the wrong lane coming out of a gentle corner just prior to a head-on collision.
- [133] The first question goes to the *actus reus*: Was Mr. Kowal's driving, viewed objectively, dangerous to the public in all of the circumstances? This question is answered by focusing on the risks created by the manner of driving: *R. v. Roy*, 2012 SCC 26 at para. 34.
- [134] Viewing all of the circumstances, I find that on an objective basis, Mr. Kowal's manner of driving was dangerous to the public because of the following:
- (1) even though traffic was light, it was apparent that there were other vehicles using the highway;
 - (2) passing on a double solid line approaching a corner that called for a reduction in speed was dangerous;
 - (3) passing on a double solid line without knowing where the upcoming corner was located was dangerous;
 - (4) driving through a tight corner in the wrong lane and in the face of oncoming traffic was dangerous; and
 - (5) driving through a gentle bend on the highway in the wrong lane was dangerous, particularly when just moments before there had been oncoming traffic.
- [135] The second question goes to the *mens rea*: Was Mr. Kowal's dangerous driving the result of a marked departure from the standard of care expected of a reasonable person? This inquiry is to consider whether a reasonable person would have foreseen the risks and taken steps to avoid them. If the risk was foreseeable and steps could have been taken to avoid it, then the last inquiry is whether the failure to foresee the risks and take steps to avoid them was a marked departure from the standard of care expected of a reasonable person in Mr.

Kowal's circumstances: Roy at paras. 36-37.

- [136] Simple carelessness is generally not criminal conduct. Momentary lapses of attention will not generally be regarded as a marked departure from the standard of care: Roy at paras. 37-38.
- [137] A pattern of conduct that shows a disregard for the safety of others using the highway may be of assistance in determining whether there has been a marked departure from the standard of a reasonable driver: R. v. Settle, 2010 BCCA 426 at para. 55.
- [138] I have not accepted Mr. Kowal's assertion that he fell asleep just before the collision. Accordingly, his explanation as to how or why the collision occurred is not a factor in determining what risk he foresaw and what steps were taken to avoid the crash.
- [139] A reasonable person would have appreciated that even though traffic was light, there were nonetheless others using the highway. A reasonable person would have stayed within his or her own lane of travel, particularly when approaching, going through, or coming out of corners. A reasonable person would have foreseen the risk of a collision if he or she drove in the oncoming lane. By staying in his or her own lane of traffic, a reasonable person would have taken the steps needed to avoid colliding with oncoming traffic.
- [140] Mr. Kowal's driving pattern was a marked departure from the standard expected of a reasonable person. He almost rear-ended the Gerlach vehicle. He passed the Gerlach vehicle on a double solid line approaching a corner. He crossed into the oncoming lane causing traffic to take evasive measures, and he caused a head-on collision while in the wrong lane. Any one of these incidents taken in isolation might be excused as carelessness or attributed to momentary inattention, but not when taken together as a pattern of driving. Mr. Kowal's driving showed a disregard for the safety of other users of the highway.
- [141] I am satisfied beyond a reasonable doubt that Mr. Kowal drove in a manner that was dangerous to the public, having regard to all of the circumstances, and that the dangerous driving caused the death of Donovan Pippus.
- [142] In summary, I find Mr. Kowal:
- 1) guilty of Count 1, dangerous driving causing death;
 - 2) not guilty of Count 2, impaired driving causing death; and
 - 3) not guilty of Count 3, having the care and control of a motor vehicle while his blood-alcohol concentration exceeded 80 milligrams percent, causing the death of Donovan Pippus.

DLEY J.

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Prepared on 28 October 2026 · Esheria