
CANADA / JUDGMENT

R. v. Locke

2015 BCSC 2277

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 2277 R. v. Locke

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Locke,

2015 BCSC 2277

Date: 20151204

Docket: 11272

Registry: Fort Nelson

Regina

v.

Joshua Alan Rai Locke

Before: The Honourable Madam Justice Arnold-Bailey

Reasons for Judgment

Counsel for the Crown:

Paul Swartz

Counsel for the Accused:

Kevin Westell

Place and Date of Trial:

Fort St. John, B.C.

June 1-5, and 8-12, September 22 and 23, 2015

Place and Date of Judgment:

Fort Nelson, B.C.

December 4, 2015

I. Introduction

- [1] The accused, Joshua Alan Rai Locke aka Joshua Alan Locke ("Mr. Locke"), is charged with a number of criminal offences arising from a fatal motor vehicle accident that occurred on June 9, 2010, near Fort Nelson, BC, in which two young women were killed and another young woman was seriously injured.
- [2] This was a most tragic accident. Two young women, Courtney Siegmund and Chelsea Cook, lost their lives and a third, Terri-Lynn McAuley, was very severely injured and continues to bear lasting mental and physical scars. Brandon McKinnon, their male acquaintance, was in the front passenger seat. He survived without serious injury, being the only person in the vehicle wearing a seat belt.
- [3] The three young women, ages 15 and 16 and all in Grade 9, were friends residing in or near Fort Nelson, BC. The accused, Mr. Locke, age 23 at the time, and one of the deceased, Courtney Siegmund, were cousins. Mr. Locke was residing with her at the time of the accident.
- [4] It is alleged by the Crown that Mr. Locke's manner of driving caused the accident and the resulting deaths or injuries to the passengers in his vehicle. The Crown also alleges that Mr. Locke was under the influence of alcohol and drugs when he lost control of his vehicle that then left the road at a very high rate of speed and rolled a number of times before it came to rest in the ditch. In all the circumstances, the Crown submits that Mr. Locke is guilty of the offences charged on the Indictment, the most serious being two counts of criminal negligence in the operation of a motor vehicle causing death, and one count of criminal negligence causing bodily harm.
- [5] The defence admits that Mr. Locke had a blood alcohol level in excess of 80 mg. of alcohol in 100 ml. of blood at the time he was driving, based on the analysis of samples of his blood taken at the Fort Nelson General Hospital after the accident, and is thus guilty of an offence contrary to s. 253(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46 (the Code).
- [6] The defence further admits that Mr. Locke is guilty of dangerous driving contrary to s. 249(1) (a) of the Code, but submits that his conduct, in light of the overall circumstances of the accident, falls short of proof beyond a reasonable doubt that he committed the more serious offence of criminal negligence in the operation of a motor vehicle causing death or bodily harm.

- [7] In this regard the defence submits that the Court ought to have a reasonable doubt as to whether the dangerous driving admitted by the accused is proven to have caused the deaths and injuries arising from the accident beyond a reasonable doubt.
- [8] The issue of causation arises from the evidence of the surviving young woman, Terri-Lynn McAuley, that she may have recalled that Brandon McKinnon grabbed the steering wheel of Mr. Locke's vehicle just before the accident. Mr. Locke also testified that Brandon McKinnon grabbed or touched the steering wheel of his car, which he claims caused it to go out of control and resulted in the accident. Mr. McKinnon testified that he did no such thing.

II. The Charges

- [9] The Indictment charges Mr. Locke with two counts of criminal negligence causing death in the operation of a motor vehicle contrary to s. 220(b) of the Code in relation to Courtney Siegmund (Count 1) and in relation to Chelsea Cook (Count 2).
- [10] Mr. Locke is charged with two counts of operation of a motor vehicle while his ability to do so was impaired by alcohol or a drug, contrary to s. 255(3) of the Code, and that he "thereby did cause" the death of Courtney Siegmund (Count 3) and the death of Chelsea Cook (Count 4).
- [11] Mr. Locke is charged with having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 mg. of alcohol in 100 ml. of blood ("Over 80"), that he did have the care or control of a motor vehicle and "did cause an accident resulting in death" to Courtney Siegmund (Count 5) and to Chelsea Cook (Count 6), contrary to s. 255(3.1) of the Code.
- [12] With regard to Terri-Lynn McAuley, Mr. Locke is charged with one count of criminal negligence causing bodily harm contrary to s. 221 of the Code (Count 7), one count of impaired operation of a motor vehicle causing bodily harm, contrary to s. 255(2) of the Code (Count 8), and one count of having the care or control of a motor vehicle with a blood alcohol concentration in excess of 80 mg. of alcohol in 100 ml. of blood and causing an accident resulting in bodily harm, contrary to s. 255(2.1) of the Code (Count 9).
- [13] Mr. Locke is also charged with breach of a recognizance that required him to abstain absolutely from the consumption or possession of non-medically prescribed illicit drugs, contrary to s. 145(3) of the Code (Count 10), and the unlawful possession of a controlled substance, cocaine, contrary to s. 4(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (the CDSA) (Count 11).

- [14] The Court notes that in the event that causation is not proved, the charges of criminal negligence causing death or bodily harm (Counts 1, 2 and 7) will not be proven and the result would be that Mr. Locke is guilty of one count of dangerous driving contrary to s. 249(1)(a) of the Code. Similarly, the "Impaired Driving" charges (Counts 3, 4 and 8) and the Over 80 charges (Counts 5, 6 and 9) that include the elements of causing death, bodily harm, or an accident would be reduced to the offences of Impaired Driving and Over 80 simpliciter.
- [15] Given that Mr. Locke has admitted to the Over 80 offence, absent proof of causation, he will be convicted of one count of Over 80 contrary to s. 253(1)(b) of the Code. The Crown has asked the Court to enter conditional stays with regard to the Impaired Driving charges.
- [16] It is useful to point out that, for Mr. Locke to be convicted of dangerous driving simpliciter or dangerous driving causing death or bodily harm (all contrary to s. 249), the Crown is not required to charge those offences in the Indictment by virtue of s. 662(5) of the Code. Section 662(5) specifies that the dangerous driving offences are included offences under a charge of criminal negligence causing death or bodily harm, pursuant to ss. 220 and 221 of the Code respectively, arising out of the operation of a motor vehicle.

III. Brief overview of events on June 9, 2010

- [17] June 9, 2010, was a clear warm day in Fort Nelson. The weather and road conditions were good. People in Fort Nelson like to "hang out" on the banks of the Muskwa River. Courtney Siegmund and Mr. Locke went down to the Muskwa River in the afternoon in his car with Terri-Lynn McAuley. They hung out for a while. Then Mr. Locke drove his car back into Fort Nelson to pick up Brandon McKinnon. Mr. McKinnon gave Mr. Locke \$40 to buy a 26 oz. bottle of Wiser's whisky from the liquor store attached to Dan's Pub, which Mr. Locke did. Ms. McAuley had some marihuana. A number of beers were either purchased or present in the car. The four of them (Mr. Locke, Mr. McKinnon, Ms. McAuley and Ms. Siegmund) had whisky, beer and marihuana with them when they returned to the banks of the Muskwa River. Chelsea Cook was dropped off to join them. Shots of whisky and beer were consumed by a number of people, including Mr. Locke and Mr. McKinnon. Marihuana was apparently smoked by the three young women, Mr. McKinnon, and Mr. Locke.
- [18] Late in the afternoon the group decided to leave the river bank and Mr. Locke drove them back into Fort Nelson. Chelsea Cook went with them, and thus there were five people in his car. The three young women were in the back seat of the car. Ms. Siegmund was seated behind Mr. Locke, Chelsea Cook was seated in the middle and Ms. McAuley was behind Mr. McKinnon, who was in the front passenger seat. In the back seat there were only two seat belts and a raised area in the center that extended forward into the console area, providing some space for the legs of the person seated in the middle of the back seat. The car had a "T" shaped support in its roof and a sun roof that was open to the sky on either side of the "T".

- [19] Upon getting back into the town of Fort Nelson, they stopped at Brandon McKinnon's house, where his father helped them put steering fluid (or oil) into the car (depending on the witness), which apparently it was noted to need on the way into town. Terri-Lynn McAuley went to her house nearby and picked up some personal belongings and then met up again with the other four. The plan was to have a bonfire at Courtney Siegmund's house located just off the Old Alaska Highway, a number of kilometers from town. Chelsea Cook lived nearby. The five of them all got back into Mr. Locke's car, driven by Mr. Locke, in the same positions, except that Ms. McAuley changed positions with Ms. Cook, such that Ms. McAuley then occupied the space in the middle of the back seat.
- [20] As they left the town of Fort Nelson, Mr. Locke drove out past the RCMP's Highway Traffic Office, west along Highway 97 and then right onto the Old Alaska Highway. The evidence is that, leaving town, Mr. Locke began to drive more quickly and he continued to accelerate once he turned off Highway 97 and onto the Old Alaska Highway, where there are some curves that are well-known to the locals and are named by their proximity to the old posts that used to mark the miles on the Old Alaska Highway. The Old Alaska Highway in that portion is a paved two lane highway through a rural area with residential driveways scattered along the way, and a posted speed limit of 80 km/h.
- [21] Shortly thereafter, Mr. Locke lost control of his vehicle. Initially, it slid sideways down the road at the 302 Corner and then left the road, flipping a number of times before it came to rest in the ditch just across a driveway. Ms. Siegmund was thrown from the car and pronounced dead at the scene. Ms. Cook, Mr. Locke and Ms. McAuley were also all thrown from the car and very seriously injured, with Ms. Cook succumbing to her injuries later that evening in the hospital.
- [22] About a year after the accident, Ms. McAuley commented to Jordan Siegmund, the brother of the deceased Courtney Siegmund, that she seemed to recall Brandon McKinnon grabbing the steering wheel prior to the accident. Rumours started going around Fort Nelson to that effect. This prompted further investigations by the police, who took further statements from Ms. McAuley and Mr. McKinnon.

IV. The Agreed Facts

- [23] An agreed statement of facts has been filed in this case (Exhibit 20). I accept as proven beyond a reasonable doubt the facts contained therein. I will not set it out in its entirety but will refer to the relevant facts it contains.
- [24] Mr. Locke was 23 years old on June 9, 2010, and turned 24 on June 28, 2010. He had been living for about six months with his paternal aunt and her two children, Courtney and Jordan Siegmund.
- [25] Mr. Locke's mother was the registered owner of the black 1991 Nissan 300 ZX car that Mr. Locke was driving on the evening of June 9, 2010 (referred to as the "Locke vehicle" in the agreed statement of facts). He was its primary designated operator. Mr. Locke had an

Alberta driver's licence. The Locke vehicle had four seat belts, two in the front and two in the back. Mr. Locke was driving the Locke vehicle at approximately 19:41 hours on June 9, 2010, when it was involved in the single vehicle accident on the Old Alaska Highway near Fort Nelson, BC that resulted in the present charges against him.

- [26] This portion of the Old Alaska Highway is a paved roadway with a posted speed limit of 80 km/h. It is lined with residential properties, and has a steady volume of traffic to and from the residences as well as the local golf course. It is common to have pedestrian and all-terrain vehicle traffic along this portion of the highway during the month of June in any given year.
- [27] Mr. Locke had driven the Locke vehicle (with his four passengers) through Fort Nelson on Highway 97 where the posted speed limit was 50 km/h. As he left Fort Nelson in the direction of the intersection of the Old Alaska Highway the posted speed limit became 70 km/h.
- [28] At the time of the accident it is agreed that Brandon McKinnon, who was in the front passenger seat of the Locke vehicle, was wearing his seat belt. Chelsea Cook, seated in the rear behind Mr. McKinnon, was not wearing her seat belt. Courtney Siegmund was seated in the rear seat behind Mr. Locke, and she was not wearing her seat belt. Terri-Lynn McAuley was seated in the rear seat in the middle between the two other young women, where there was no seat belt for her to wear.
- [29] The accident occurred on the Old Alaska Highway approximately 2.2 km. from the junction with Highway 97. Approximately 1.7 km. before the site of the accident there was a speed sign posted for Mr. Locke's lane of travel stating that the speed limit on that portion of the highway was 80 km/h.
- [30] The admitted facts pertaining to the observations of three individuals who saw the Locke vehicle just prior to the accident will be set out separately.
- [31] Emergency services personnel attended the scene, arriving at 19:46 hours. Two paramedics attended the injured. Courtney Siegmund was pronounced dead at the scene. She died of injuries sustained in the accident, which were "massive blunt and tearing force trauma to the head, chest and abdomen", according to the coroner's report (Exhibit 25).
- [32] One paramedic attended to Mr. Locke, who was considered the highest priority casualty. He found Mr. Locke to be unresponsive and somewhat physically combative. The paramedic tried to open Mr. Locke's mouth to get an airway but could not do so because Mr. Locke's teeth were clenched. He did not notice any odour of liquor emanating from Mr. Locke. A second paramedic transported Mr. Locke and Ms. McAuley in one ambulance to the Fort Nelson General Hospital. He noticed a slight odour of alcohol in the rear of the ambulance and yellow frothing around Mr. Locke's mouth.

- [33] Chelsea Cook was also transported to the Fort Nelson General Hospital where she died of injuries at 23:16 the same night. According to the autopsy report (Exhibit 27) and the coroner's report (Exhibit 26) she died of injuries sustained in the accident, including hemorrhagic shock and blunt force trauma, fractures to her clavicles and right sixth rib associated with pulmonary contusion and edema, as well as a fracture of her pelvis contusion and hemorrhage of pelvic soft tissue.
- [34] Terri-Lynn McAuley was airlifted to Prince George Regional Hospital for further medical treatment and surgery. She sustained numerous injuries, including a fractured hip that required a plate to be installed, lacerations to her arm and face that required many stitches, four broken teeth and a fractured left hand and arm.
- [35] Cst. Bruneau located a 26 oz. bottle of Wiser's Special Blend whisky with an alcohol concentration of 40 per cent on a driveway approximately 30 feet behind the Locke vehicle's final resting place, which he photographed.
- [36] Cst. Erickson attended the scene and rode in the ambulance transporting Mr. Locke and Ms. McAuley to the Fort Nelson General Hospital, where he remained with Mr. Locke and observed a nurse suction an object from Mr. Locke's mouth. He seized this object and the police subsequently sent it for analysis.
- [37] On June 12, 2010, Cpl. Klubi was issued a search warrant that authorized the RCMP to seize from the Fort Nelson General Hospital the urine and blood samples taken from Mr. Locke and his medical records. Mr. Locke admits that there were reasonable grounds to obtain the warrant and that a copy of the warrant may be filed as an exhibit at trial without further proof.
- [38] Mr. Locke also admits that the opinions of the following experts and their reports, accompanied by their resumes, may be filed as exhibits at trial without further proof: Kimberly Young (analyzed his blood for alcohol); Ronald Pon (analyzed bodily samples and extrapolated Mr. Locke's blood alcohol level back to the time of driving); Dylan Pallett (analyzed the baggie with a white substance obtained from the accused's mouth); Brian Musyowski (performed a mechanical inspection of Mr. Locke's vehicle); Cpl. Scott Wessell (performed an accident reconstruction analysis based on his examination of the scene); Kris Hagan (the coroner who reported on the deaths of Ms. Cook and Ms. Siegmund); and Dr. Heydarzadeh-Azar (a pathologist, who performed an autopsy on Ms. Cook). Mr. Locke also admits that all the photographs taken during the investigation of the accident may be filed in evidence without further proof.
- [39] Certain of these reports and the findings they contain will be referred to elsewhere in these reasons, in particular regarding Mr. Locke's level of intoxication at the time of the accident and the nature and analysis of the accident scene. Other admissions contained in the Agreed Statement of Facts, to which I will not refer given the admission of the Over 80 offence, include details as to the taking of urine and blood samples from Mr. Locke at the Fort Nelson General Hospital (at 21:30 and approximately 22:00 hours on June 9, 2010) by medical staff

pursuant to the orders of the treating physician, and their ensuing storage, continuity and testing.

V. crown evidence

[40] The Crown called the following 13 witnesses at trial:

- Erica Rice: a friend of Courtney Siegmund, who met up with Joshua Locke, Brandon McKinnon, Courtney Siegmund, Chelsea Cook and Terri-Lynn McAuley at a spot on the banks of the Muskwa River just outside of Fort Nelson BC on June 9, 2010, prior to the accident;
- Melissa Eldstrom: a neighbour of Courtney Siegmund's who, with her boyfriend, Angus Campbell, pulled out onto the Old Alaska Highway to drive into Fort Nelson and saw the vehicle driven by Mr. Locke as it was flipping over and came to rest in the ditch, and who was then present at the scene of the accident;
- Angus Campbell: Ms. Eldstrom's boyfriend, who was driving into Fort Nelson with her and described seeing the vehicle driven by Mr. Locke "bounce and roll and bounce and roll" until it came to a stop, and then made certain observations at the accident scene, including with regard to the behaviour of Mr. McKinnon;
- Kenneth Rombough: an experienced truck driver very familiar with the part of the Old Alaska Highway where the accident occurred, who passed the vehicle driven by Mr. Locke as it proceeded away from Fort Nelson (Mr. Rombough was driving towards Fort Nelson) and made observations about the speed and manner in which Mr. Locke was driving at the bend in the highway just prior to the bend where the accident took place;
- Terri-Lynn McAuley: a friend of Courtney Siegmund and Chelsea Cook's, who sustained life-threatening injuries in the accident, and who testified about the events of the day prior to the accident, Mr. Locke's behaviour and driving, and what she recalled about events in the car immediately prior to the accident;
- Brandon McKinnon: an acquaintance of those in Mr. Locke's vehicle, who survived the accident with minor injuries and testified about the events of the day prior to the accident, Mr. Locke's behaviour and driving, and events in the car immediately prior to the accident;
- Cpl. Dean Klubi: the RCMP officer in charge of the overall investigation into the accident, who coordinated the investigation and collected the information from the scene and witnesses and wrote the Information to Obtain used to obtain the warrant to seize Mr. Locke's blood and urine samples from the Fort Nelson General Hospital, and who also took possession of the small bag of white powder seized from Mr. Locke's mouth in the hospital emergency by Cst. Erickson and sent it for analysis;

- Cst. Allan Erickson: the first RCMP officer on the scene of the accident at approximately 7:50 p.m. on the clear, bright and dry evening of June 9, 2010, who immediately called for more police assistance, stayed with Mr. Locke at the scene, during transport and at the hospital, as he understood him to be the driver and it appeared that alcohol had been involved, and later saw a nurse at the hospital emergency suction Mr. Locke's mouth and obtain a small bag containing a white powder that he suspected was cocaine;
- Cst. Mark Bezzina: the RCMP officer who was dispatched to the scene of the accident and did various tasks related to the investigation;
- Orelia MacDonell: the lab technician working at the Fort Nelson General Hospital on the evening of June 9, 2010, who, upon the directions of the attending physician, took blood samples from Mr. Locke and received a sample of his urine from a nurse, and then later that evening performed some analyses on the samples;
- Margaret Steele: the chief lab technologist at the Fort Nelson General Hospital in June 2010, who did some retesting of a blood sample taken from Mr. Locke the day after the accident for alcohol, and explained the lab testing and storage procedures, as well as how the labels for the vials in which the blood samples were placed were generated by the lab information system;
- Marcie Sheppard: the health records manager at the Fort Nelson General Hospital, who explained how it was that the clinical information system implemented in March 2009 produced labels on June 9 and 10, 2010, that referenced a different Joshua Locke with a different birthdate who was not the accused, and how it became apparent that they had registered the accused incorrectly, mixing him up with someone with the same first and last name but a different middle name and birth date (with a Tumbler Ridge profile), such that the system generated labels by default referring to that person. She further explained how these had been applied to the samples collected from Mr. Locke, and how she corrected the records as there was only one person of that first and last name in the hospital on the June 2010 dates, who was the accused;
- Kimberly Young: a forensic toxicology specialist, who analyzed a sample of Mr. Locke's blood taken by medical staff at the hospital the night of the accident; and
- Cpl. Scott Wessell: the RCMP officer qualified as an expert in collision reconstruction, who testified that he attended and analyzed the scene of the accident, and referred to the investigation he undertook, preparing a report that addressed two issues: the use of seat belts and the speed of the vehicle.

[41] The Court has engaged in a most careful review of all the evidence.

[42] Given the admissions by the defence, including that Mr. Locke's blood alcohol level was in excess of the legal limit of 80 mg. while he was in care and control of his vehicle at the material time, it is not necessary to refer to evidence pertaining to the continuity or integrity of the samples taken from the accused or their analyses.

- [43] This means that the Court is not obliged to consider further the testimony of the following witnesses as it relates to those aspects of the evidence: Cpl. Klubi, Cst. Bezzina, Orelia MacDonell, Margaret Steele and Marcie Sheppard.

A. Testimony of Erica Rice

- [44] Erica Rice testified that she was down at the Muskwa River with some other young people on June 9, 2010. She was 16 years old at the time. Ms. Rice had been a close friend of Courtney Siegmund's for many years and in the months leading up to this time had also been fairly close to Chelsea Cook. She knew Terri-Lynn McAuley. She had known Brandon McKinnon for years and knew Mr. Locke by his first name, Josh, although she thought his last name was Laforge. The girls had made plans to go down to the river and when she called Courtney and Terri-Lynn they were already in the car on their way there. Ms. Rice drove a quad down there with Caitlin White on the back and they arrived at the river about the same time as Brandon, Josh, Terri-Lynn and Courtney. They were there from about 5:30 p.m. until about 7 p.m. Terri-Lynn and Courtney were looking through the vehicle getting things out, unpacking blankets and a dog they had brought with them. Josh and Brandon were nearby doing their own thing. Brandon, Josh, Terri-Lynn and Courtney, smoked what Ms. Rice recognized as some weed or pot. She recalled Terri-Lynn having it in her hand at some point. They were using a plastic bottle to smoke it, trying to make it work. They tried it a couple of times and it would not work. Ms. Rice did not smoke. After this, Ms. Rice left on the quad to pick up Jasmond Graves (phonetic). As she was leaving she heard Brandon and Josh talk about drinking and Brandon said how drunk they were. She saw Josh with a bottle of beer in his hand and he was dumping some out, a little at a time. She saw Brandon drinking whisky and also saw Josh with the whisky in his hand, although she did not recall seeing Josh drink it. It was a "2-6" bottle of Wiser's Black Label.
- [45] Ms. Rice returned to the gathering at the river five or ten minutes later with Jas, who had taken a cab to the bottom of the bridge. Chelsea Cook arrived after Jas. Another male, Devon Boyton, arrived after everyone else and was only there for about half an hour before they packed up to leave. Ms. Rice said that she did not drink any alcohol that night. Terri-Lynn, Courtney and Chelsea were drinking beer and there was a 12-pack of Corona. She did not think that any of the three girls drank whisky from the bottle.
- [46] Ms. Rice recalled that Brandon tried to get her to drink and he showed her how much was out of the whisky bottle, and she saw that there was about a quarter of it left. Prior to that, she recalled that the bottle had tipped over on its side on the rocks and some spilled out before one of the girls picked it up. She also recalled previously seeing it sitting on the hood of the car when it was three-quarters full. She recalled that Brandon was acting "goofy" by yelling and jumping around, "being hyped up" and he was shouting to Josh. She said that Josh was acting the same way, "goofing around", laughing and telling stories, basically "just goofing off." She described the car that was there as a little, blue two-door car, a coupe with a sun roof.

- [47] Ms. Rice recalled that Terri-Lynn, Courtney, Chelsea and Brandon left in the car, which was driven by Josh. All five of them were going towards the bridge, that route being the only way back to Fort Nelson. She and Jas left on her quad and Devon and Caitlin left on his.
- [48] Ms. Rice's view of Mr. Locke's sobriety at the time was that he did not seem that drunk, and she said that she did not let her friends leave with people who had been drinking, so she thought it would be fine. She said that Brandon seemed "more drunk" than Josh.
- [49] Ms. Rice impressed the Court as a credible and reliable witness who was careful not to testify to things that she was not sure about. She did not exaggerate or make things up and was careful not to make assumptions as to what might have occurred, as opposed to testifying to what she actually recalled having occurred. Based on her observations, Mr. Locke smoked some marihuana at the Muskwa, consumed some beer and likely consumed some Wiser's whisky before getting into his car and driving the group back into Fort Nelson.

B. Testimony of Kenneth Rombough

- [50] Kenneth Rombough, a 70 year old man who had spent many years in and around Fort Nelson, was hauling shale in a large semi tractor-trailer unit with a second trailer attached in the early evening of June 9, 2010, on the Old Alaska Highway. He was very familiar with this portion of the Old Alaska Highway as he owned property out that way, farther from town than where the accident occurred. He said he had driven it a thousand times or more over the years. Mr. Rombough marked various points along the Old Alaska Highway on a Google map of the area (Exhibit 14).
- [51] While he was travelling towards Fort Nelson, Mr. Rombough testified that a vehicle passed him going the other direction. This occurred at about the old location of the 301 Corner, referring to the old signs that used to mark the miles on the Old Alaska Highway. He first saw the dark coloured vehicle coming towards him on a portion of the roadway visible through a gap in the trees and then he lost sight of it momentarily. When he next saw the vehicle he was surprised how much closer it was and how great a distance it had travelled in a very short time.
- [52] Mr. Rombough looked down at the same vehicle, a car, as it shot by him, from his higher vantage point in the cab of the truck. He saw what he thought was an arm sticking out from the passenger side, either from the front or rear window (he was not sure which). He testified that just before the car flashed by he looked into it for what he described as a split-second. He saw that the car appeared to be full of people and that the driver was a male, who was not looking ahead but in the direction of the passenger or the rear-view mirror with his head turned at a 25 degree angle. Mr. Rombough saw the face of the driver and his mouth was open. It appeared to him that the driver was laughing, although on cross-examination he admitted that was an assumption on his part.

[53] Mr. Rombough followed the car in his rear-view mirror, which he said afforded him a good view. He said he was watching it because it had gone by him at such a "high rate of speed", which he estimated to be "somewhere between 80 and 90 miles an hour." He saw the car go into the bottom of the 301 Corner, which is heavily banked, and it crossed into the oncoming lane as it went around that corner. He did not see any brake lights come on. Mr. Rombough said "I watched that vehicle explicitly until I couldn't see it anymore and when the last time I seen it, it was at least halfway across the road in that corner trying to negotiate that turn." He clarified his testimony that he was on the high side of that corner turning to the left, whereas the driver was on the low side, turning right and going north. He said that as he was looking in his rear-view mirror, observing the vehicle start the turn on the low side of the bank:

A Where he ended up was - - was up as the road starts to flatten out as it goes around the corner. I lost sight of it at about the time where it was - - he's - - he's obviously starting to use up the rest of the road to try and stay on the road.

Q Okay. So what you're saying when he used the whole corner and you're saying he used the road you're talking about the vehicle not remaining in its own lane of travel.

A Absolutely.

(Transcript, p. 15, ll. 25-37)

[54] Mr. Rombough said he thought that he would see the vehicle in the ditch at that corner when he returned a short time later. Instead, on his return trip he came upon the accident scene, involving what he was sure was the same vehicle, about a mile farther down the road at what he described as the 302 Corner. Mr. Rombough lived at Mile 303.3, just a bit further down the highway. Mr. Rombough closed his testimony with comments about his ability to estimate speed based on his experience flying.

[55] Mr. Rombough was an impressive witness. His recollections were clear and, as someone very familiar with this stretch of the Old Alaska Highway, he knew the roadway. As an experienced truck driver and someone experienced in flying, he was well-equipped to observe and comment upon Mr. Locke's driving, in addition to being able to estimate his speed.

[56] Based on Mr. Rombough's evidence I find that Mr. Locke was speeding excessively, travelling at least in excess of 120 km/h (as between 80 and 90 miles per hour converts to between 128.7 and 144.8 km/h). He was also driving in a manner and at a speed that caused his vehicle to cross the center line at a significant right curve in the roadway that preceded the significant curve to the left where the accident took place.

C. Admitted evidence of Scott Neitzel

- [57] According to the agreed statement of facts, Scott Neitzel was walking towards Fort Nelson on the Old Alaska Highway a short time before the accident. He was walking on the side of the highway facing the oncoming traffic. He saw a little black car, admitted to be the Locke vehicle, coming toward him. He moved off to the side of the road. The car sped past him at what he estimated to be over 100 km/h, perhaps 120 km/h. He heard the tires squeal on the road after the car passed him. After the Locke vehicle had gone out of his sight, he saw a cloud of dust.

D. Admitted evidence of Joseph Warren and Lois Warren

- [58] According to the agreed statement of facts, Joseph Warren and his wife, Lois Warren, live at 7404 Old Alaska Highway. A short time before the accident they were having dinner on the exterior deck of their residence when they heard screeching brakes and/or squealing tires. Each of them caught a brief glimpse of the Locke vehicle passing by their residence. Joseph Warren, a truck driver, estimated that the Locke vehicle was travelling at least 100 miles per hour. To Lois Warren, the vehicle appeared to possibly be airborne. She could not give an estimate of the vehicle's speed. They both heard the vehicle crash. Lois Warren contacted the ambulance and Joseph Warren went to the scene. The vehicle they both observed was the Locke vehicle.

E. Testimony of Terri-Lynn McAuley

- [59] Terri-Lynn McAuley was 15 years old on June 9, 2010, and turned 16 in September of that year. She became tearful and upset when describing her two friends who died in the accident and what they were all doing on June 9th, prior to leaving Fort Nelson to go to Courtney Siegmund's for a bonfire.
- [60] Ms. McAuley recalled giving a statement to a police officer in the Fort Nelson General Hospital the evening of the accident as she was in and out of consciousness. She was medically evacuated to the hospital in Prince George, where she remained for two weeks, and she recalled speaking to the police while she was there. She then returned to Fort Nelson, where she recalled speaking to a police officer. Then, many months later, she recalled speaking to a police officer at her house. In the years since then she has not made any further statements to the police about the accident. She reviewed her statements for the preliminary inquiry by listening to them, as opposed to reading them, because she found it too hard and emotional and also because she is not a very good reader, having not gone past Grade 9 in school.
- [61] Ms. McAuley explained how it was that she was picked up by Courtney and Josh in his car to go down to the banks of the Muskwa River. They contacted Brandon McKinnon and drove back into town and picked him up and also purchased a bottle of booze, and then went back to the river and waited for Chelsea to arrive. She was not sure who purchased the alcohol but

she thought it was Josh. She said it was a 2-6 of Wiser's whisky, and she knew that because she was drinking it. She recalled that they had a few beers, maybe three or four Coronas, in the trunk of Josh's car from a few days before. Back at the river they met up with others, including Erica Rice.

- [62] Ms. McAuley recalled that she had a few shots of whisky out of the bottle, but she did not recall if she drank any beer. She had marihuana with her, "maybe a twenty bag, which is two grams", and she made a kind of pipe to smoke it out of an empty plastic bottle. She recalled that it was mostly her and Brandon who were taking shots out of the bottle of whisky, but Josh had a little bit of it, and she could not say whether he had a lot in that shot or not. She said they were down at the Muskwa for about an hour to an hour and a half. She had a few puffs of marihuana from the bottle pipe. About half of the whisky in the bottle was consumed, although at one point, the whisky bottle tipped over and some of it spilled. She, Courtney and Chelsea took a walk with her puppy and then, as it was almost 6 o'clock, they decided it was time to go as they were going to have a fire at Courtney's. Chelsea's parents were going to pick Chelsea up but the group did not want to wait around for that to happen, so Chelsea came with them.
- [63] Josh Locke drove her and the others into Fort Nelson. Brandon McKinnon was in the front passenger seat, Courtney was sitting in the back seat behind Josh, Chelsea was in the rear seat in the middle and Ms. McAuley was behind Mr. McKinnon.
- [64] On the way back into town Ms. McAuley recalled that Josh's car "kind of stalled" and she assumed it was running on fumes until they got to Fast Gas, where they got some gas and grabbed some oil and some chips before going to Brandon's house. She went nearby to get some personal belongings and then went back to meet the others at Brandon's place. Next, they left Brandon's place in town with Josh driving and people sitting in the same spots in his car, except that she and Chelsea had switched spots, so she was in the rear seat in the middle.
- [65] Ms. McAuley described their route north out of town towards the Old Alaska Highway, which went past various landmarks including the Roy Ballpark and the RCMP traffic station on the edge of town, and then turned right onto the Old Alaska Highway. She said that as they were going through town Josh started to increase his speed and to go faster than the speed limit. As they drove by the RCMP traffic station he gave the cops "the middle finger", and then took the right-hand turn onto the Old Alaska Highway "pretty sharp." She said, "Speeds are getting faster, not driving within the lines, kind of all over the road. We go around the first corner at 301, which is Chelsea's house and that -- we take that corner very sharply " (Transcript, p. 22, ll. 37-41). Asked about what her understanding was about their speed, Ms. McAuley described what she remembered of the events leading up to the accident, commencing after the 301 Corner, as follows:

A Not at that time I hadn't looked, but after that corner, we come over a hill and we're flying over this hill and getting a lot more speed as we come down the hill, and then I was in the middle seat with my legs between the two guys in the front, and I had looked and we had been going at least, by the time we come down the hill, hundred and -- over a hundred and forty kilometres an hour on the speedometer, because I could see it. And then we come into the corner that -- at 303 [referred to by others as the 302 corner] where the accident has taken place, and as we come down the hill, increasing speed, we come around that last corner, and I remember feeling the back end hit gravel, and then that's where I grabbed -- we're screaming all at this point when we're coming down the hill, and speeds are coming up really fast, we're driving really fast, no one's got their seatbelts on. The two girls were really yelling, and Courtney was hitting the seat to slow down, slow down. And I remember Brandon putting his seat belt on and then going around that last corner and losing control. I remember just hearing the rocks and the gravel, the back of my head, closed my eyes, I said, "love you guys," like we're just holding on really tight to each other, and then I just don't remember a thing after that. I remember in and out of consciousness, arms flying everywhere, and then out

[Emphasis added.]

(Transcript, p. 24, ll. 4-31)

[66] Asked to elaborate on her account, Ms. McAuley said the following:

- When asked for more details about the speed of the vehicle, she said, "I'm not sure how fast, I looked at the speedometer once, and I -- I think it said one sixty, but I can't say for sure what it was but it was over one forty. We were flying" (Transcript, p. 25, ll. 18-21).
- They were all pretty scared when they hit the 301 Corner, and were surprised that they had made it that far as they were going really fast (Transcript, p. 25, ll. 39-44).
- Approaching the 301 Corner Josh was "kind of all over the road", meaning "crossing the yellow line", and he went "very wide" over the yellow line going through the 301 Corner into the lane of oncoming traffic (Transcript, p. 33, ll. 7-15 and ll. 24-31).
- After the hill and the 301 Corner is when really the girls started screaming and saying, "'Slow down, slow down.' [It] [w]as getting pretty frantic'" (Transcript, p. 26, ll. 33-36).
- None of the back seat passengers were wearing seat belts and there was not one available for her in any event, as she was sitting in the middle of the back seat (Transcript, p. 30, ll. 32-47).
- Brandon McKinnon put his seat belt on just after they came down the hill, "strapping it over very quickly", but she did not think Josh was wearing a seat belt (Transcript, p. 31, ll. 4-9).
- She believed that Brandon also told Josh to slow down (Transcript, p. 31, ll. 17-20).
- She, Chelsea and Courtney were all screaming to slow down by the time they were approaching the 301 Corner and then coming down off the hill (Transcript, p. 27, ll. 26-42).

· She noticed the speedometer on the flat plain after the hill about three to four hundred metres before the 302 Corner (Transcript, p. 28, ll. 4-12).

[67] Ms. McAuley indicated, in terms of her own level of sobriety just prior to the accident, that she assumed she was feeling "pretty good", having had a few shots and a couple of tokes, but that she "wasn't that messed up" given that she walked to her house to get her things prior to getting into the car. With regard to Mr. McKinnon's level of sobriety, Ms. McAuley said that she could not remember how drunk he was at that time or if he was really intoxicated at all. In terms of Josh Locke, she said that she only saw him have a little bit out of the whisky bottle and that it was not until they were driving out of town on their way to Courtney's place and he started to drive faster and faster and act careless that she realized that "maybe he was a little intoxicated."

[68] Ms. McAuley described the extensive injuries she sustained in the accident and their lasting effects upon her. She said that she is physically put back together, but she still suffers a variety of physical limitations from her injuries and has "post-traumatic depression or whatever they call that."

[69] She said that just prior to the accident, as she heard rocks flying and felt the back end slipping, she saw Josh driving and indicated that she did not see him do anything unusual with his driving; he was driving the vehicle (when asked if she saw any steering of the vehicle by Josh) and there was no slowing down (when asked if she noticed any sensation of braking) (Transcript, p. 36, ll. 30-41). When asked what Brandon McKinnon was doing at the point when she heard the rocks flying and felt the back end slipping, Ms. McAuley said:

A I don't remember. I was closing my eyes at that point. As we come out of the corner and we started to lose control, I closed my eyes.

Q What, if anything, can you say about Brandon McKinnon touching the steering wheel of this vehicle that you were in?

A I cannot say that he did and I cannot say that he didn't. I remember in my going in and out of consciousness seeing arms flying around the vehicle, and that's all I have to say.

[Emphasis added.]

(Transcript, pp. 36-37, ll. 45-7)

[70] When asked if she had told anyone that Brandon grabbed the steering wheel of the car, Ms. McAuley answered, "I don't -- I might have said that I thought I seen him grab it, but I couldn't say for sure" (Transcript, pp. 37-38, ll. 47-1). Then the following questions and answers concluded her direct examination:

Q Do you remember to whom it was that you ever first said that?

A I think it was to Courtney's brother. But I don't remember for sure. I was in a pretty -- I was in a recovering state, I was in a wheelchair, I don't remember for sure.

Q And can you tell Her Ladyship today why it is what caused you to say that to Jordan's -- to Jordan Siegmund?

A My Lady, I feel like I had said that because I had seen arms flying around in my conscious -- like going in and out of consciousness, and that's why I feel like I might have said that, but I couldn't say for sure because I cannot remember seeing him do it for sure. I will not say that he did. I have no idea. It could have been a thought, and I could have -- could be now thinking that I'd seen it but I haven't. I remember seeing arms flying around the car, but that's it.

Q The point in time where you recall arms flying around the car, just to be clear, is that --

A After I -- losing control of the corner where I feel the dirt hit -- the rocks hitting the back of the vehicle, on the corner of 303 [referred to by others as the 302].

[Emphasis added.]

(Transcript, p. 38, ll. 2-25)

[71] During cross-examination Ms. McAuley reiterated that she did not recall, at this time, seeing Brandon McKinnon grab the wheel but she remembered seeing arms flying around the vehicle. When she was asked if she recalled telling the police that she was not really sure, but she thought that Brandon might have grabbed the wheel, she indicated that she "might have", "so probably yes." She then repeated her previous testimony about remembering seeing arms flying around, going in and out of consciousness and added "so just before we crashed, I remember seeing arms flying. Could have been while we were crashing, could have been anything, at this time that's what I remember in my knowledge" [Emphasis added.] (Transcript, p. 40, ll. 14-19).

[72] A portion of her May 6, 2011 statement was read to her, in which she said she thought that Brandon had grabbed the wheel but she did not know, and the police had tried to ask her to make a statement about it, but she did not want to say because she was not sure. She continued in the statement, saying "I'm not sure at all what happened but I think just remember seeing something. His arm was out of his body frame, I remember seeing his hand was over here (motions to the left), but I don't know if he grabbed the e-brake or like the steering wheel like this, but his hand was somewhere over here, I remember. I remember. I can see it. I'm not sure, I wish I was sure."

[73] In court, Ms. McAuley's response when asked if that statement had been read correctly was that it had and "I'm still not sure" (Transcript, p. 42, l. 43). She agreed that what she said in this statement about not being sure but thinking that Brandon had grabbed the wheel was different from her evidence in court that she just saw hands flying around the vehicle. She agreed that her memory when she made the statement was likely better than when she was testifying in court.

[74] When it was put to Ms. McAuley that she had a specific memory about seeing Brandon's arm being outside of his body frame, she said that she was not even sure what that meant; and in terms of her recollection about seeing his hand "somewhere over here" and whether that refreshed her memory, she said:

A A little bit, I mean I -- like I said, I seen arms flying and I did see Brandon's arm over there, yeah, I remember that.

Q Okay.

A But it could have been anything.

[Emphasis added.]

(Transcript, p. 44, ll. 19-23)

[75] Ms. McAuley then reluctantly agreed that her earlier statement as read in court was a better reflection of what really happened, stating "I guess, like I -- I -- it's -- I don't know, my remembering now is five years later so, yeah, I guess so." She also admitted that she was confused as to when Mr. McKinnon may have grabbed the wheel (Transcript, p. 45, ll. 4-12).

[76] She indicated that she has known Brandon McKinnon since she was seven and her brother played hockey with him, and he was the rebel child, someone that gets into a lot of trouble. She has resisted his efforts to talk to her since the accident and finds him to be "annoying and stupid." She sees him around but "blows him off" when he tries to speak to her. He tried to contact her on Facebook about two years ago when information got to him about what she said regarding him touching the steering wheel. She said she talked to Jordan Siegmund about Brandon possibly touching the steering wheel. Other people heard about it and then the police came to talk to her and she said that she could not say for sure. She could not remember how the topic came up with Jordan.

[77] When asked if Mr. Locke was driving "pretty normal or slowly through town", Ms. McAuley did not agree. She said he sped up as they were headed out of town, estimating his speed to be 70 or 80 km/h, but also said that because she does not drive, it is hard for her to estimate.

[78] Cross-examined about the speed the car was going just before the accident, Ms. McAuley said "over 140" and when it was put to her that she was just inferring that from the placement of the hands of the speedometer, she reiterated that she saw it "past the 140" (Transcript, p. 58, ll. 43-45), subsequently agreeing that she inferred that was the speed based on where she thought 140 was on the speedometer (Transcript, p. 59, l. 10). Then she indicated that she was very confused by all the questions and could not "do this anymore." When a prior statement of hers was put to her, made to police the night of the accident at the Fort Nelson General Hospital, in which she said they were going over 100 km/h, she agreed that this was her earliest statement from the emergency bed. She then admitted that she was not sure "if the 140's in my mind because of things that's happened over the years. Like, I don't know if that's even, like, what I really thought at that point. Like, all these

questions are making me double-think my own mind" (Transcript, p. 61, ll. 43-47).

Subsequently, Ms. McAuley says that she would, "Just go with over a hundred, then" (Transcript, p. 61, l. 38). She was then directed to a statement she made to police on June 10, 2010, in hospital in Prince George in which she also referred to the speed of the vehicle as "over a hundred."

[79] Asked about what she recalled of Mr. Locke's actions on the day of the accident, Ms. McAuley said that she remembered him "drinking a little bit", as it was his bottle of booze, which was followed by her comment that she cannot remember.

[80] A portion of Ms. McAuley's statement to police in May 2011, as follows, was read to her:

Right as we're flying over the hill, Brandon puts on his seatbelt. And Josh is, like: "Watch this." I remember it. I'm not really sure, but I thought that Brandon grabbed the wheel, but I don't know. And the police have tried to ask me to make a statement about it, but I'm not sure and I don't want to say I'm sure because I'm not sure. I'm not sure at all what happened, but I think -- I just remember seeing something. His arm was out of his body frame. I remember seeing his hand. I don't know if it was just because -- or something, but I remember his hand was over there.

[Motion is to the left.]

[Question and answer omitted.]

But I don't know if he grabbed the E-brake or, like, the steering wheel like this, but his hand was somewhere over here. I remember. I remember I can see it. I'm not sure. I wish I was sure.

[Emphasis added.]

(Transcript, pp. 69-70, ll. 26-40 and 47-4)

[81] Ms. McAuley agreed in court that she was doing her best to be honest and accurate at the time she gave the statement, and her memory of the event was better at that time than on the day she testified. When asked if she adopted that statement as a more accurate description of what she recalled about the events in the vehicle than what she told the Court in direct examination, Ms. McAuley replied:

For right now, all I remember is arms flying around. So whether that came up in a dream or I just -- in unconsciousness. Like I said, I can remember arms flying around today. That's all I remember today.

[Emphasis added.]

(Transcript, p. 70, ll. 20-24)

[82] She then agreed that what she said in the statement was a better and more accurate description of her memory or her "vision" than what she is able to presently give. When she was pressed further about raising the issue of Brandon McKinnon grabbing the steering wheel the following exchange occurred:

Q I'm going to suggest to you that you wouldn't -- you would not have raised this issue with Jordan had it not been something that you would actually remember happening?

A Correct. That would make no sense to me why I would tell my best friend's brother -- my best friend who died's brother that this happened, in my mind. Does that make sense to you.

Q Yes.

A Thank you.

Q So you -- you told him your actual memory of the events, and your actual memory was that he reached across and grabbed the wheel --

A It says that I can't -- that I didn't say it for sure because

Q I'm talking to you about --

A -- I didn't know.

Q I'm asking you a separate question [inaudible/away from microphone].

A And I didn't tell Jordan it was for sure, either. I told Jordan that I wasn't sure. That I'd seen arms flying around and that, yeah, maybe he had, because it didn't make sense to me why we crashed on this side of the road, not this side of the road, is why I said it.

[Emphasis added.]

(Transcript, pp. 71-72, ll. 32-9)

[83] Then defence counsel asked Ms. McAuley if her recollection of the way the car moved was consistent with somebody either grabbing the steering wheel or jerking the E-brake, and her response was:

A No. I -- my recollection is that I seen Brandon's hand somewhere on the left side of the car. Could have been him putting on a seatbelt. That could have been what it was. Could have been him just scared or it could have been anything. It could have been a gesture of his arm over here.

I don't know for sure if he grabbed the E-brake or the wheel. That's -- I tend -- I never said that I could say for sure. I remember seeing his arm in the left part over that direction, so near Josh, correct. Doesn't mean that I felt that the car took a wrong turn, because it could have been that the wheels grabbed the pavement wrong and flew us the other way. It could have been anything. I can't say for sure that that's what happened, so I don't know.

Q You just raised the issue; I didn't ask you. You just raised the issue of the vehicle moving a particular way off the road?

A Yes. Because that's why I told Jordan that is because I seen Brandon's arm over there, and it didn't make sense to me why the vehicle was on this side of the road rather than this [indiscernible] the road if we were on the side of the road, but it could have been anything. That's why -- like, I seen his arm over there, and, yeah, I can't say for sure what he grabbed or if he even did.

[Emphasis added.]

(Transcript, pp. 72-73, ll. 43-24)

[84] Next, defence counsel asked Ms. McAuley whether she agreed that the car moving off the road in the fashion she described was consistent with how it would have moved if Mr. McKinnon jerked the wheel, and her response was:

No. Not correct. The back end lost control because it hit dirt going around a right-hand corner is why I feel that. I don't feel like that's 'cause Brandon grabbed the wheel.

[Emphasis added.]

(Transcript, p. 74, ll. 34-37)

[85] The following further portion of Ms. McAuley's May 6, 2011 statement was put to her by defence counsel. The police officer asked her:

You're not sure what took place there. What I -- what I was getting at before was this arm. Like you say what -- what was his doing. Where was that in relation to the accident?

[86] To which, in her statement, Ms. McAuley responded:

I don't think it was. I just had thought that maybe he had grabbed the wheel, and then we had went that way because I thought we were going to crash on this side of the highway [-- you motion to the right --] because that would make sense, right? Like, when you roll. It was a corner. It was like this, so when you roll this way off to the corner, but then we were over here. So maybe he grabbed the wheel, tires that way. The car was, like, driving like this, and then it was right there like this. And then I thought maybe he would have grabbed the wheel, and it was like but I just don't remember.

To this, in court, Ms. McAuley said, "I just don't remember" (Transcript, p. 75, l. 32).

[87] Defence counsel continued to read the following portion of her statement to her:

thought that maybe if we had rolled this way, because it's on his side, had it rolled this way probably -- so he wouldn't get hurt, and we rolled this way and he wouldn't get hurt, or he would -- yeah, wouldn't get hurt if we rolled this way. He would because it would be room right on this side, right? Maybe that's what I thought. But, like, I thought maybe he had grabbed the wheel because his hand was over here. So I was, like, why is his hand here? So that's what I thought.

[88] Defence counsel then said to Ms. McAuley that he was giving her the opportunity to correct what she had said because it was not clear. Her response was:

Yeah, but it doesn't sound very -- it doesn't make any sense, really. "Maybe," "maybe," "I don't know," "maybe." Like, that's just what I read. A whole bunch [] -- of "maybes" and "I don't knows."

(Transcript, p. 76, ll. 6-11)

[89] She indicated, referring to what she had said in the statement, that she was trying to make sense in her mind of what happened that day, and when asked to explain what she was trying to say in that statement, she stated:

That I had thought I seen Brandon grab the wheel or the E-brake, or whatever, but I'm not 100 percent sure. It says "maybe," "I don't know." And that I thought, in my mind, that we should have crashed the other way. So I'm trying to put these two things together to make sense in my head what happened. So

[Emphasis added.]

(Transcript, p. 76, ll. 30-36)

[90] Defence counsel concluded his cross-examination by reading a further portion of the same statement to Ms. McAuley in which she said she "thought maybe he had grabbed the wheel because his hand was over here. So I was, like, why is his hand there? It's nothing I know. It's nothing I know. I don't know Because I seen his hand. I seen his hand coming around" (Transcript, p. 78, ll. 1-22). And when the officer taking the statement asked her if she ever saw his hand on the wheel, Ms. McAuley said, "No, no, I don't think so. Now in my head I picture his hand on the wheel and now it's confusing me. Like, I can see his hand on the wheel. But it's just my imagining; it's just in my head. My head's all messed up right now. Like, we've talked about this for too long" (Transcript, p. 78, ll. 34-40). Ms. McAuley was asked if counsel had read that passage accurately and if that is what she said on that day, to which she responded in the affirmative.

[91] The following are my findings in relation to Ms. McAuley's evidence generally, and specifically as to whether she saw Mr. McKinnon grab the steering wheel:

- Ms. McAuley was severely injured in the accident, which was extremely traumatic for her, and she lost consciousness. This makes any of her recollections of the terrifying seconds before impact suspect.
- Ms. McAuley continues to be traumatized by the deaths of her two friends and her memories of the accident.
- She did her best to give a clear account of what occurred and the most obvious feature of her evidence is that she is not at all sure if Mr. McKinnon grabbed the wheel.

- Her recollections of seeing "arms flying everywhere" and Mr. McKinnon's "arm out of his body frame" relate to the time after Mr. Locke had lost control and the back end of the vehicle started to slide.
- Her position in the vehicle gave her a very good view of the seats in the front and the speedometer.
- I accept her evidence that the speed of the vehicle going down the hill as it approached the 302 Corner was approximately 140 km/h, based on her recollection of seeing the speedometer.
- In her May 2011 statement, Ms. McAuley had a clear recollection of the point when the passengers in the car were urging Mr. Locke to slow down and then of Mr. McKinnon putting on his seat belt. She recalled Mr. Locke saying something to the effect of "Watch this". At that point, she said, "I'm not really sure, but I thought that Brandon grabbed the wheel, but I don't know." While she appeared to initially adopt her statement in court, she then resiled from it, saying all she really recalled was arms flying around and that she was trying to make sense of why they ended up on the opposite side of the road.
- Her clearest memories of the events in the vehicle immediately prior to the accident do not include Mr. McKinnon grabbing the wheel before Mr. Locke lost control of the vehicle.
- Ms. McAuley's description of Mr. McKinnon as the rebel child, and his habit of committing criminal offences (as referred to in his cross-examination), likely made him a target of speculation in Fort Nelson when Ms. McAuley returned to that community after the accident in a most vulnerable state. She was very open to suggestions from others as to what might have caused the accident and this likely prompted her thought that Mr. McKinnon may have grabbed the wheel.

[92] For these reasons I accept Ms. McAuley's evidence in a general sense as she gave credible and reliable testimony about what happened during the day of June 9, 2010. She had a clear recollection of what went on in the vehicle until the back end started to slide. Thereafter, understandably, her evidence is confused and not reliable. In particular, her recollections that Mr. McKinnon may have grabbed the wheel at some point are highly suspect and fraught with uncertainty. I do not accept her evidence in this regard.

F. Testimony of Brandon McKinnon

[93] Brandon McKinnon was 25 years old at the time of the trial. He was 20 years old in June 2010. He had lived in Fort Nelson for many years and through Terri-Lynn McAuley, he came to know Courtney Siegmund and Chelsea Cook. He met Josh Locke through Terri-Lynn and Courtney. He had known Mr. Locke for a month before the accident.

[94] On June 9, 2010, after he finished his labouring job for an oil and gas company, Mr. McKinnon said he was in touch with Josh Locke on Facebook and Mr. Locke, accompanied by Courtney and Terri-Lynn, came to pick him up at his house. After they picked him up in Mr. Locke's car they drove to Dan's Pub Liquor Store where Mr. McKinnon gave Mr. Locke

money and Mr. Locke went in and purchased a 2-6 of Wiser's Special Blend whisky that Mr. McKinnon specifically requested and a 12-pack of Budweiser beer. Then they drove down to the banks of the Muskwa, where they stayed for about two hours. Chelsea Cook was dropped off to join them about 45 minutes to an hour later. Before Chelsea arrived, Mr. McKinnon said that he had some whisky and two beers, and Mr. Locke had a little bit of whisky and was drinking his beer, but Mr. McKinnon said that he did not know how much alcohol Mr. Locke consumed. Both Courtney and Terri-Lynn had a shot of whisky. No marihuana was consumed until after Chelsea Cook arrived.

[95] Asked if they had any other drugs down by the river, Mr. McKinnon said that Mr. Locke showed him three grams of cocaine by taking them out of his mouth. When Mr. McKinnon was asked how he knew it was three grams of cocaine, he said, "They were already bagged up" by being packaged in the corner of a plastic sandwich baggie and tied up, with the end snipped off. Mr. McKinnon described how to package cocaine in this manner because he said he used to be involved in sniffing cocaine. He said that when Mr. Locke showed him the drugs, the two of them had just stepped aside from the others and were talking. Mr. McKinnon recalled that Mr. Locke just said "check this out" and Mr. McKinnon responded, "Sweet". Then Mr. Locke wanted to know if Mr. McKinnon knew anyone who was looking to buy. Mr. McKinnon said that Mr. Locke told him it was cocaine and Mr. McKinnon knew what cocaine looked like.

[96] After Chelsea Cook arrived, Mr. McKinnon said that they were all drinking. He had whisky and only the two beers he earlier referred to. Mr. McKinnon estimated that he had roughly seven shots of whisky and did not keep track of how many shots there were in the bottle, saying he "just gets drunk". On this occasion he said he was "drunk, started to get a buzz on, yeah, feeling good" (Transcript, p. 14, ll. 40-41). If "10" was black out drunk, he placed himself between a "5" and a "6". He saw "the girls" smoking marihuana out of a "mini-bong". Mr. McKinnon said that neither he nor Mr. Locke consumed any marihuana. Asked about Mr. Locke's behaviour down at the Muskwa, Mr. McKinnon said that "he was drunk", his behaviour "wasn't too bad, wasn't trying to fight or nothing, we were all having a good time" (Transcript, p. 15, ll. 40-42.)

[97] Mr. McKinnon then described the group leaving the river with the plan of going out to Courtney's place for a bonfire. The five of them got into Mr. Locke's car, with Mr. Locke driving, himself in the front passenger seat, Terri-Lynn sitting in the back behind him, Courtney in the back behind Josh and Chelsea in the back in the middle. He recalled that as they drove into town the engine light came on in Mr. Locke's car at the top of the hill, so they pulled over to check it and it needed some oil. At Mr. McKinnon's place his father brought them out some oil and helped them put it in. Next, they stopped at Fast Gas where Mr. McKinnon said that he put \$40 worth of gas into the car and bought them some food. Then they headed out and he put on his seat belt (Transcript, p. 16, ll. 10-23). On the way out of town he placed everyone in the same positions in Mr. Locke's vehicle as when they drove into Fort Nelson from the Muskwa River (which is contrary to the evidence of Ms. McAuley

and the Agreed Statement of Facts, that has Ms. McAuley and Ms. Cook changing places, such that Ms. McAuley was in the middle of the back seat).

- [98] On the drive out of town Mr. McKinnon said that Mr. Locke was going the speed limit. He recalled they drove past the RCMP highway traffic office, but did not recall Mr. Locke doing anything (whereas Ms. McAuley said Mr. Locke gave the RCMP the finger as he drove by). After taking a right onto the Old Alaska Highway, Mr. McKinnon described the roadway: a little bend, followed by the roadway going up a little hill, then a flat straight stretch and then the big right bend. Mr. McKinnon said that Mr. Locke started picking up speed halfway along the straight stretch, and he thought he was going between 80 and 90 km/h, but then said he did not know why he picked those numbers, but that he thought it was over the speed limit (which he thought was 60 km/h) based on looking out of the car and seeing the grass and trees fly by. In terms of the big curve to the right, Mr. McKinnon said that Mr. Locke took that curve well, staying on his own side of the road which had a solid, no-passing line. At this point Mr. McKinnon said that they were all telling Mr. Locke to slow down as he was gaining speed. He recalled that Courtney hit Mr. Locke on the back and said, "Josh, slow down" (Transcript, p. 24, ll. 11-12).
- [99] After this big right-hand curve Mr. McKinnon said that the road goes straight, with a slow incline up a little hill. Then it goes down and straight, and then there is a little dip just before it curves to the left. Mr. McKinnon indicated that as Mr. Locke drove down the straight stretch of the roadway before the left curve, he looked at the speedometer and it said "140". He said they all "kept bugging him" to slow down before the previous curve to the right and they just gave up on telling him as he would not listen; "He just wouldn't listen, he kept gaining speed" (Transcript, p. 26, ll. 28-31 and ll. 40-41). Mr. Locke's only response was that he "just smiled" (Transcript, p. 27, ll. 2-6). Mr. McKinnon said that he saw the speedometer halfway down from the top of the incline toward the left curve and he marked the spot with the "140" on his diagram (Exhibit 17). On the way down, Mr. McKinnon said there were two dips in the road, a little one and then an even smaller one. Nothing happened when Mr. Locke drove through the first little dip at "140", but then he lost control at the second, smaller dip. He said the car "bottomed out" at the second, smaller dip in the road, which he explained as the transmission hitting the road when the shocks absorbed too much. The back of the car "kicked out" as the car was going around the corner at high speed. He said the right rear wheel "fish tailed" and the back right rear of the car went to the right. At this point there was yelling in the car and Mr. McKinnon said he was scared and fearful. He said no words were spoken, just fearful yells. He said he and the girls were screaming and, "As the back kicked out a little bit, we -- we -- just driving, it happened so fast, it skidded out, and, yeah, that's when the accident After it was -- we were going fast, and it happened too fast, and after it kicked out, it just -- he went to the left, and we just went nose -- front and nose into the -- to the ditch. And that's -- yeah. So I was knocked out, everyone, after the accident" (Transcript, p. 30, ll. 25-40). Mr. McKinnon then described waking up, taking off his seat belt and opening the door. Thereafter, he described the aftermath of the accident. He explained that while the vehicle had been travelling on the right-hand side of the

roadway before the accident, after the crash it was off the road in the ditch on the left-hand side of the roadway. Mr. McKinnon indicated that he had whiplash from the seat belt and, after the ambulance attendants checked his pulse and blood pressure, he left the scene and later went to the hospital to get checked out. He healed in a couple of weeks but said that he is still traumatized by the accident.

- [100] When Mr. McKinnon was asked if he did anything in the vehicle before it left the roadway his response was, "Sat there. It happened so fast." Next, he was asked if there was anything he did inside the vehicle to try to prevent the crash, to which he responded "No" (Transcript, p. 33, ll. 3 and 6).
- [101] Mr. McKinnon indicated that he has spoken to Terri-Lynn McAuley more than once since the accident. His first contact was with her was through Facebook when she was in the hospital in Prince George having surgery. He just inquired about how she was doing, but she did not want to talk. When he first spoke to Ms. McAuley in person she was back in Fort Nelson in a wheelchair being pushed by a friend, and they just bumped into each other by Fast Gas.
- [102] Between those two contacts Mr. McKinnon said that Jordan Siegmund confronted him, saying that he had heard that Mr. McKinnon had grabbed the wheel. Mr. McKinnon said that he told Jordan that it was not him. Mr. McKinnon said that he thought at first Terri-Lynn McAuley had thought it was him. He wondered if she was scared, and he really had no idea what prompted her to think that. Mr. McKinnon said this idea that he had grabbed the wheel just came across Fort Nelson as a rumour, and he talked to Jordan and explained that it was not him. When Jordan approached him, Mr. McKinnon said that this was the first he had heard of it.
- [103] Therefore, on the occasion when Mr. McKinnon saw Ms. McAuley by Fast Gas he brought the subject of him grabbing the wheel up with her and she denied saying that. Mr. McKinnon said other people had mentioned it to him and he denied grabbing the wheel. After they met by Fast Gas, Mr. McKinnon said that he confronted Ms. McAuley on Facebook about her being the source of the rumour and she denied it. He said that he never learned its source or how or why it got started.
- [104] Mr. McKinnon was cross-examined in some detail, first in relation to his lengthy adult criminal record, which was reviewed in detail. He has committed various property offences and other offences, including 17 breach convictions, an assault, using counterfeit money and robbery. He has served jail sentences of varying lengths for some offences and received conditional sentence orders for others.

- [105] Mr. McKinnon indicated that, for the most part, the offences he committed were a result of an addiction to crack cocaine. He indicated that he is also inclined to drink alcohol. He admitted that he was more likely to do stupid crimes with his friends, but that he had "grown out of all that" and had not been in any trouble, not even a breach, for the nine months since September 2014.
- [106] In June 2010 Mr. McKinnon said that he was trying to stay away from crack cocaine and he said he had been clean for about three weeks prior to the accident. He relapsed about a month after the accident. He said he was sober on June 9, 2010, when he set off to the Muskwa River with the group. He agreed that on this date he was bound by conditions on two probation orders with terms that did not permit him to consume alcohol or drugs. He freely admitted that while drunk or high he committed criminal acts and generally was less well behaved, and was less likely to make good choices, although he insisted that he still makes good choices. He agreed that when he has been drinking he tends to get loud, a bit more hyperactive, more argumentative if someone yells at him or pushes him, but that he is usually "mellow" when he drinks, depending on the environment. He said that afternoon at the Muskwa "we were just having a good time." Mr. McKinnon recalled that Mr. Locke took shots of whisky with him and that Mr. Locke had more beers than the two Mr. McKinnon said that he, himself, consumed.
- [107] When Mr. McKinnon's prior statement to the police, made the day after the accident, was put to him - specifically the portion where he said he thought that Mr. Locke drank "maybe one or two beers" (Transcript, p. 55, l. 45) in bottles, and he did not see him drink anything else and did not know where the whiskey came from (Transcript, p. 56, ll. 1-17) - he agreed that he was doing his best to recall what happened and denied lying to the police. He also said he was very stressed out and that he could have been wrong about what Mr. Locke had to drink. He then said he "coulda sworn that he [Mr. Locke] had shots, 'cause the bottle was half I coulda sworn everyone was drinking it with me" (Transcript, p. 57, ll. 15-28). Mr. McKinnon then agreed with defence counsel that if he told the officer that Mr. Locke had two beers and no whiskey that day, then that was what happened (Transcript, p. 57, ll. 42-44).
- [108] In his testimony at trial, Mr. McKinnon confirmed that no one was using cocaine that day at the Muskwa that he was aware of, and confirmed that while he did not see Mr. Locke use cocaine, he had it in his mouth.
- [109] Mr. McKinnon had testified by video link from jail at the preliminary inquiry. When his prior testimony from the preliminary inquiry, in which he denied seeing Mr. Locke with any drugs and denied seeing anything in Mr. Locke's mouth, was put to him, he agreed that was what he said, and that he "was trying to be honest, to the best I could have"; and he agreed that he had no explanation for what he said on that day. He further explained that his "mind was racing", he "felt put on the spot", and he did not know "why I told them no" (Transcript, p. 61, ll. 2-9). He agreed that he was doing his best to tell the truth at that time.

- [110] Mr. McKinnon mentioned bringing a lawsuit against Mr. Locke to the police the day after the accident, which he explained as something he knew about because he had a few friends who had been involved in accidents who had received money from ICBC, but he indicated that his focus was not on that because two people had just been killed. Mr. McKinnon also denied telling people at the scene of the accident not to call the police, and recalled that Angus (referring to Angus Campbell) saw it and called in the accident.
- [111] The sources of the rumours regarding Mr. McKinnon grabbing the wheel were further canvassed with him in cross-examination. When questioned about the time he was confronted by Jordan Siegmund, who accused him of grabbing the wheel, Mr. McKinnon said that he responded that it was not true and he would not put his life and the lives of others in jeopardy, especially when he was not driving, as he wanted everyone at the end of the day to go home to their families (Transcript, p. 66, ll. 16-23).
- [112] Mr. McKinnon agreed that if he had thought he was putting his own life in jeopardy by getting into a car driven by Mr. Locke, he would not have done it. He said that while he knew that Mr. Locke had been drinking, he did not know how drunk he was. However, he also admitted that, had he thought Mr. Locke too drunk to drive, he probably still would have driven with him, as this was his first accident, and "probably had it run through my head that it wouldn't happen, it couldn't happen to us, couldn't happen to me crashing" (Transcript, p. 66, ll. 30-45).
- [113] When Mr. McKinnon was challenged regarding his evidence that he recalled the vehicle going 140 km/h he agreed he was going to stick with it. When a portion of a statement he made the day of the accident was put to him in which he first said they were going "80k, if not more", and then when questioned further by the police officer he said that his "mind's blank", Mr. McKinnon said he thought that the officer was referring to when they were at the earlier right bend in when he did say they were going between 80 to 90 km/h. When it was put to him that the officer was referring to the point that the vehicle rolled, Mr. McKinnon agreed that he did not correct the officer and say that they had been going 140 km/h just before the accident. Mr. McKinnon also agreed that in that statement he did not mention looking at the speedometer or say anything else about speed. He responded in court that he "should have though." When asked why he did not, Mr. McKinnon said, "I don't know. I was just scared, I don't know. You know, I didn't really want -- I don't know, I just wanted to not talk really I just didn't really wanna talk about it, I don't know" (Transcript, p. 72, ll. 14-21). Mr. McKinnon agreed that he was being honest when he gave those answers and as accurate as he could possibly be. However, when it was put to him that his memory was that the car hit a top speed of 80 km/h that day, Mr. McKinnon was unshaken in his recollection to the contrary:

A I was -- I was -- I thought I seen 140 on the dash.

Q If that had been your memory --

A Yeah.

Q -- on June the 9th, 2010, then you would have said that?

A Yeah.

Q And you didn't?

A No I never.

Q So it wasn't your memory at that time?

A On June 9th, is -- yeah, I still have a memory, yeah.

(Transcript, p. 72, ll. 35-46)

[114] It was then put to Mr. McKinnon that he was drunk that day, and he agreed. He also agreed that in the past he has made bad decisions when he was drunk. However, he flatly denied the proposition that on that day he made another bad decision to interfere with the steering of the vehicle and also flatly denied that his actions contributed significantly to the crash.

[115] I find that despite his bad habits and prior criminal history, Mr. McKinnon was fundamentally an honest witness with a reasonably good recollection of the events on June 9, 2010.

[116] While he appears to be mistaken about some details (for example, where each of the young women were sitting and how well Mr. Locke drove around the right curve, referring to the 301 Corner), Mr. McKinnon's account of what the group did at the Muskwa and in Fort Nelson generally accorded with that of Ms. McAuley.

[117] Mr. McKinnon did not exaggerate his evidence and he was not evasive. He did not shade it to put himself in an unrealistically favourable light. He did not minimize the fact that he was drunk. He also resisted a number of clear opportunities to heap blame on Mr. Locke in terms of his driving or to state that Mr. Locke had consumed alcohol beyond what he clearly recalled. I also note that Mr. McKinnon impressed the Court as someone with "street smarts" and a keen survival instinct, despite examples of his past poor judgment on occasion. He put his seat belt on as Mr. Locke drove faster. This likely saved his life. It also made it physically more difficult for him to interfere with Mr. Locke's driving as Mr. Locke later testified about, as Mr. McKinnon's movements were, at least to some degree, restrained by his seat belt.

[118] Mr. McKinnon's account of the manner in which Mr. Locke drove the vehicle down the roadway, with reference to the hill, the two dips, the vehicle bottoming out and then the back of the vehicle "kicking out", the vehicle going nose first into the ditch and him going unconscious, has the ring of truth. It also fits with the nature of the roadway and the evidence of the collision reconstruction expert. However, where his evidence conflicts about how Mr. Locke negotiated the 301 Corner (the earlier right-hand curve) with that of Mr. Rombough, I accept the evidence of Mr. Rombough.

- [119] Despite careful and smart cross-examination, Mr. McKinnon was not shaken in his testimony that he recalled seeing the speedometer at 140 km/h midway down the hill prior to the left curve where the accident occurred. I accept his evidence in that regard, and note that his recollection also fits with the evidence of Ms. McAuley. As for Mr. McKinnon running around the scene of the accident screaming, he was obviously extremely upset, shaken and in shock given what he had just experienced. He does not like the police. The fact that he appears to have not wanted the police called is of no import at the end of the day. His disrespect for the police is also evident in the statement they took from him that night when he was likely still under the influence of alcohol and did not want to talk to them. Inconsistencies arising from what he said then and what he said in court at trial must be viewed in that light.
- [120] I also accept Mr. McKinnon's testimony that he did not grab the steering wheel of the vehicle prior to the accident or interfere with Mr. Locke's driving at that time. After the accident was in progress and the vehicle was skidding and then flipping, Mr. McKinnon's arms may have been in any number of places and he may have tried to grab the emergency brake or touched the wheel, but I accept his testimony that he did not grab the wheel immediately prior to Mr. Locke losing control of his vehicle.
- [121] Also, I accept Mr. McKinnon's evidence that he saw Mr. Locke with balls of cocaine in his mouth when Mr. Locke showed them to him and they were having a conversation at the Muskwa River. The fact that Mr. McKinnon testified from jail by video link at the preliminary inquiry makes it less likely that he would testify honestly to implicate Mr. Locke in a drug offence. His trial testimony in this regard is corroborated by the fact that the nurse in the hospital emergency department, treating Mr. Locke, retrieved a ball of cocaine from Mr. Locke's mouth, from the same location Mr. McKinnon saw Mr. Locke keep the cocaine, packaged just as Mr. McKinnon described.

G. Testimony of Melissa Eldstrom

- [122] Melissa Eldstrom testified that she was driving with her boyfriend, Angus Campbell, in the early evening of June 9, 2010. She had just turned 18 years old. She knew Brandon McKinnon and Courtney Siegmund as acquaintances. She also knew Chelsea Cook, but not well. Terri-Lynn McAuley was an old friend of Mr. Campbell's. She did not know Josh Locke.
- [123] Ms. Eldstrom described how she lived on Pioneer Way, which intersects with the Old Alaska Highway just outside of Fort Nelson. To get to Fort Nelson at that intersection she said a person turns left to travel in a roughly southern direction along the Old Alaska Highway, a two-lane paved highway, with one lane travelling in each direction. It was about a ten minute trip into town.
- [124] On that evening Ms. Eldstrom described how she and Angus had been on the Old Alaska Highway heading towards Fort Nelson for less than a minute when Angus started to yell and she looked ahead. She saw a cloud of dust and a car coming out of the dust. It had flipped

and she thought it would keep coming and they would get hit, but it did not come that close. Ms. Eldstrom said she saw the last flip of the car when it hit the ditch. It was flipping end over front, and landed facing roughly north. Angus sped up and then pulled over to see if they could help. She said that she saw Terri-Lynn and "kind of" saw Courtney, but when Angus saw Courtney's condition he moved their vehicle across the road. Ms. Eldstrom did not get out of their vehicle.

[125] Ms. Eldstrom said that Brandon McKinnon was wandering around the accident scene distraught. He appeared to be upset and looking for people, and he came up to the truck she was in. She vaguely remembered her initial interaction at the roadside with Mr. McKinnon, who was yelling about a number of things, including that people were dying; and he was requesting that people not call the police. Ms. Eldstrom said that he did not say anything about the accident, but he was just worried about cops in general. When her June 10, 2010, statement to Cst. Bruneau was put to her, Ms. Eldstrom adopted it as how things occurred, just as she did at the preliminary inquiry. In her statement she said that when she and Angus first got to the scene Mr. McKinnon was very adamant that they not call the police and he was crying. He was yelling "Oh my God, oh my God" in their faces. Ms. Eldstrom recalled that Angus thought Brandon might fight him so he went across the road to call the cops. She said it was like Mr. McKinnon was scared they were calling the police, but then added "what did he expect?"

[126] I find Ms. Eldstrom to be a reliable and credible witness with a clear recollection of what she saw that evening, and I accept her evidence.

H. Testimony of Angus Campbell

[127] Angus Campbell described how he had left a residence and was driving on Pioneer Way with Ms. Eldstrom, and then turned onto the Old Alaska Highway heading towards Fort Nelson, which was seven or eight kilometers away. He initially noted a side view of a car and thought nothing of it. At this point he was on the right-hand side of the road and the car was on the other side of a dip in the road where the road goes around a corner. He thought maybe he saw someone doing a donut up there, maybe driving erratically. He turned his attention back to his own driving. Then he saw a vehicle on the right side of the road in the ditch that was rolling, "and it would bounce and roll and bounce and roll until it came to a stop." His rough guess was that there were three or four bounces. He saw the car rolling and he waited for it to come to a stop before he pulled his vehicle up to the scene. On its last roll, as it slammed to a stop, he saw a number of people ejected from the vehicle. He saw that one young woman was seriously injured. He told Ms. Eldstrom to stay in his vehicle and he got out. She was trying to call 9-1-1, but ended up calling the fire department.

[128] Mr. Campbell knows Mr. McKinnon, and he described Mr. McKinnon as being out of the crashed vehicle when Mr. Campbell pulled up, frantically running around, grabbing his head and yelling and screaming things like "Oh my God, they're dead", and saying not to call the cops. Mr. Campbell, who has his industrial first aid ticket, considered Mr. McKinnon to

be in shock and he tried not to engage him as he did not want to set him off. Mr. Campbell did not see another male at the accident scene. He said they made the call to emergency services and left the scene. Also at the scene were people on quads and dirt bikes who knew the people involved in the accident and Mr. Campbell saw Mr. McKinnon running around explaining things to these people. He recalled that Mr. McKinnon was saying things like "Oh my God, Courtney is dead" and explaining things in a way that Mr. Campbell found gruesome and disrespectful. He did not hear Mr. McKinnon say anything else about who was there or how the accident had occurred.

- [129] Mr. Campbell was cross-examined about his definition of a car doing a "donut", which he said was a kind of stunt done in a parking lot, turning the wheel to the extreme and making the car swerve. When he made his initial observation of the vehicle Mr. Campbell said he was approximately 600 meters away. He knew Mr. McKinnon to be the kind of person one did not want to hang out with, who had a reputation for using drugs, although he did not recall anything about him selling drugs. He remembered Mr. McKinnon saying not to call the cops. When his prior statement from the date of the accident was put to him, he adopted it, saying that he would not have lied. In that statement he made reference to Mr. McKinnon saying that he was going to get "screwed over or charged" and Mr. Campbell assumed that he was the driver, as he was the only person Mr. Campbell saw up and moving.
- [130] In re-examination, when asked about his use of the word "donut" to describe the vehicle, he said that he did not see the vehicle turn a full "360" or even a "180", so he could have used a different word.
- [131] Mr. Campbell impressed as a careful and honest witness and the Court accepts his evidence.

I. Testimony of Cst. Mark Bezzina

- [132] Cst. Mark Bezzina of the RCMP was dispatched to the scene of the accident on the evening of June 9, 2010, where he took photographs, including a photo of a 1.4 litre bottle of Wiser's whisky, which he recalled had a bit of liquor left in the bottom. He obtained Mr. Locke's wallet and driver's licence from the coroner who attended, and then provided it to Cpl. Klubi to use in seeking a warrant.
- [133] On June 14, 2010, with Cst. Serge Bruneau, he executed the warrant obtained by Cpl. Klubi on the Fort Nelson General Hospital laboratory, where he seized samples of blood and urine from Ms. Steele, who advised him they had been mislabelled and re-labelled them in front of him.
- [134] I find the evidence of Cst. Bezzina to be reliable and credible and I accept it, except he was mistaken about the size of the whisky bottle.

J. Testimony of Cst. Allan Erickson

- [135] Cst. Allan Erickson had been with the RCMP for about two years when he attended at the scene of the accident. He was posted to the RCMP in Fort Nelson and was working in the RCMP accident services office just on the edge of Fort Nelson on the evening of June 9, 2010, when he heard sirens. He knew when the ambulances headed out of town that the RCMP would likely get a call from dispatch in Prince George in five to seven minutes, so he was in a police car and was just pulling out onto Highway 97 when the call dispatching him to the accident scene came. He arrived at the scene at about 7:50 p.m.
- [136] Upon his arrival, Cst. Erickson was advised by a firefighter that this was a fatality collision and he requested more police attend. He observed a young boy kneeling by a body covered with a tarp, grieving the death of his sister, Courtney Siegmund. He saw several bodies lying in the ditch. He observed the distraught screaming of Brandon McKinnon, who he knew from prior dealings. Mr. McKinnon told him that Josh Laforge (some individuals refer to Josh Locke as Josh Laforge) was the driver and he pointed towards one of the bodies in the ditch. He learned from Mr. McKinnon that Josh had consumed at least three beers. Cst. Erickson said that he asked about alcohol consumption because the driving conditions that evening were nearly perfect as it was a bright, clear and dry day. He spoke with Angus Campbell. Cst. Erickson thought that Brandon McKinnon might have been driving because he was telling people not to call the police. Cst. Erickson appreciated that it was important to stay with the person who was believed to be the driver for continuity from the scene in the event that a blood warrant was obtained. He stayed with Mr. Locke and assigned Cst. Martin, who had arrived, to stay with Mr. McKinnon. Cst. Erickson recalled that he saw a bottle of whisky at the scene that was about half full, but he could not remember if it was a 26 oz. or 40 oz. bottle. While travelling in the ambulance with Mr. Locke and Ms. McAuley, Cst. Erickson smelled alcohol but he could not say where it was coming from.
- [137] Once at the hospital, Cst. Erickson observed the medical staff work to assist Mr. Locke and at one point he approached Mr. Locke and smelled alcohol on his breath. Cpl. Klubi had arrived. As a nurse was suctioning Mr. Locke's mouth she pulled the suction tube out and a small bag was attached to the end of it. Cst. Erickson seized it, noting that it appeared to be the corner of a sandwich bag containing a white powder that he suspected to be cocaine. Cst. Erickson stayed with Mr. Locke in the hospital until he was relieved by another officer. He then went with Cpl. Klubi to continue the investigation and seek a blood warrant, which they were not able to do within the requisite time limit. Shortly thereafter, he was advised that Chelsea Cook had died from injuries sustained in the accident.
- [138] On cross-examination, Cst. Erickson indicated that Brandon McKinnon was known to him and to the police from a number of files prior to June 9, 2010. At the scene of the accident Cst. Erickson said that he believed that Mr. McKinnon was under the influence of alcohol as he could smell an odour of alcohol about him, his eyes were heavily glazed over and his face was flushed. Given that Mr. McKinnon had just been involved in a serious accident, Cst. Erickson did not attach much significance to his physical symptoms in assessing his

level of impairment. Cst. Erickson reiterated how Mr. McKinnon was frantic and loud at the scene, and was screaming that people were dead. Cst. Erickson did not hear everything that Mr. McKinnon said at the scene.

[139] Just over a year later, on July 28, 2011, Cst. Erickson took a warned statement from Mr. McKinnon, with regard to information that the police received that he may have grabbed the steering wheel prior to the accident. Cst. Erickson said that he was aggressive in this interview and Mr. McKinnon completely denied it.

[140] I find the evidence of Cst. Erickson to be reliable and credible and I accept it.

K. Testimony of Cpl. Dean Klubi

[141] Cpl. Dean Klubi of the RCMP was the officer in charge of this investigation. As of June 2010 he had considerable experience in accident investigation and had investigated at least 40 fatal collisions. He attended at the Fort Nelson hospital where he met with Cst. Bruneau and Cst. Erickson. Mr. Locke was in the trauma room, unresponsive and receiving medical treatment. The information provided to him by officers at the scene was that Mr. Locke was the driver and it was suspected that he had alcohol in his system. Cst. Erickson gave Cpl. Klubi the small plastic bag containing a white powdery substance obtained from Mr. Locke.

[142] After the treating doctor was consulted and Cpl. Klubi was told that it would not jeopardize Mr. Locke's health if blood samples were taken from him, Cpl. Klubi set about to gather information for an Information to Obtain to obtain a warrant for blood samples. At the hospital he learned that a second female had died from injuries in the accident and a third was being transported to another hospital for a higher level of care. He also made arrangements for Cpl. Wessell, an accident reconstruction analyst, to attend the scene of the accident. Cpl. Klubi attended the scene himself in the early morning hours of June 10, 2010.

[143] After collecting information from witness interviews and the scene, Cpl. Klubi completed his Information to Obtain, seeking a general warrant, as the four hour window after the accident during which to apply for a blood warrant had passed. He sought and obtained the general warrant (Exhibit 1) on June 12, 2010. Cst. Bruneau and Cst. Bazzina executed it on June 14, 2010, by attending at the Fort Nelson hospital and obtaining three vials said to contain Mr. Locke's blood, a container said to contain his urine, and Mr. Locke's hospital records.

[144] Cpl. Klubi delivered the samples to the RCMP lab in Vancouver by RCMP plane on June 23, 2010, because local courier services could not guarantee that the frozen samples would arrive at the lab before the end of the day on the Friday and he did not want them sitting in a warehouse over the weekend. Further details regarding the continuity of the samples taken from Mr. Locke are not relevant in light of the admission made about his blood alcohol level.

[145] Cpl. Klubi impressed the Court as a dedicated and careful investigative officer with considerable experience. I accept his evidence as to what he did in pursuit of this investigation.

L. Testimony and admitted evidence of Kimberly Young, a forensic toxicologist

[146] The Crown called Kimberly Young, a forensic toxicologist from the RCMP Forensic Science and Identification Services Laboratory ("the RCMP Lab") in Vancouver. She is qualified to provide expert opinion evidence with regard to alcohol analysis.

[147] Ms. Young analyzed the whole blood sample contained in the lavender stoppered vial admitted to contain Mr. Locke's blood (Police ex. no. 4), taken at the Fort Nelson General Hospital late in the evening of June 9, 2010. Although there is an approved container for blood samples under the Code, Ms. Young indicated that blood in an industry- standard lavender stoppered vial is not unusual. Her analysis was that the blood alcohol level in the sample of Mr. Locke's blood was 87 mg. of ethyl alcohol in 100 ml. of blood. This finding is reflected in her certificate of analysis (Exhibit 2). It is a measurement of whole blood, which is required in relation to the Code limit of 80 mg.%. Her results fell within the range of the corrected hospital lab results that tested a serum plasma blood sample for alcohol, which was also taken from Mr. Locke at approximately the same time.

[148] Ms. Young impressed the Court as an accurate, unbiased professional, skilled in her field and accurate in her alcohol test results. The Court accepts that the sample of Mr. Locke's blood she analyzed indicated a blood alcohol concentration of 87 mg.%.

M. Admitted evidence of Ronald Pon, a forensic toxicologist

[149] The admitted evidence of Ronald Pon, a forensic toxicologist with the RCMP lab in Vancouver, is contained in two reports by him (Exhibits 3 and 5) and is also set out in the Agreed Statement of Facts (Exhibit 20).

[150] Mr. Pon's findings regarding Mr. Locke's blood alcohol level at the time of the accident and his opinion regarding the effects of alcohol at certain blood alcohol levels are contained in his report marked as Exhibit 5. The following portions of this report are quoted from the Agreed Statement of Facts:

30. Ronald Pon estimated that the concentration of alcohol in Mr. Locke's blood at the time of the MVI [motor vehicle incident] was between 110 and 133 mg% ("Mr. Locke's BAC").
31. Mr. Pon's estimation of Mr. Locke's BAC at the time of the MVI is based on an extrapolation back to the time of the time of the MVI, ("the TOI") from 87 mg% of alcohol concentration found in the blood of Mr. Locke that was collected from Mr. Locke at the FNGH [Fort Nelson General Hospital] at approximately 22:00 hours at June 9, 2010.
32. Mr. Pon opined as follows:

In order to extrapolate the BAC back to the TOI certain assumptions must be made. If there was no unabsorbed alcohol in the subject's stomach at the TOI, which is what I would expect if there was nothing consumed in the half hour prior to the TOI until the time when the blood was drawn, I calculate the subject's BAC to be in the range of 110 to 133 mg% at the TOI (1943 h). This calculation utilizes the normal rates of alcohol elimination (10 to 20 mg% per hour) applied to the BAC of 87 mg% from the blood sample taken at 2200h.

If there was alcohol consumed within the half hour preceding the TOI, then the above calculation may be an overestimate of the BAC at the TOI. In order for this subject to have been at the legal limit at the TOI and still have a BAC of 87 mg% more than two hours later, he would need to have a minimum of about 1.4 oz of 40% v/v liquor left unabsorbed in his stomach at the TOI. This is a theoretical calculation, in reality the person would most likely have to consume a greater quantity for this hypothetical to occur. In terms of pharmacological classification, alcohol is a central nervous depressant, meaning it depresses brain and nervous system function. With respect to driving, impairment can be defined as the deterioration of mental faculties and skills required to safely operate a motor vehicle. It can occur at BAC's as low as 50 mg% and as the BAC increases, more and more individuals in a given population would be impaired. At a BAC of 100 mg% or higher, all individuals are impaired regardless of their tolerance to alcohol or their skill in driving. The mental faculties and skills mentioned above include: diminished sensory perception, especially vision; attention and alertness; information processing; critical judgment; loss of inhibitions; and increased reaction time. All of these elements are essential in the safe operation of a motor vehicle and are negatively affected by alcohol consumption. It should be noted that an individual can be impaired even if there are no outward physical symptoms displayed, ie. they may not appear to be 'drunk' but nevertheless they are still impaired.

[Emphasis added and italics in certain quoted portions of the Agreed Statement of Facts are omitted.]

[151] Vials of plasma serum taken from Mr. Locke (police ex. no. 6 and 7) were found to contain 16 ng/mL of carboxy-THC according to Mr. Pon's report marked as Exhibit 3. In his report Mr. Pon states the following with regards to Mr. Locke's possible impairment by marihuana use:

Carboxy-THC is the primary metabolite of tetrahydrocannabinol (THC), the active compound of cannabis products (eg. marihuana, hash, grass oil etc.), but itself does not contribute to the behavioural effects of cannabis. The concentration of carboxy-THC in the blood is useful in establishing whether a person is a frequent (ie., daily) or infrequent (ie., 2 times a week or less) user of cannabis products. A serum concentration of 16 ng/mL of the metabolite, carboxy-THC, suggests that the subject was an infrequent user of cannabis.

The absence of the active parent drug, THC in the serum, indicates no recent use of cannabis, although THC is rapidly eliminated from the blood/serum. Therefore, no conclusions can be made whether or not the subject was under the influence of THC at the time of driving unless there is additional information regarding the time of cannabis use.

[152] Mr. Pon supplemented his opinion regarding the presence of carboxy-THC in Mr. Locke's blood in his second report (Exhibit 5), after being provided with some additional assumed facts, including that witnesses stated that Mr. Locke had been consuming hard liquor and smoking marihuana between 17:00 and 19:00 hours on the day of the accident. Mr. Pon's further opinion with regard to Mr. Locke's possible impairment by cannabis use the day of the accident is as follows:

No tetrahydrocannabinol (THC) was found but only its inactive metabolite, carboxy-THC, was detected in the serum. THC is the active component of marihuana or cannabis. It is rapidly absorbed into the bloodstream after smoking but the concentration of the drug then diminishes quickly as the THC gets redistributed in the body and the drug becomes metabolized. Given the time interval between when the cannabis was likely smoked and when the specimens were collected, this could explain why there was none of the active drug found in the serum several hours later. Based on the analytical results alone, it is difficult to predict whether or not the subject was under the influence of THC at the time of driving. However, since there was evidence that the subject was seen smoking cannabis in the preceding hours prior to the TOI, cannabis may have contributed to the impairment from the alcohol.

In general, the psychoactive effects of marihuana last from 3 to 5 hours, depending upon the dose taken, route of intake and previous exposure of the individual to marihuana. These effects include perceptive (to become aware of changes in your environment through your senses), cognitive (pertaining to the act of knowing), affective (pertaining to emotional reactions) and sensory changes which all combine to yield a state of marihuana intoxication. In terms of driving ability, the use of a cannabis product may result in adverse effects on perception, judgment, attention, motor coordination, tracking and vigilance. These effects become even more pronounced when cannabis use is combined with alcohol.

[153] Also in Mr. Pon's report marked Exhibit 3 is a reference to methylecgonine that was detected in a sample of Mr. Locke's urine (police ex. no. 5), which was obtained by medical staff at the hospital and turned over to the RCMP with the other samples. Mr. Pon indicated that "The presence of methylecgonine in the urine sample indicates prior use of cocaine, however as no cocaine or metabolites were detected in the blood, this would suggest no recent use in the past 24 hour period."

N. Admitted evidence of Dylan Pallett, a CDSA analyst

[154] Dylan Pallett, a designated analyst under the CDSA, analyzed a sample from the plastic wrapped white powder that was extracted from Mr. Locke's mouth in the hospital, seized by police and sent for analysis. It weighed .08 grams. Pursuant to the certificate of analysis by Mr. Pallett (Exhibit 4), it analyzed as the controlled substance cocaine (benzoylecgonine), pursuant to Schedule I, 2(2) of the CDSA.

O. Admitted report and testimony of Cpl. Scott Wessell, a collision reconstruction expert

- [155] Cpl. Scott Wessell of the RCMP performed a detailed analysis of how the accident occurred, which he set out in his report. He also testified at trial. Cpl. Wessell was accepted by the Court to be an experienced expert in motor vehicle collision reconstruction. His findings were not challenged in any significant way at trial.
- [156] It is clear that this was a devastating single vehicle collision with an accident scene comprised of tracks and debris that covered a considerable distance along a portion of the Old Alaska Highway. Cpl. Wessell arrived at the scene at 00:38 hours on June 10, 2010. He conducted his investigation through to the morning of June 10.
- [157] He indicated that, while generally the Old Alaska Highway runs north/south, as it leaves Fort Nelson it runs east/west.
- [158] The findings of Cpl. Wessell and his photographs are contained in his report (Exhibit 6), which he reviewed in court.
- [159] His stated objectives were to determine a minimum velocity for Vehicle 1 (the Locke vehicle) and to determine the seat belt status of the occupants in Vehicle 1. Portions of his report provide a succinct summary of his observations, calculations and findings, including the following:

Synopsis of the Collision:

On June 9, 2010 at approximately 19:44 hrs, this single vehicle collision occurred on the Old Alaska Highway, Fort Nelson, B.C. Vehicle 1 was west bound when it a [sic] commenced counter clockwise rotation. It crossed the centre line of the highway, crossed the east bound lane, and entered the south side ditch where it tripped and rolled. As a result of this collision two occupants of Vehicle 1 died and three others received minor to serious injuries.

Observation of the Scene:

The Old Alaska Highway had an asphalt surface that was bare, dry and in good repair. Both east and west bound lanes were bordered by gravel shoulders. The gravel shoulders were narrow, 0.4 to 1 metres in width, along most of the highway. However, they were wider in the areas where driveways intersected the highway.

The posted speed limit at the scene was 80 km/h. A sign was posted on the Old Alaska Highway 1.7 kilometers east of the scene as well as a sign posted at the west end of the scene.

A vehicle traveling west bound on the Old Alaska Highway would have traveled on a long straight stretch with a downhill grade. 150 meters east of the scene it would have passed a yellow left curve advisory sign that was in good condition. It would have continued up hill and entered the counter clockwise curve at the scene. Along the length of the Old Alaska Highway a vehicle would have passed numerous driveways to country residential homes.

- [160] Using tire marks at the scene and measuring the radii of a number of curves, and then performing a number of calculations, Cpl. Wessell disregarded his first critical curve velocity speed for reasons he sets out at p. 7 of his report.
- [161] Using "the fall formula" - the average of the grades of the front and rear tires of Mr. Locke's vehicle at take-off (ie. when it became airborne after travelling sideways a distance down the highway sideways and was rotating front first in a counter clockwise direction) and the height and distance that the centre of mass of the vehicle travelled during the fall - Cpl. Wessell calculated that the Locke vehicle was travelling at 99 km/h at take-off.
- [162] Next, Cpl. Wessell noted that the vehicle's center of mass travelled 60.76 meters from where it "tripped" or left the ground to the spot where it finally came to rest. He indicated, using a range of tumbling deceleration values for a vehicle tumbling on asphalt and gravel and the distance the vehicle "tumbled", that the vehicle had a minimum tumbling velocity of between 23.92 m/s and 26.52 m/s, or between 86 km/h and 95 km/h. Cpl. Wessell regarded these figures to be consistent with the speed of the vehicle when it took off, or as he described it "the velocity calculated from the vault."
- [163] Using the first tire marks made on the roadway by Mr. Locke's vehicle when it started to skid (prior to it becoming airborne), which Cpl. Wessell described as "striations in some of the marks that indicated Vehicle 1's tires were rotating and side slipping", he noted that the marks all curved counter clockwise, indicating that Mr. Locke's vehicle was "in counter clockwise rotation as it travelled west". Using "spin out formulas, an initial velocity of 27.67 m/s from the vault calculations," published coefficients for asphalt and gravel, Cpl. Wessell calculated the speed of Mr. Locke's vehicle at the start of the marks on the roadway to be 33.80 m/s or 121 km/h.
- [164] Therefore, Mr. Locke's vehicle was going approximately 121 km/h when it went out of control and started to skid, 99 km/h at the point it became airborne and had tumbling velocity of between 86 km/h to 95/km/h as it flipped a number of times before coming to rest in the ditch.
- [165] Cpl. Wessell indicated that he did not find any evidence of braking on the path travelled by Mr. Locke's vehicle and the marks on the pavement, but he could not provide any further opinion regarding braking in this case.
- [166] Cpl. Wessell's examination of the vehicle indicated that it had four seat belts, two in the front and two in the back. The front passenger seat belt had been engaged in the accident, whereas the driver's seat belt and the two seat belts in the back seat had not been in use.
- [167] In cross-examination, Cpl. Wessell agreed that he could not say if interference from a passenger played a role in the accident, nor could he comment on what went on in the vehicle at that time or the state of its steering. Cpl. Wessell's findings, contained in his report that was admitted in the Agreed Statement of Facts, were not challenged.

P. Admitted evidence of Brian Musyowski, a motor vehicle inspector

- [168] On June 17, 2010, Brian Musyowski, a motor vehicle inspector, conducted an inspection of Mr. Locke's vehicle, a black 1991 Nissan 300 ZX. In his report (Exhibit 7) he concluded that the seats and seat belts appeared to be in good working condition prior to the crash. The steering system and drive line appeared to be in good working condition prior to the crash, as did the suspension and the brakes. His opinion was that "this vehicle did meet the standards of the British Columbia Motor Vehicle Act and Regulations prior to the crash."
- [169] The Court notes upon review of the photographs Mr. Musyowski took of the Locke vehicle that its interior is very compact with relatively little space between its occupants. The speedometer on the dash is to the immediate left of the casing for the steering wheel and the r.p.m. gauge is next to it, immediately to the right. The front console area is open and the driver, the front passenger and any individual in the back seat area would be in close physical proximity. In particular, a person sitting in the back seat in the middle would most likely have their legs extended forward and would have a good view of the dash board in front of the driver. Similarly, a person in the front passenger seat would easily be able to see the gauges in front of the driver, including the speedometer.

VI. Defence evidence

- [170] The defence's only witness was Mr. Locke. He denied aspects of the evidence called by the Crown. Mr. Locke testified that Brandon McKinnon grabbed or pushed the steering wheel of his car twice: once minutes before the accident; and then again, causing his vehicle to go out of control and resulting in the accident. Mr. Locke also testified about the extent of the injuries he sustained in the accident that include permanent brain damage, memory loss and impairment of his coordination and balance.

A. Testimony of Joshua Locke, the accused

- [171] Joshua Locke was born in June 1986 in Surrey, BC. He was seriously injured in the accident on June 9, 2010, reporting that he was in a coma for roughly three months. He understands that he sustained permanent brain damage in the accident. He indicated that he suffered frontal lobe damage to his brain and as part of his recovery he had to relearn how to walk and balance himself. He said his speech and his thinking are slowed down. Some days are better than others. He has a scar on the back of his head from an injury sustained in the accident.
- [172] Mr. Locke did not put before the Court any independent evidence of the extent of his injuries. After the accident he was transferred to a number of different hospitals for treatment. He indicated he has psychological problems as well, arising from the accident. Also, his memory has been affected. He said he remembers some things and draws a blank regarding others. He described his work prior to the accident as a labour job involving hydro-vacs in the oilfield. Since the accident he has tried unsuccessfully to work in a

warehouse, at Superstore and doing moving jobs as he had previously. Mr. Locke advised that he cannot calculate numbers or manage a schedule and forgets things, like taking his medication. He quit school before the end of Grade 10. He said he is a "small guy" to start with and, having previously been 130 lbs., he is down to 90 lbs. due to being in custody.

- [173] Mr. Locke came to Fort Nelson in the winter of 2010 and stayed with his aunt, Courtney Siegmund's mother, who is his father's sister. He described driving the car his mother helped him buy, which was subsequently involved in the accident, from Vancouver to Fort Nelson, arriving five or six days before the accident. Mr. Locke told the Court how much he loved his cousin, Courtney; how he "spoiled her rotten" and how she gave meaning to his "already messed-up life." He said that Courtney and Chelsea were always together, and he treated Chelsea the same way as he treated Courtney. Mr. Locke described having met Brandon McKinnon after he arrived in Fort Nelson and how he understood that Mr. McKinnon had given crystal meth to Courtney and Chelsea. They met up with friends in town and Mr. Locke confronted Mr. McKinnon, who apologized. Mr. Locke said he told Mr. McKinnon he would kill him if he ever gave crystal meth to Courtney again. After that, Mr. Locke said they saw each other several times but they were not friends. He indicated that Terri-Lynn McAuley, who hung out with Courtney and Chelsea, was the "pothead" friend.
- [174] Continuing with his direct examination, Mr. Locke described going to the Muskwa on June 9, 2010, in terms similar to those of Ms. McAuley and Mr. McKinnon. He recalled that he brought Corona beers to the Muskwa, and drank one or two of them himself. He said he was not much of a drinker and two would have been the maximum, "'cause six, [he's] puking." He could not say whether he remembered a bottle of Wiser's at the riverbank that day, and said that he remembered seeing people drink but he did not know what it was. Mr. Locke denied drinking any hard liquor that day and said that he does not drink hard alcohol. When asked if he had a bag or a flap of cocaine with him at the riverbank, Mr. Locke said, "I believe I didn't 'cause I'm -- I was trying to get away from that, which was the reason I was up in Fort Nelson" (Transcript, p. 13, ll. 11-13). He said that he left Alberta because he owed some people money and got himself in trouble with "some older guys that were real dangerous type guys." When he was asked again about whether he had cocaine at the riverbank, Mr. Locke said, "I can't say for sure but I'm -- like, I'm 99 percent positive I wouldn't have. I just -- it's -- for one, I don't know where to get cocaine in Fort Nelson" (Transcript, p. 13, ll. 42-45).
- [175] Mr. Locke recalled leaving the riverbank of the Muskwa River on June 9, 2010 with Courtney Siegmund, Chelsea Cook, Terri-Lynn McAuley and Brandon McKinnon in his 300 ZX car. He said he was feeling fine when he left and he would not drive drunk because he "loved that car." He remembered stopping at Brandon's house as his power steering was seizing up and he got Brandon to get him some power steering fluid or transmission fluid that he put in himself. Contrary to what others have said, Mr. Locke said it was not an oil change. He could not say if he stopped at the Fast Gas before or after he left the Muskwa. He remembered driving past "some sort of native-looking teepee place" on his left and the

RCMP station and some sort of ice arena on his right. He said he always gave "the finger" to the traffic police; because that was part of the way he was. He was not happy with what the police had done to him in Alberta. As to whether he gave the RCMP the finger as he passed their office on this occasion, Mr. Locke said he could not say, "but most likely" he did on this occasion.

[176] Mr. Locke testified that before he took the road to the right, at a stop sign Mr. McKinnon touched his steering wheel and he asked him "what the fuck was he doing" to which Mr. Locke said Mr. McKinnon responded, "I just wanted to see what you would do." Mr. Locke said that he looked Mr. McKinnon square in the eyes and told him, "I'd fucking kill you", and that was that.

[177] Mr. Locke's next memory was:

I remember my cousin was hitting my seat. The girls were being loud in the back. I remember I took the right turn, and I believe I drove by Chelsea's house, which was on the corner of that road. And then the last thing I remember is him -- Brandon's arms being on my steering wheel again, and that's it.

The next thing I know I'm in the hospital months later. I had no recollection of an accident when I woke up.

(Transcript, p. 15, ll. 13-19).

[178] In terms of Mr. Locke remembering where the accident occurred, he said he had never seen the location and he did not know where he had the accident, but he knew where he saw Mr. McKinnon "grab the steering wheel and where everything went black." When Mr. Locke was asked whether he remembered if he was speeding, he said:

I can't say if I was or wasn't, but I know I wouldn't have been going under the speed limit and I wouldn't have been going too much over, but I -- it was, I had a fast car. So I probably would have been going around 120, 110, somewhere in there.

(Transcript, p. 16, ll. 11-16)

[179] When he was asked to be as specific as he could be about Mr. McKinnon touching the steering wheel, Mr. Locke demonstrated that the first time Mr. McKinnon touched it Mr. McKinnon's hands would have been at the 9 o'clock and the 3 o'clock position; but then he corrected himself and said that the first time Mr. McKinnon touched the steering wheel it was over on the other side, noted to be at about the 7 o'clock position. Then Mr. Locke said if his steering wheel was a clock, Mr. McKinnon's hand would have been at the 4 o'clock position. When asked if he recalled how Mr. McKinnon touched the steering wheel the second time, Mr. Locke said, "I can't say. As soon as I saw his arms, it was -- it goes black" (Transcript, p. 17, ll. 9-10). When asked if he could provide more detail, Mr. Locke testified:

We started driving, would have been going straight, coming up to a right-hand turn where Chelsea's house would have been on the left side of that turn. And I'd say there, within a hundred or 200 yards of there, is where the second touch is.

And during that drive was when people were banging my seat. The girls were being loud. It was drunken teenage girls in a car.

And, yeah, that's when the second steering wheel or the second time I seen him touch my steering wheel was, was in between that stretch of Chelsea's house, and it would be on the way to what I'm guessing was my house, 'cause I lived on Pioneer Way. I can't remember if there's turns or not first. But it was -- I know I was going home.

(Transcript, pp. 17-18, ll. 36-7)

[180] When Mr. Locke was asked if he recalled anything more about how he was driving he stated:

I can recall that my cousin was hitting my seat. I know -- I'm assuming it was her 'cause she was sitting behind me, and she was -- kept standing up and they all kept standing up in the back, and I was getting mad cause they were sticking their heads out of the T-roof.

And then that's -- it's only like a -- it's maybe a 30-second drive, if that.

From the first touch to the second touch is like a 30-second drive, maybe more, but not by much.

(Transcript, p. 18, ll. 15-29)

[181] Mr. Locke guessed that the road he was on was the Old Alaska Highway based on what he was hearing in court. When he was asked if he could remember anything about the way the vehicle was travelling at the point when Mr. McKinnon touched the steering wheel the second time, Mr. Locke said:

It was -- I can't recall. As far as I know, perfect.

Well, I don't drive like an idiot. I drove fast, but I wouldn't have been all over the road or I wouldn't have been -- I would have been in my lane. Like I loved that car. It was a collector car. Next year it would have been a collector car.

[182] Mr. Locke concluded his direct examination answering a question about when he found out that two of his passengers had died. He said it was about two weeks after he woke up. He said he remembered running around the hospital and it was worse than death. He said when he found out he did not want to be alive anymore.

[183] Mr. Locke underwent a lengthy cross-examination. I will set out points I regard to be significant:

- Mr. Locke said he had not been using cocaine since he arrived in Fort Nelson; that he had been "clean" and had gone there and quit.
- That he was on conditions from a probation order in Alberta to stay away from drugs and also to abstain from consuming alcohol.
- He said that he still drank alcohol at the house as he didn't see that as illegal and sometimes he drank to the point that he was intoxicated, but very rarely.
- He estimated that there had been three times while he was in Fort Nelson where he had consumed six beers and became ill and said that he was not "a good drinker." He knew that drinking beer at the house was a breach of his conditions.
- On June 9, 2010, Mr. Locke indicated that he trusted Mr. McKinnon as the latter had apparently kept his word about not giving drugs to Courtney or Chelsea after their previous verbal confrontation. He recalled that Courtney and Terri-Lynn or Chelsea had been speaking to Mr. McKinnon and invited him to join them.
- Asked if he remembered going to Dan's Pub, Mr. Locke said he could not say whether he did or did not.
- He did recall that he had been having problems with the power steering in his car the whole way from Vancouver to Fort Nelson; and he remembered going to Brandon's house.
- He admitted to smoking marihuana after arriving in Fort Nelson when he could find it, and he regarded marihuana to be a medication and not a non-prescription drug that he was prohibited from consuming based on his probation conditions. As he had smoked marihuana since he was seven years old, nothing was going to stop him from continuing to do so.
- Mr. Locke said that when they were at the Muskwa he was not aware that Mr. McKinnon had a bottle of Wiser's whisky.
- Then Mr. Locke recalled that he saw a bottle of liquor, a two-six or a 40 pounder of something, but he did not think it was open. Mr. Locke said that Mr. McKinnon did not share it with him although it was possible that he shared it with the girls. He also recalled seeing Mr. McKinnon with a bottle in his hand but he did not see Mr. McKinnon put it to his lips. When asked if he saw Mr. McKinnon consume more than one shot, Mr. Locke said it was hard to say, as he was not specifically watching anyone.
- Mr. Locke "guessed" that Mr. McKinnon was drunk and said that he would not have gotten into a vehicle driven by Mr. McKinnon. He recalled how Mr. McKinnon was walking and that he was loud.
- As he had been living in Fort Nelson for four to six months Mr. Locke agreed that he drove the Old Alaska Highway, from where his aunt and Courtney lived on Pioneer Road to Fort Nelson, almost daily.

- Then Mr. Locke said he did not know that the roadway was called the Old Alaska Highway as he is still not familiar with the town, does not know which street is which and does not pay attention to such things.
- Mr. Locke knew that after he drove through town he had to turn right on the roadway that took him out to Courtney's house. Once on that roadway (which is the Old Alaska Highway) on June 9, 2010, Mr. Locke did not recall seeing anyone walking towards him (Mr. Neitzel was) or anyone driving (Mr. Rombough was coming the other way). He attributed the fact that he did not observe these things to his brain injury, saying that he seemed to remember other things, and stating that he would remember if someone was walking. Then he added, "But then again, I'm in a car full of screaming girls that are drunk, so I'm not paying attention to every little detail. It's too hard to say" (Transcript, p. 40, ll. 6-9).
- When it was put to Mr. Locke that he did not remember a person walking towards him that day on the roadway because he had consumed enough alcohol that his memory and his ability to observe were affected by it, he stated, "That, I'd have to disagree with. I don't drink and drive. It's just my rule and I don't drink and drive that car" (Transcript, p. 40, ll. 30-32).
- Mr. Locke admitted to having a Corona beer that night, saying that it was not enough to affect his judgment. When asked if it was absolutely impossible that he did not notice somebody on the highway that night because his mind was affected by alcohol, Mr. Locke said, "I'm not saying it's impossible. Anything's possible. But it's unlikely" (Transcript, p. 40, ll. 45-46).
- Similarly, when it was put to Mr. Locke that he failed to notice a large truck (driven by Mr. Rombough) travelling towards him, he agreed that the same possible explanations for that applied: his memory was affected by his brain injury, the girls in the back were making so much noise, or his mind was affected by alcohol.
- Mr. Locke had a fairly detailed recollection of the curves, a straight stretch and going up and down a hill on the way to the turn-off for Courtney's house, a route he said he had driven many times. He agreed that he paid attention to those details as he travelled that road to town and back "probably ten times a day." He drew a diagram (Exhibit 23).
- Shortly after he turned onto the Old Alaska Highway Mr. Locke recalled the girls screaming. Then he said that he could not say they were all screaming but that they were loud. Then Mr. Locke said that he heard his cousin telling him to slow down and smacking his seat. The girls were having fun. Courtney kept standing up and poking her head out of the roof of his car - all the girls did that. He clearly recalled Courtney telling him to slow down. He said it was like a party in his car while he was trying to drive, and all he wanted was them out of his car.
- Asked what he did when Courtney told him to slow down, Mr. Locke said:

I just maintained speed. I was going the speed limit, as far as I know, or very minimal over. Like I did usually drive a little over but not excessively.

(Transcript, pp. 46-47, ll. 45-1)

- After some discussion about what Mr. Locke recalled from June 9, 2010, as opposed to other occasions, Mr. Locke indicated that he did not know if Courtney was yelling at him to slow down and banging the back of his seat on that day; and he was unsure if that was the day she was standing up in the back seat. Then he said that this day was the only time he had all three girls in his car and Brandon McKinnon.
- Then Mr. Locke recalled that on June 9, 2010, Courtney was standing up in the back of his car.
- With regard to several references he had made about Mr. McKinnon "pulling" on his steering wheel, Mr. Locke said it was just a word he used and that he could say "grabbing", "pushing" or "touching" (Transcript, p. 51, ll. 28-30).
- Mr. Locke said that Mr. McKinnon first grabbed the wheel on the edge of town about 50 yards before the stop sign (referring to where he turned right on the Old Alaska Highway) and the second time was past where the girls were saying to slow down, if they were saying to slow down, which he did not recall.
- Then Mr. Locke said that he did not recall all the girls yelling to slow down, he just recalled his cousin telling him to slow down once. Then he contradicted himself again and agreed that on this occasion she had never told him to slow down and that he was confusing it with another time when she told him to slow down and he was driving her mother's van.
- Mr. Locke agreed that he was a fast driver. When it was put to him that he took the first significant curve to the right way too fast Mr. Locke disagreed, saying:

A No. I wouldn't say way too fast. I don't speed, speed. Like I -- if the kilometre -- the speed limit is 80, I'm maybe going a buck, a buck ten.

Q So the speed limit's 80 and you were doing 100 or 110?

A Yeah, but I doubt I was even going that fast. I know there's not that much road there.

(Transcript, p. 55, ll. 9-15)

- When it was put to Mr. Locke that his speed was 100 to 110 at the point where he marked "girls" on his diagram in Exhibit 23, his response was, "To the part where it says "girls", I doubt I was even going 60, cause it was just after the stop sign. I was probably just punching the gas and that's probably when she started telling me to slow down" (Transcript, p. 55, ll. 29-33).
- Mr. Locke denied that, as he took the curve to the right, his car went over the centre yellow line. But he agreed that he picked up speed going around that corner.
- Mr. Locke said it was hard to do the speed limit, especially when he had a fast car, agreeing that it was very easy to drive his fast car over the limit on June 9, 2010. He said he would not have gone more than 20 km. over the speed limit, but then said the maximum he would be doing was 110 to 120 km/h., depending on how much road he had in front of him and the terrain. Despite the speed limit, Mr. Locke said if he feels he can do something safely then he is likely to do it. He said that he enjoyed speeding in this car and when he was alone he went "real fast." He denied

wanting to impress these girls with how fast he could drive, saying he was driving fast to get them home.

- Mr. Locke agreed that on the route home there was a sharp bend to the right, and that he was exceeding the speed limit, which was why Courtney was yelling at him. He also agreed that he picked up speed as he went on a downhill straight stretch.

- Mr. Locke agreed that just after the big curve to the right was Chelsea Cook's home. He said he did not stop and ask them all to get out there because they were going to Courtney's house where he was staying. He agreed that when he drove past Chelsea's house he was going "anywhere in between 80 and 120" but he denied going as fast as 140. He also said that in his car when the speedometer indicator was pointing straight up the speed was 100 km/h. He did not recall looking at the speedometer when he was going down the hill.

- When it was put to Mr. Locke that he knew he was in a dangerous situation as he was going down the hill - because he had a drunk person beside him, who according to him had already touched the wheel, a cousin behind him who had been banging the back of his seat and standing up, and the girls were making noise - Mr. Locke agreed that he could have assessed the situation better. The following exchange with the prosecutor occurred:

A At the time I hadn't put two and two together and realized this was a dangerous situation. All I wanted was them out of my car. I should have pulled over. I should have kicked them all out and made them walk.

Q You are right. I'm not disagreeing with you there. So you didn't even have a sense at the time that you were speeding down that hill -- you didn't even have a sense that this was a dangerous situation/

A No. My sense was just to go home. I wanted to just get home and call, like, that's it.

Q But knowing that this was dangerous in that way, with what was going on, you could have slowed down to 80 kilometres an hour?

A Yes, I should have. When you're getting smacked and people are yelling, it's irritating and your anger starts boiling and you're -- the last thing on your mind is slow down and let's have a coffee. Like, this -- I don't work that way. My anger, my temper, doesn't work that way.

(Transcript, p. 61, ll. 20-41)

- Mr. Locke agreed that a prudent person in his shoes heading down the hill over the speed limit at 110, 120 should have slowed down approaching the curve to the left at the bottom of the hill.

- When it was put to him that a reasonably prudent driver speeding down the hill would drive defensively, Mr. Locke agreed, but then said, "but man, I'm a learner. I was a learner driver with an Alberta license." He then agreed that was all the more reason to be extra careful (Transcript, p. 63, ll. 15-19).

- He said that on this occasion he was not driving for the thrill of it, as when he would sometimes go over 300 km/h, "burying" the needle on his speedometer past the 280 mark.

- Mr. Locke said he did not recall the first time after the accident that he heard anything about Brandon McKinnon possibly touching the wheel of the car, but the first time he thought he heard something was when Jordan Siegmund told him that he and his buddies were going to beat up Mr. McKinnon. He said it was probably about two years after the accident and "I didn't know nothing and then I remembered memories that I had and every memory that I had of that day, and that's all I can go on." Mr. Locke said that he did not tell anybody about this memory, as he had plans to kill Mr. McKinnon or at least to "maliciously wound" him (Transcript, p. 65, ll. 2-11).

- With regard to his driving down the hill at a high speed and his car "bottoming" out on the little dip with the extra weight in it, and it therefore being more important to slow down as he approached the dip and the curve to the left, Mr. Locke said it was something that he probably should have given more thought to before he let people into his car. He agreed that anyone who looked at the situation objectively as a prudent driver would have slowed down (Transcript, p. 65, ll. 34-47).

- When it was put to him that Mr. McKinnon did not touch his steering wheel, Mr. Locke responded:

Okay, well the first -- the first time I would suggest that he touched it because it wasn't a full on grab, to steer me off the road. The second time, however, I would say he pulled me right off the road, to fucking kill me.

(Transcript, p. 67, ll. 27-31)

- Mr. Locke said the first time Mr. McKinnon touched his steering wheel he believed it was with his right hand and it was a little pull that made his car move a bit. The second time "was more of a reach over and pull my car right off the road, which is probably why the car flipped", and Mr. Locke testified that he saw Mr. McKinnon's "whole body was on my side of the vehicle." Then Mr. Locke said that Mr. McKinnon pulled with both his arms and he could not say in which direction, just that he "seen arms in front of me", and Mr. McKinnon touched the wheel at the 10 or 11 o'clock position with his right hand (Transcript, pp. 69-70, ll. 6-1). And then Mr. Locke said "That was it" and he recalled waking up in the hospital "brain dead."

- Mr. Locke knew as he was coming down the hill that he faced a curve in the roadway to the left and that he expected to make a right-hand turn onto Pioneer Way after the left-hand curve where the accident took place.

- When it was put to Mr. Locke that he was going 140 km/h down the hill before the left-hand curve where the accident took place his answer was, "I'd say no, because I love that car way too much to travel like that, especially with passengers" (Transcript, p. 74, ll. 22-23); but he did not recall looking at the speedometer.

· When it was put to Mr. Locke that he would have wanted to be careful going through the left-hand curve, given that he had three girls in the back and a man in the front, and he knew that after this curve he had to turn onto Pioneer Way, he said, "Yes. I most likely would have slowed down I believe that corner is about 20 feet from where Pioneer Way is, so I would have had to slow down to make the other turn" (Transcript, p. 78, ll. 11-18). He said his slowing down anywhere depended on his brakes, and he had no memory of how his car was operating, "other than the power steering wasn't so great" as it had a slow leak and he topped it up at Brandon McKinnon's house that day. He had noticed earlier in the day down at the Muskwa that his steering was very stiff.

· Returning to Mr. McKinnon's touching of the steering wheel just prior to the accident, Mr. Locke demonstrated Mr. McKinnon reaching across the front of Mr. Locke's body towards Mr. Locke's left side with both hands. Mr. Locke could not say which direction Mr. McKinnon moved the wheel, but said:

When he touches it, it moves Well, if a touch is the last thing I remember, and then I'm waking up and there's a tragic accident, I'm guessing it moved.

(Transcript, p. 88, ll. 19-21).

· Mr. Locke's recollection about when he first had any thought or image of Mr. McKinnon's hand or hands being near the steering wheel immediately prior to the accident is very unclear. First he said it was not long after he got out of the coma, three months after the accident, but it could have been a year later. He also remembered Jordan Siegmund talking to him about it. Then Mr. Locke said he started having "imagery" when he was in the hospital, and he was not sure about the three months and said the whole period was "fuzzy"; and he said he really could not say for sure when the imagery came to his mind about Brandon doing anything to the steering wheel (Transcript, pp. 90-92).

· After certain inconsistencies were pointed out to Mr. Locke in terms of how he had previously described Mr. McKinnon moving to grab or push the steering wheel, the following exchange concluded his cross-examination:

Q And so today you're saying that you have an image of both of Brandon's hands touching the steering wheel?

A Well, I do remember they were both touching the steering wheel because he was in front of me.

Q So his body was in front of you?

A Well, not his whole body. He wasn't sitting on my lap. I just remember, like, his shoulder and arms were in front of me where my steering wheel was.

Q And so you can't say that both of his hands touched the steering wheel? You don't know that?

A I don't know for certain. I can't say for certain. I was in a coma right instantly after.

Q But the image in your mind is not of both hands of his touching that steering wheel?

A No, it's both hands going in front into the direction where it's-- that's where I last seen them.

Q And -- and, similarly, you can't say that either of his hands actually grabbed the steering wheel?

A I can't say that I know for sure, but if you look at the statistics, I'm pretty damn sure.

Q You can't say that Brandon turned the wheel?

A I -- I don't know. I guess I couldn't say which way it was pulled, pushed, touched, whatever word you want to use. All I remember is seeing what I saw.

(Transcript, p. 94, ll. 4-30)

[184] I have carefully assessed Mr. Locke's evidence. In particular, I have considered both its internal consistency and its consistency with the evidence of other witnesses, including Ms. McAuley, Mr. McKinnon, Mr. Rombough, Cpl. Wessell and the admitted evidence of Scott Neitzel and Joseph and Lois Warren. Where his evidence conflicts with theirs, I reject it.

[185] Mr. Locke's evidence possessed a very "flexible" quality. I observed that at times he claimed no recollection and then in cross examination he recalled more than he had originally indicated. On numerous occasions his testimony shifted. First he would deny something; for example, not being aware that Mr. McKinnon had a bottle of Wiser's whiskey with him (which, based on the evidence of Mr. McKinnon, I find Mr. Locke went into Dan's Pub and purchased). Next, he recalled that Mr. McKinnon was carrying around this bottle of hard liquor that was not open, and then he regards Mr. McKinnon as so drunk that he would not have driven with him. Similarly, his evidence shifted as to the speed he was going after he turned onto the Old Alaska Highway. It shifted from to the "girls" screaming to them just having fun. It shifted from his cousin, Courtney, asking him to once slow down, to his cousin asking him on another occasion to slow down. It shifted in relation Courtney, and whether she was standing in the back of his car that day and whether she banged on the back of his seat and told him to slow down.

[186] I did not find that Mr. Locke had any trouble understanding or responding to the questions he was asked. He did not struggle to answer and appeared to remember his prior testimony. If he has suffered a brain injury as a result of the accident, its effects are not readily apparent. He appeared to have a good recollection of events prior to June 9, 2010; for example, why he left Alberta, and prior interactions with Mr. McKinnon on Facebook. Rules like speed limits and probation conditions were flexible guidelines for him to disregard when he saw fit to, and he was clearly able to explain why, to him, marihuana was a medication and therefore not caught by the probation condition he believed to be in effect.

[187] Mr. Locke also remembered many details about June 9, 2010; for example his recollections of social interactions on the river banks of the Muskwa, in terms of who he saw there and generally what people did (Transcript, p. 31). He told the Court many things that, when

pressed a little further, were not true. For example, he was adamant that he did not drink and drive, and yet he clearly did. He was also 99% certain that he did not have any cocaine with him that day and yet Mr. McKinnon saw him with cocaine and a nurse extracted a ball of it from his mouth in the hospital emergency department. Mr. Locke is quite simply not an accurate historian about anything that he thinks might put him in a bad light. His self-interest is transparent and he is not a skilled liar.

[188] The manner in which Mr. Locke says Mr. McKinnon grabbed his steering wheel (except at the end of cross-examination he was not sure that this had occurred) is a highly implausible account. At one point, Mr. Locke stated that Mr. McKinnon was sitting in the front passenger seat and reached all the way across the car and across Mr. Locke with both of his arms and used his right hand to grab the steering wheel in the 10 or 11 o'clock position. Later, he said that Mr. McKinnon used both his hands. The implausibility of this account is apparent from Mr. Locke and Mr. McKinnon's relative positions in the vehicle, the point on his steering wheel that Mr. Locke says Mr. McKinnon grabbed with his right hand, and the fact that, by all accounts, Mr. McKinnon was wearing his seat belt by this point. In short, I do not accept many aspects of Mr. Locke's evidence, including as to his alcohol consumption and his driving. In particular I reject his evidence about Mr. McKinnon grabbing or touching the steering wheel of his car in any manner immediately prior to Mr. Locke losing control of his vehicle and the accident occurring.

[189] This accident was a horrendous event in Mr. Locke's life. He continues to be haunted by it. When Mr. Locke learned that Jordan Siegmund had heard Brandon McKinnon had possibly touched the steering wheel, it gave him a convenient out and he latched onto it, and wove it into what he did recall of the events prior to the accident. It is, however, not a reliable or credible recollection.

B. Application of R. v. W.(D.)

[190] When an accused takes the stand at trial and credibility is at issue the trier of fact must be instructed as set out in R. v. W.(D.), [1991] 1 S.C.R. 742 at 758 [W.(D.)]:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[191] In this trial Mr. Locke took the stand and testified in his defence. For the reasons set out above I find that I do not believe his testimony as it relates to the essential elements of the offences charged. I also do not find it raises a reasonable doubt in relation to any essential element of the offences charged. In particular, I do not accept Mr. Locke's evidence about:

how much he had to drink on June 9, 2010; the nature of his driving where it conflicts with the reliable testimony of others; what he said his speed was; or that Mr. McKinnon grabbing the steering wheel in his car caused the accident. Nor do I accept his evidence that he did not knowingly possess cocaine on June 9, 2010, or that he was bound by a term of a probation order on that date that he abstain from the consumption or possession of non-medically prescribed illicit drugs. This means I must consider the third instruction in W.(D.), namely whether on the basis of evidence I do accept, here the evidence in the Crown case, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused in relation to the offences charged in the Indictment.

- [192] The principles of W.(D.) apply equally to the reasoning process of judges in judge-alone trials: *R. v. D.S.C.*, 2004 NSCA 135. Summarized eloquently by Cromwell J.A. (as he then was), "the ultimate issue in any criminal case is not who the jury (or judge) believes but whether, in light of all of the evidence, a reasonable doubt about guilt persists" (at para. 19).

VII. The position of the parties and the authorities

- [193] The position of the Crown is that it has proven the essential elements of the offences charged beyond a reasonable doubt and that Mr. Locke should be convicted. While Mr. Locke has admitted that at the time of the accident his blood alcohol concentration exceeded the legal limit, and thus he is guilty of an offence contrary to s. 253(1)(b) of the Code, and his driving constituted the offence of dangerous driving within the definition of s. 249(1)(a) of the Code, the Crown submits that the egregious nature of his conduct elevates it to commission of the more serious offences of criminal negligence in the operation of a motor vehicle causing death or bodily harm (s. 220(b) and s. 221 respectively).
- [194] The Crown further submits that it has proven beyond a reasonable doubt that Mr. Locke's conduct in relation to his driving and the accident was a significant contributing cause of the ensuing deaths and bodily harm, such that he is to be found guilty of the offences that require proof of the element of causation, namely criminal negligence causing death or bodily harm, impaired operation of a motor vehicle causing death or bodily harm, and care or control of a motor vehicle with a blood alcohol level in excess of 80 mg. in 100 ml. of blood, causing an accident that resulted in death or bodily harm.
- [195] With regard to Ms. McAuley's evidence that Mr. McKinnon may have grabbed or touched the wheel of the vehicle, and thus became an intervening cause interrupting Mr. Locke's conduct that otherwise would have resulted in Mr. Locke being found to be a significant contributing cause of the accident, the Crown submits that this evidence is either unreliable and ought not to be accepted; or, alternatively, does not operate to displace Mr. Locke as the significant contributing cause of the accident and its consequences. The Crown further submits that the evidence of the accused with regard to Mr. McKinnon allegedly grabbing the steering wheel and causing the accident is concocted and false and ought to be rejected. Alternatively, the Crown submits that even if an event of this nature occurred, it was reasonably foreseeable to the accused - given his excessive speeding and

what was occurring inside the vehicle, in terms of his passengers repeatedly asking him to slow down, and what he knew of the upcoming left curve - that someone in the vehicle could try to intervene with respect to his driving. Either way, the Crown submits that Mr. Locke's conduct makes him a significant contributing cause of the accident.

- [196] The defence submits that the evidence falls short of elevating Mr. Locke's conduct to the level required for convictions of criminal negligence causing death or bodily harm, as opposed to the offences of dangerous driving and driving with a blood alcohol level in excess of 80 mg., which he admits.
- [197] With regard to causation, the defence submits that the Court should have a reasonable doubt that Mr. Locke's conduct caused the car to crash, as opposed to the intervening actions of Mr. McKinnon by grabbing the wheel as alluded to by Ms. McAuley and testified to by Mr. Locke. The defence submits that this evidence, if believed, breaks the chain of causation.
- [198] In terms of legal authorities referred to, both parties referred the Court to *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30 [Maybin].
- [199] The Crown also relied upon: *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670 [Galaske]; *R. v. S.M.B.*, 2004 BCCA 98 [S.M.B.]; *R. v. Scales*, 2005 BCCA 230 [Scales]; *R. v. Vanmerrebach*, 2008 NSSC 3 [Vanmerrebach]; *R. v. Hughes*, 2011 BCCA 220 [Hughes]; and *R. v. Malkowski*, 2014 ONCJ 192 [Malkowski].
- [200] The defence relied upon: *R. v. Pressley*, [1948] B.C.J. No. 63 (C.A.) [Pressley]; *R. v. C.W.H.*, [1991] B.C.J. No. 2753 (C.A.) [C.W.H.]; *R. v. Parent*, 2000 BCPC 11 [Parent]; *R. v. Menezes*, [2002] O.J. No. 551 (S.C.J.) [Menezes]; *R. v. O'Brien*, [2005] O.J. No. 4340 (S.C.J.) [O'Brien]; *R. v. Alli*, 2012 ONCJ 49 [Alli]; *R. v. Lilgert*, 2014 BCCA 493 [Lilgert]; and *R. v. Phan*, 2015 ONSC 2088 [Phan].
- [201] By memorandum to counsel dated October 21, 2015, the Court indicated that it would also consider: *R. v. Fedan*, 2014 BCSC 2527 [Fedan]; *R. v. Cluney*, 2013 NLCA 46 [Cluney CA]; and *R. v. Cluney*, unreported trial decision dated March 23, 2012, Judge J. Joy, Provincial Court of Newfoundland and Labrador at Happy Valley-Goose Bay [Cluney]. The Court invited further submissions and none were received.

VIII. The Law, Analysis and Findings

A. The Issue of Causation

- [202] The Court's analysis of causation will precede the discussion of the offences themselves because Mr. Locke must be found to have caused death or bodily harm to be found guilty of the criminal negligence offences charged. Otherwise he will only be subject to the driving-related charges of dangerous driving simpliciter, impaired driving simpliciter, and Over 80 simpliciter.

- [203] The driving-related offences listed on the Indictment in this case (and the lesser offence of dangerous driving) all specify a prohibited consequence that must be caused by the accused's conduct. With respect to criminal negligence or dangerous driving, the accused's manner of driving must have caused death or bodily harm. The Over 80 offences require that the accused, with the specified blood alcohol content, caused an accident that resulted in death or bodily harm. For offences arising from the impaired operation of a motor vehicle, it is the accused's impaired ability to operate a motor vehicle in conjunction with his driving that must cause death or bodily harm.
- [204] Where causation is an issue, as it is here, it forms an essential element of the offence and must be proven beyond a reasonable doubt in order to sustain a conviction.
- [205] In order to determine whether the accused should be held responsible for causing death or bodily harm as a result of his operation of a motor vehicle, it must be determined whether he caused that result both in fact and in law.
- [206] Factual causation is concerned with how the result occurred in a "medical, mechanical, or physical sense, and with the contribution of the accused to that result": *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488 at para. 44. In other words, "but-for" the actions of the accused, would that result have occurred? Factual causation is necessary, but not sufficient, to establish legal causation.
- [207] Legal causation is a narrower concept concerned with whether the accused is sufficiently connected to a harm to warrant legal responsibility for it. The legal test for causation asks whether the accused's actions were a significant contributing cause of the result: *Maybin* at para. 28. This standard was previously expressed as whether the accused's actions were a contributing cause, outside the *de minimis* range: *R. v. Smithers*, [1978] 1 S.C.R. 506.
- [208] Intervening acts may serve to break the chain of legal causation and limit the scope of acts that will generate criminal responsibility: *Maybin* at para. 23. Different approaches may be useful in assessing whether legal causation has been interrupted by an intervening act in a given case. Two approaches explicitly mentioned by the Supreme Court of Canada are whether the intervening act was reasonably foreseeable and whether the intervening act was independent: *Maybin* at paras. 26-27.
- [209] The reasonable foreseeability approach "posits that an accused who undertakes a dangerous act, and in so doing contributes to a death [or bodily harm], should bear the risk that other foreseeable acts may intervene and contribute to that death [or bodily harm]": *Maybin* at para. 30. Those intervening acts that were reasonably foreseeable at the time the accused undertook the unlawful act will generally not break the chain of legal causation sufficiently to absolve the accused from responsibility for the charged offence. The precise details of the intervening act need not be reasonably foreseeable; rather, "it is sufficient if the general nature of the intervening act and the risk of non-trivial harm are objectively foreseeable at the time of the dangerous and unlawful acts": *Maybin* at para 34. The issue is whether the acts that followed flowed reasonably from the wrongful conduct of the

accused. If so, then the accused's actions will remain a significant contributing cause of death or bodily harm.

[210] Independent, intentional acts of a third party may serve to sever the chain of legal causation. This approach asks the court to weigh the relative weight of each of the causes. It looks to whether the intervening act was responsive to the accused's conduct or coincidental. As stated by the Supreme Court of Canada in *Maybin*, at para. 57:

[] If the intervening act is a direct response or is directly linked to the [accused's] actions, and does not by its nature overwhelm the original actions, then the [accused] cannot be said to be morally innocent of the death.

[211] It is only when the accused's wrongful act merely sets the scene for the independent acts that follow that those independent acts will break the chain of causation. Although these approaches are useful, I am mindful of the words of Paccioco J. in *Alli*, at para. 78:

The truth is that there are few legal causation rules that actually exculpate individuals who have factually caused consequences. Instead, most legal causation principles explain why responsibility will be imputed, in spite of arguments to the contrary. Of most relevance to this case, "the criminal law does not recognize contributory negligence": *R. v. Nette* at para. 49. The fact that Mr. Williams played a crucial if not the most crucial and immediate part in his own death does not mean that Mr. Alli can avoid responsibility.

[212] Clearly, the requirements of factual causation are met in the circumstances of the present case. But for Mr. Locke's driving, the accident resulting in the deaths of Ms. Cook and Ms. Siegmund and the serious bodily harm to Ms. McAuley would not have occurred. In addition, the legal test for causation is met as the accused's actions were a significant contributing cause of the accident. In fact, they were the sole identifiable cause.

[213] Given my findings of fact, there was no independent intentional act of Mr. McKinnon to sever the chain of legal causation between Mr. Locke's manner of driving and the accident.

[214] Hypothetically speaking, in the event that a person inside Mr. Locke's vehicle had tried to intervene to cause him to slow down, which I have not found to have occurred on the evidence before me, any such intervening act would have been in direct response to Mr. Locke's actions and would not have overwhelmed his original conduct. Mr. Locke's actions would therefore still have constituted a significant contributing cause of the accident and the deaths and injuries that ensued.

[215] A stark example of this is provided by *Cluney*. In that case, the accused had consumed drugs and alcohol and was exceeding the speed limit in a vehicle with a mechanical condition causing it to veer slightly to the left. As the accused was driving home from a party with his friends in the vehicle, one of the passengers grabbed the wheel in an act of apparent horseplay which caused the vehicle to fishtail. The passenger who had grabbed the wheel was killed in the accident and the accused was charged with impaired driving causing death. The judge found that the deceased had "played a major role in the accident":

Cluney at p. 22. Further, the judge found that the accused was not proven to be the sole or even a major cause of the deceased's death: Cluney at p. 45. Nonetheless, applying the test for causation outlined above, the judge found that the accused's impairment was a substantial contributing cause of the death and entered a conviction: Cluney at p. 46.

- [216] Another similar example is found in *R. v. K.L.* 2009 ONCA 141 [K.L.]. The accused's mother had purchased a used vehicle, which was then certified for safety by a licensed mechanic. However, the vehicle had significant problems, including worn tire treads and defective brakes. The accused subsequently got into an accident owing to the fact that he accelerated to over twice the speed limit to pass his friend's vehicle and had to apply the brakes to avoid a collision. His brakes locked and he slid across the roadway, striking a passing cyclist and colliding into a tree. The accused was convicted of dangerous driving by the trial judge. Watt J.A., in upholding the conviction, stated that neither the mechanic's certification nor the braking malfunction severed the chain of causation "when it was the manner in which the [accused] operated the vehicle that created the necessity of braking": K.L. at para. 21.
- [217] Causation does not require the accused's actions to be the only cause, or even the most significant cause, of the specified results. All that the law requires is that the accused's actions are a significant contributing cause of the death or bodily harm that ensued.
- [218] For these reasons I find that the actions of Mr. Locke are proven beyond a reasonable doubt to be a significant contributing cause in relation to the accident and the ensuing deaths and bodily harm arising from it in the context of the charged offences of criminal negligence causing death or bodily harm, dangerous driving and impaired operation of a motor vehicle.
- [219] Turning to causation in respect of the Over 80 offences charged, I note that the preferred view of causation is that the Crown must establish the requisite causal connection between the accused's blood alcohol concentration being in excess of the legal limit and the accident that resulted in death or bodily harm: Phan at para. 85; CRIMJI: Canadian Criminal Jury Instructions, 4th ed., loose-leaf (updated November 2014), (Vancouver: The Continuing Legal Education Society of British Columbia) at 6.34A-11.
- [220] However, another approach interprets the offences as requiring only a temporal link between an accused's prohibited blood alcohol concentration and the occurrence of an accident that has resulted in death or bodily harm to another, but not requiring a causal link between those two elements. Therefore, if the accused "causes" the accident resulting in death/bodily harm, and incidentally but unrelatedly happens to be Over 80, then the accused can be convicted. This view has been accepted in cases such as *R. v. Koma*, 2015 SKCA 92, where Caldwell J.A. held at para. 32 that:

for a conviction to lie under s. 255(2.1) of the Criminal Code, I conclude the Crown must prove beyond a reasonable doubt that an individual, while operating a motor vehicle or in care or control of a motor vehicle, had a blood alcohol concentration exceeding 80 mg of alcohol in 100 mL of blood and the individual caused an accident that resulted in bodily harm to another; but, s. 255(2.1) does not require the Crown to prove the individual's over .08 blood alcohol concentration caused the accident.

[221] In the present case, I find that Mr. Locke's level of impairment caused by alcohol was at least a significant contributing cause of the accident as it carried with it the effects enumerated by Mr. Pon in his expert opinion on the effects of alcohol on the brain and central nervous system. They include: diminished sensory perception, information processing, critical judgment, loss of inhibitions and increased reaction time. The evidence shows that Mr. Locke's level of impairment was disinhibiting and affected his decision-making such that he continued to drive at the excessive speeds and in the manner noted above even after his passengers begged him to slow down, only smiling in response, and then lost control of his car when it became unstable due to its speed and the nature of the roadway. As such I find that his blood alcohol level, well in excess of the legal limit, was a significant contributing cause of the accident resulting in deaths and bodily harm. He was also clearly Over 80 when the accident occurred in the context of a temporal requirement only.

[222] Therefore, I also find causation to be proven beyond a reasonable doubt in relation to Counts 5 and 6 on the Indictment pertaining to Over 80 causing an accident resulting in the deaths of Courtney Siegmund and Chelsea Cook; and in relation to Count 9 regarding bodily harm to Terri-Lynn McAuley.

B. The Offences

[223] Dangerous driving and criminal negligence involving the operation of a motor vehicle are related offences. They differ in terms of the degree of moral blameworthiness attributable to each offence: Alli at para. 55. Criminal negligence in the context of driving covers the more serious cases of driving in a dangerous manner and is consequently at the highest end of the "continuum of moral blameworthiness" in relation to motor vehicle offences: R. v. J.L., [2006] O.J. No. 131 (C.A.) at para. 14 [J.L.]. Dangerous driving is a lesser offence, as is evident from the fact that s. 662(5) of the Code makes dangerous driving an included offence under a charge of criminal negligence in relation to the operation of a motor vehicle. At the lowest end of this continuum is careless driving under provincial regulatory statutes.

[224] It is useful to first look at the offence of dangerous driving admitted by the accused.

C. Dangerous Driving

[225] The offence of dangerous driving is contained in s. 249(1) of the Code. It states:

249. (1) Every one commits an offence who operates

- (a) a motor vehicle in a manner that is 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.

[226] The actus reus of dangerous driving is established when the accused drives in a manner that endangers the public, with regard to all the circumstances surrounding the use of the motor vehicle. For purposes of the offence, the public includes passengers of the accused's vehicle: *Vanmerrebach* at para. 63. Dangerousness cannot be inferred from the consequences that ensued from the driving, but must be based on the manner of driving itself.

[227] The mens rea of the offence is a marked departure from the standard of a reasonably prudent driver, as contrasted with a mere departure from this standard, which is sufficient to occasion civil liability. The Supreme Court of Canada explained this mens rea requirement at para. 37 of *R. v. Beatty*, 2008 SCC 5 [Beatty], as follows:

The underlying premise for finding fault based on objectively dangerous conduct that constitutes a marked departure from the norm is that a reasonable person in the position of the accused would have been aware of the risk posed by the manner of driving and would not have undertaken the activity.

[228] This is a modified-objective standard. It does not import the idiosyncrasies of the accused, such as their immaturity or lack of driving experience, short of an incapacity to appreciate the risks inherent in the situation they have created: *Beatty* at para. 40. The particular circumstances in which the alleged offence arose, however, such as the driving conditions existing at the time of the accident, must be imported into the analysis when setting the standard of the reasonably prudent driver against which the accused's actions are measured.

[229] In *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60 [Roy], Cromwell J. provided the following guidance on the proper way for a court to analyze mens rea in a dangerous driving case, at para. 37:

It is helpful to approach the issue by asking two questions. The first is whether, in light of all 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.

[Emphasis in original.]

- [230] The mens rea may be proven based on inferences from conduct. Although proof of the actus reus of dangerous driving will not be sufficient on its own to prove the mens rea, once the accused's operation of a motor vehicle reaches the level of a marked departure from the norm, the trier of fact may infer that the objective fault requirement has been met: Roy at para. 40. Nonetheless, it is important to examine all of the circumstances in each case, including explanations given by the accused for the conduct, to determine whether the evidence supports this inference.
- [231] In admitting that he is guilty of dangerous driving contrary to s. 249(1)(a), Mr. Locke is admitting that he drove his car in a manner that endangered the public, with regard to all the surrounding circumstances, which included the safety of his passengers, and the nature of the roadway upon which he was travelling: a narrow two-lane highway with significant curves or corners, lined by residences and frequented by vehicular and pedestrian traffic given the time of day and year. He is also admitting that a reasonable person would have foreseen the risk his driving posed and would not have driven in such a manner, and that his failure to foresee that risk and avoid it amounts to a marked departure from the standard of care expected by a reasonable person in his circumstances.
- [232] However, the Crown's position is that the same evidence ought to found convictions for criminal negligence.

D. Criminal Negligence

[233] Criminal negligence is defined in s. 219 of the Code as follows:

219. (1) Every one is criminally negligent who

- (a) in doing anything, or
- (b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

- [234] The subsequent sections then establish the offences of criminal negligence, which require that the above definition is met, in circumstances where the accused causes death (s. 220) or bodily harm (s. 221).
- [235] The actus reus of criminal negligence causing death is "an act or omission that shows wanton or reckless disregard for the lives and safety of others, and causes the death [or bodily harm] of another person": R. v. Kerr, 2013 BCCA 506 at para. 24 [Kerr]. Therefore, when the offence involves a motor vehicle, the driving at issue must not merely endanger the public, as is sufficient for dangerous driving; it must be so dangerous that "the act is wanton and reckless on its face": Alli at para. 84. Wanton or reckless, in this context, mean that the driver proceeded heedlessly or irresponsibly, without regard for consequences. However, it is important to note that the actual consequences of the driving are immaterial to a determination of whether the actus reus of criminal negligence is established.

- [236] The mens rea of the offence requires a marked and substantial departure (as opposed to just a marked departure) from the conduct of a reasonably prudent person "in circumstances in which the accused either recognized and ran an obvious and serious risk or, alternatively, gave no thought to that risk": R. v. A.D.H., 2013 SCC 28, at para. 61. The fault requirement may therefore be established through evidence of the accused's subjective state of mind, or objectively from the accused's conduct: Kerr at para. 25; Menezes at para. 75. The greater the risk of harm the accused ran, the more appropriate it will be to determine that a reasonably prudent person would have foreseen the consequences and governed themselves accordingly.
- [237] Based on a review of the authorities provided by counsel, the presence of certain factors may assist in determining when a driver's behaviour warrants criminal consequences, and in particular whether the circumstances of a particular case support a conviction for dangerous driving or criminal negligence in the operation of a motor vehicle. The greater the number of these factors present in a given case, and the greater the extent to which any factor is present in a given case, the more likely it is that the driving in question will constitute criminal negligence, as opposed to dangerous driving.
- [238] These factors are:
- Excessive speed: Alli; Hughes; Malkowski; Menezes; O'Brien; Scales; S.M.B.; Vanmerrebach.
 - Alcohol consumption: O'Brien; Vanmerrebach.
 - The nature of the roadway, such as whether it was residential or contained curves or other hazards: Scales; Vanmerrebach.
 - Performance of unsafe driving manoeuvres, such as attempting to pass other drivers in risky situations or entering the wrong lane of traffic: Vanmerrebach.
- [239] The dangerous driving provision itself further directs a court to consider the nature, condition, and use of the place at which the vehicle is being operated and the amount of traffic that was, or might reasonably be expected to be, present at the place. Obviously, inclement weather or heavy traffic will exacerbate the risks involved in driving: see Hughes.
- [240] In the present case, the Crown also relied on Galaske for the proposition that, in civil cases, there is a duty on all occupants of a vehicle to wear their seat belts; and, in particular, there is a duty on the driver of a vehicle to ensure that passengers under 16 wear their seat belts: Galaske at para. 22.
- [241] Although Galaske was not a criminal case, seat belt use was also considered in the dangerous driving case of R. v. Fedan, 2014 BCSC 2527 [Fedan]. Kloegman J. partly relied on the fact that the accused "did not don his seat belt or ensure his obviously intoxicated passengers had done their seat belts up" in determining that he had displayed a marked departure from the conduct of a reasonably prudent driver: Fedan at para. 52. In my view

seat belt use is therefore also relevant to both the actus reus and the mens rea in a criminal negligence case arising from driving.

- [242] Two of the above-mentioned factors of significance to the present case have received more consideration in the case law and therefore deserve additional explanation: excessive speed and alcohol consumption.
- [243] Some cases suggest that speed alone, in certain circumstances can be sufficient to constitute the offence of dangerous driving: Vanmerrebach at para. 62; Malkowski at para. 184. In Malkowski, for instance, the accused was found to have driven 152 km/h. on a regional road with a speed limit of 50 km/h.. The court found at para. 250 that the excessive speed, in and of itself constituted dangerous driving. Most cases, however, suggest that something more is required in terms of the presence of other factors: S.M.B. at para. 62.
- [244] It is not surprising then, that there is very little authority to support the proposition that speed alone can result in a conviction for criminal negligence: Vanmerrebach at para. 57. One such case on this issue to which I have been referred to is Scales. In that case, the appellant argued that the trial judge erred in convicting him of criminal negligence causing death on the basis of speed alone, and inferentially argued that speed alone would be insufficient to convict an individual of criminal negligence. The BC Court of Appeal declined to accept that inferential argument as an accurate articulation of the law, but did not decide the case on that basis. Instead, the court found that speed had combined with low visibility and a dangerous roadway with a tight curve to create a situation where the appellant's driving constituted criminal negligence: Scales at para. 9.
- [245] Generally, therefore, additional acts of negligence, including voluntary intoxication or dangerous road conditions, combined with speed, serve to increase the extent of accused's departure from the standards of a reasonable driver to the level required for criminal negligence: that of a marked and substantial departure from the conduct of a reasonably prudent person, in circumstances in which the accused either recognized and ran an obvious and serious risk, or alternatively, gave no thought to that risk.
- [246] Alcohol consumption was considered in the context of dangerous driving in R. v. Settle, 2010 BCCA 426. The accused was charged with impaired driving and dangerous driving causing bodily harm; he had been acquitted of the former and convicted of the latter at trial. On appeal, the issue was whether the trial judge erred in relying on the accused's alcohol consumption to convict him of dangerous driving, given that he had been acquitted of the impaired driving charge. The BC Court of Appeal held, at para. 48, that voluntary consumption of alcohol may be relevant as evidence of an accused's state of mind, even when they have been acquitted of impaired driving, in order to establish the mens rea of dangerous driving. The court went on to point out, at para. 55:

That evidence [of voluntary alcohol consumption], when considered with evidence of driving conduct, may demonstrate a "pattern" of conduct that shows a disregard for the safety of others using the highway, which in its totality may be sufficient to establish a marked departure from the standard of a reasonably prudent driver.

[247] Presumably, the same reasoning applies to a charge of criminal negligence when it involves the operation of a motor vehicle, bearing in mind the higher mens rea requirement of a marked and substantial departure from the conduct of a reasonably prudent driver in the circumstances.

E. The Present Case

[248] The factors proven to be present in this case to be considered in the context of Mr. Locke's behaviour being found to be criminally negligent are:

1. Driving at an excessive speed in an 80km/h zone, ranging from approximately 140 km/h to a minimum of 121 km/h at the point when Mr. Locke lost control of his vehicle;
2. A prolonged period of driving preceding the accident at excessive rates of speed and in a manner that caused his vehicle to cross into the lane of travel for oncoming traffic as observed at the 301 Corner by Mr. Rombough;
3. Continuing to drive at excessive speeds when his passengers were begging him to slow down;
4. Driving his vehicle at excessive speeds on a roadway lined with the driveways of residential homes, and frequented by other vehicles, quads and pedestrians, at a time when people were likely to be out and about.
5. Driving while significantly impaired by alcohol with a projected blood alcohol level at the time of the accident of between 110 to 133 mg.%;
6. The presence in his car of more individuals than there were seat belts for; and
7. The failure to ensure that his passengers under the age of 16 were wearing their seat belts.

[249] In considering whether Mr. Locke's conduct in the circumstances rises to the level of criminal negligence I have had regard to the authorities cited. In particular, I have found the legal analysis of Wright J. in *Vanmerrebach* to be of assistance. In reviewing the law, Wright J. quoted the following portions of the reasons of Weiler J.A. in *J.L.*, in his analysis of the elevated standard required for criminal negligence as opposed to the lesser offence of dangerous driving:

16. Criminal negligence requires a more elevated standard. The departure from the norm must be more marked in both the physical and mental elements of the offence. See *R. v. Palin* [citations omitted]. The requirement for a greater marked departure in both the physical and mental elements is consistent with the higher level of moral blameworthiness associated with criminal negligence, namely, wanton or reckless disregard for the life or safety of others
18. To establish that conduct is wanton or reckless the consequences must be more obvious. The greater the risk of harm the more likely it is that the consequences are the natural result of the conduct creating the risk. It is from this conduct that the conclusion that the accused had a wanton or reckless disregard for the lives or safety of others is drawn: *Anderson*, supra, at 486-487. In this case, the admission of the appellant as to his state of mind is an important factor, but so, too, is his driving. The offence of criminal negligence punishes, not a state of mind, but the conduct of the accused. See *R. v. Tutton* [citations omitted]. Thus the physical action of the appellant is as critical to the determination of wanton or reckless conduct as the mental element.

[Emphasis in original.]

[250] In *Menezes*, Hill J. engages in a thorough summary of the law in relation to criminal negligence at paras. 72-74. In particular, he enumerates the terms "wanton" and "reckless" as follows:

72 The term wanton means "heedlessly" (*Regina v. Waite* (1996), 28 C.C.C. (3d) 326 (Ont. C.A.) at 341 per Cory J.A. (as he then was)) or "ungoverned" and "undisciplined" (as approved in *Regina v. Sharp* (1984), 12 C.C.C. (3d) 428 (Ont. C.A.) at 430 per Morden J.A.) or an "unrestrained disregard for consequences" (*Regina v. Pinsky* (1988), 6 M.V.R. (2d) 19 (B.C.C.A.) at 33 per Craig J.A. (affirmed on a different basis [1989] 2 S.C.R. 979 at 979 per Lamer J. (as he then was)). The word "reckless" means "heedless of consequences, headlong, irresponsible": *Regina v. Sharp*, supra at 30.

[Emphasis in original.]

[251] Mr. Justice Hill then continues with the following:

75 Ordinarily then, the mens rea or guilty mind for the crime of criminal negligence can be determined from the conduct of the accused - the driver either recognized and ran an obvious and serious risk to the lives and safety of others, or alternatively, gave no thought to the risk involved: *Regina v. Nelson* (1990), 54 C.C.C. (3d) 285 (Ont. C.A.) at 290 per curiam; *Regina v. Sharp*, supra at 434, 436; *Regina v. Waite*, (Ont. C.A.) supra at 329, 333, 338. The consequence of death is an element of the actus reus - the mental element only requires objective foresight of bodily harm: *Creighton v. The Queen*, supra at 370-2, 376-383; *Regina v. Pinsky*, supra at 32-3. The greater the risk of harm created, the easier it is to conclude that a reasonably prudent person would have foreseen the consequences: *Anderson v. The Queen*, supra at 486.

- [252] On the facts of the present case I find that the actus reus for the offences of criminal negligence causing death or bodily harm is proven beyond a reasonable doubt. This finding is abundantly clear in my view on the evidence. Mr. Locke drove at speeds ranging from approximately 40 km/h to 60 km/h over the posted speed limit of 80 km/h. Such speeds would have made it very difficult for Mr. Locke to avoid the traffic from residential driveways that could have been present on the roadway, or to navigate the curving roadway that he was faced with; indeed, according to Mr. Rombough, he left his own lane of travel and nearly lost control of his vehicle on the curve prior to the one where the accident occurred. This was compounded by the fact that Mr. Locke had consumed alcohol to the point where, on the accepted evidence of Mr. Pon, his mental faculties and skills essential for the safe operation of a motor vehicle would have been impaired. Mr. Locke's conduct was not a mere momentary lapse in judgment or attention. It was not just dangerous to the public, as those terms have been interpreted in the dangerous driving cases to which I have been referred. Rather, it is evident that Mr. Locke's operation of his motor vehicle on June 9, 2010, displayed a wanton and reckless disregard for the lives and safety of his young passengers as well as the other potential users of the Old Alaska Highway that day.
- [253] With regard to the mens rea requirement for the offences of criminal negligence causing death or bodily harm, I find that Mr. Locke either recognized and ran an obvious and serious risk, or gave no thought to that risk. He voluntarily consumed an amount of alcohol at the Muskwa River that he knew, or should have known, would negatively affect his ability to operate his vehicle. He had also smoked some marihuana. He then decided to transport more passengers than he had seats or seat belts for in his vehicle (two of them under 16 years old), and did not ensure that those passengers who could have worn seat belts did so. He had concerns about the power steering on his car. Then, when driving on a roadway he knew contained sharp curves, as he had driven it often, he drove at an excessive speed. Sadly, Mr. Locke could, and should, have recognized the exceedingly risky nature of his behaviour and perhaps avoided this accident if he had listened to the pleas of his frightened passengers and slowed down when they were calling out and frantic (to use Ms. McAuley's term) for him to do so. In all the circumstances, I have no hesitation in concluding that there was here a marked and substantial departure from the conduct of a reasonably prudent driver.
- [254] Further, within the context of the W.(D.) analysis, having not believed the evidence of the accused as it related to the essential elements of these offences including causation, and not being left in a reasonable doubt by it, I find on the basis of evidence I do accept, that I am convinced of his guilt beyond a reasonable doubt.

F. Over 80 and Impaired Operation of a Motor Vehicle

- [255] The accused is also charged with the offences of impaired operation of a motor vehicle and Over 80. The basic offences are contained in s. 253(1) of the Code, which reads:

253. (1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

[256] Mr. Locke is charged with both types of offences in their more serious forms: impaired operation of a motor vehicle causing death (s. 255(3)) and causing bodily harm (s. 255(2)); and Over 80 in the context of causing an accident resulting in death (s. 255(3.1)) and causing an accident resulting in bodily harm (s. 255(2.1)). I have found that causation has been proven beyond a reasonable doubt. Mr. Locke has admitted that his blood alcohol level exceeded the legal limit based on the 87 mg.% reading obtained from his blood taken at the hospital, which resulted in a projected blood alcohol reading of between 110 and 133 mg.% at the time of the accident. He clearly had the care or control of a motor vehicle. Thus, all the essential elements for convictions of the offences of Over 80 causing an accident resulting in the deaths of Courtney Siegmund and Chelsea Cook have been proven beyond a reasonable doubt and he is guilty of the charges contained in Counts 5 and 6. Similarly, he is also found to be guilty of Over 80 in relation to causing an accident resulting in bodily harm to Terri-Lynn McAuley as charged in Count 9.

[257] Although an accused may be charged with both the offences of impaired operation of a motor vehicle and Over 80, the principle established in *R. v. Kienapple*, [1975] 1 S.C.R. 729, precludes convictions on both. Therefore, the Crown asks the Court to impose conditional stays in relation to the offences charged arising from impaired operation of a motor vehicle.

[258] In the extremely unlikely event (given the admission regarding Over 80) that the Over 80 offences should fall on appeal, the Court will make brief findings in relation to Mr. Locke and the impaired operation of a motor vehicle charges.

[259] Impaired driving requires an inquiry into the subjective effect of drugs and/or alcohol on the accused's ability to drive. The law is clear that, in appropriate circumstances, impairment may be proved through expert evidence based on breath or blood test results, and there is no rule that prevents a trier of fact from relying on this type of evidence alone to conclude beyond a reasonable doubt that an individual's ability to operate a motor vehicle is impaired by alcohol: *Phan* at para. 64. Also, it is trite law that the evidence does not need to prove that an individual's ability to operate a motor vehicle is profoundly or significantly impaired, this element of the offence being satisfied if the evidence establishes any degree of impairment, from slight to great: *R. v. Stellato* (1993), 78 C.C.C. (3d) 380 (Ont. C.A.), *aff'd* [1994] 2 S.C.R. 478.

- [260] In the present case, aspects of Mr. Locke's driving point to his ability to drive being impaired by alcohol. The evidence shows that Mr. Locke took the 301 Corner crossing over the centre line into the lane of oncoming traffic, travelled down a hill at speeds reaching 140 km/h, and approaching the 302 Corner when he lost control of the vehicle, he was driving at a speed of up to 121 km/h.
- [261] With Mr. Locke having a projected blood alcohol level of 110 to 133 mg.% at the time of the accident, and the admitted evidence and expert opinion of Mr. Pon, the forensic toxicologist, I find that the Crown has proven beyond a reasonable doubt that Mr. Locke's ability to operate a motor vehicle was impaired by alcohol. In addition to setting out the effects of alcohol as a central nervous depressant resulting in a deterioration of the mental faculties and skills required to safely operate a motor vehicle, Mr. Pon's opinion is that, with a blood alcohol concentration of 100 mg.% or higher, "all individuals are impaired regardless of their tolerance to alcohol or their skill in driving." Mr. Pon lists the mental faculties and skills affected by alcohol impairment as, "diminished sensory perception, especially vision, attention and alertness, information processing, critical judgment, loss of inhibitions and increased reaction time."
- [262] Causation having been proven beyond a reasonable doubt, I also find Mr. Locke guilty of impaired operation of a motor vehicle causing death in relation to Courtney Siegmund (Count 3) and of the same offence in relation to Chelsea Cook (Count 4). Similarly, I find Mr. Locke guilty of Count 8, impaired operation of a motor vehicle causing bodily harm to Terri-Lynn McAuley.
- [263] However, I enter a conditional stay with regards to Counts 3, 4 and 8.

G. Breach of Recognizance

- [264] Mr. Locke is charged with breach of recognizance contrary to s. 145(3) of the Code, which reads:
- (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.
- [265] In *R. v. Custance*, 2005 MBCA 23 at para. 10, Steel J.A, writing for the Manitoba Court of Appeal explained that the essential elements of the offence are:
- (1) that the Crown must prove that the accused was bound by an undertaking or recognizance;

- (2) that the accused committed an act which was prohibited by that undertaking or recognizance or that the accused failed to perform an act required to be performed by that undertaking or recognizance; and
- (3) that the accused had the appropriate mens rea, which is to say that the accused knowingly and voluntarily performed or failed to perform the act or omission which constitutes the actus reus of the offence.

[266] The first element of the offence was further considered in *R. v. Truong*, 2008 BCSC 1151. In that case, the accused was charged with trafficking cocaine and was released on a recognizance that contained a condition that he was not to be found within the 500 block of East Hastings Street in Vancouver. On January 1, 2007, the accused was found in this area and charged with breach of recognizance.

[267] At trial, certified copies of the trafficking Information and the recognizance were entered as exhibits. The Crown also led evidence that the accused was the person named in those documents and that he was found in the prohibited area on January 1, 2007. The trial judge found that this placed the onus on the accused to demonstrate that he was not bound by the recognizance on the date in question. On appeal, Smart J. held that this conclusion was an error:

[33] In my view, the trial judge erred in interpreting s. 145(3) as placing the onus on the appellant to prove that he was not bound on January 1, 2007, by the condition of the Recognizance not to be in the 500 block E. Hastings Street. This was an element of the offence that the Crown was required to prove beyond a reasonable doubt. It was part of the actus reus of the offence. It was only after the Crown established that the appellant was bound by this condition on January 1 that the onus shifted to him to provide a lawful excuse.

[34] While it is probable that the appellant was still bound by this condition, he may not have been. He may have pleaded guilty. The charge may have been stayed. The conditions of the Recognizance may have been varied.

[268] Mr. Locke was cross-examined about whether he smoked marihuana after arriving in Fort Nelson, and was reminded about the condition he was bound by from Alberta not to consume non-prescription drugs. Mr. Locke responded to the effect that he did not consider marihuana to be a non-prescription drug given that it is sold out of corner stores in Vancouver, and that he did not consider it a drug, but rather a medication. He indicated that he considered non-prescription drugs to be heroin, crack, ecstasy and things of that nature that are harmful drugs, and that he believed the words in the order were not to consume non-prescription drugs (Transcript, p. 30, ll. 24-38 and p. 31, ll. 1-17).

[269] The recognizance that apparently existed, and contained the condition that Mr. Locke refrain from consuming non-prescription drugs, is not in evidence. The only evidence that it existed and contained such a term is the vague testimony of Mr. Locke himself, which the Court does not find to be reliable.

[270] In addition to the requirement that the Crown prove the recognizance, which has not been done, the Crown must also prove that on the date in question, June 9, 2010, Mr. Locke remained bound by the recognizance with such a condition. There is insufficient evidence of this. In particular, I do not accept Mr. Locke's vague reference to the fact that he was bound by this condition to constitute proof beyond a reasonable doubt that: a) a recognizance with such a condition existed; and b) he continued to be bound by a recognizance with such a condition on June 9, 2010.

[271] For these reasons, I acquit Mr. Locke of Count 10 on the Indictment.

H. Unlawful Possession of a Controlled Substance

[272] The accused is also charged with possession of a controlled substance, cocaine, contrary to s. 4(1) of the CDSA. The CDSA adopts the following definition of possession set out in s. 4(3) of the Code:

(3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[273] Accordingly, there are three forms of possession: personal possession (s. 4(3)(a)), constructive possession (s. 4(3)(a)(i) and (ii)), and joint possession (s. 4(3)(b)). Personal possession is at issue in the present case.

[274] To prove personal possession of a controlled substance, the Crown must establish the presence of three elements: physical contact; knowledge of the substance; and control: *R. v. York*, 2005 BCCA 74 [York] at para. 11. All of these elements must have co-existed at some point in time to constitute the offence.

[275] Mr. Justice Oppal, writing for the Court of Appeal, noted that an accused's physical contact with the substance may be very brief, but there must be some evidence that he or she took custody of it willingly and intended to deal with it in a deliberate manner: *York* at para. 20.

[276] The accused must be aware that he or she has physical custody of the substance, and must be aware of what that substance is: *R. v. Morelli*, 2010 SCC 8 at para. 16.

[277] Knowledge that the substance is a controlled substance is sufficient for this purpose: *R. v. Rai*, 2011 BCCA 341 [Rai] at paras. 18-19.

- [278] Knowledge need not be proved by direct evidence, but may be inferred from the surrounding circumstances. Where knowledge is based on circumstantial evidence, the trier of fact must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts, as succinctly stated by Bennett J.A., writing for the Court of Appeal, in *R. v. Twohey*, 2009 BCCA 428:
- [13] Knowledge and control does not need to be proved by direct evidence. Such a finding can be made based on circumstantial evidence, but only when the trier of fact is satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts: see *R v Vu*, 2004 BCCA 381 at para. 31, *R. v. Cooper*, [1978] 1 S.C.R. 860.
- [279] Wilful blindness by an accused is also recognized to provide proof of mens rea with regard to possession of a controlled substance, as was pointed out by Hall J.A., writing for the Court of Appeal, in *Rai*:
- [20] As pointed out in *Blondin*, wilful blindness can furnish the necessary mens rea for conviction. The trial judge stated at para. 52 that in the alternative he would have been prepared to utilize this doctrine as a basis for conviction in the present case. I do not consider it necessary to pass on this as a possible basis for conviction, since I consider there was an ample foundation in the evidence to establish knowledge on the part of the appellant that he was involved in the importation of a narcotic. The reasoning in *Blondin* supports the conclusion of the judge that the guilt of the accused was established on the evidence.
- [280] Lastly, the accused must maintain a measure of control over the substance. In most cases involving personal possession, control of the substance will co-exist with the other two elements. Absent evidence to the contrary, an accused in physical contact with a substance and with knowledge of that substance will typically also have control over it.
- [281] As earlier indicated, I have accepted Mr. McKinnon's evidence about Mr. Locke showing him at least one ball of cocaine packaged in plastic, which Mr. Locke withdrew and then returned to his mouth down at the Muskwa River. That evidence clearly fixes Mr. Locke with knowledge and physical possession. It was corroborated in important respects by the admitted evidence of the emergency room nurse, Linda Brake, who suctioned Mr. Locke's mouth for medical purposes and withdrew a clear plastic bag containing a white powder. This procedure was witnessed by Cst. Erickson, who took possession of the bag. The substance retrieved weighed 0.8 grams and was sent for analysis, resulting in the certificate of analysis of Dylan Pallett dated January 19, 2015 (Exhibit 4), which indicates that the white powder was cocaine, a controlled substance within the meaning of the CDSA.
- [282] In his direct examination, Mr. Locke was asked about whether he had any cocaine with him down by the river on June 9, 2010, as testified to by Mr. McKinnon. His response was that he believed that he did not because he was trying to get away from "that", which was why he ended up in Fort Nelson. When he was asked to clarify his belief and whether he could say for sure, Mr. Locke answered "I can't say for sure but I'm -- like, I'm 99 percent positive I wouldn't have. I just -- it's -- for one, I don't know where to get cocaine in Fort

Nelson" (Transcript, p. 13, ll. 42-45).

[283] I am unable to accept the evidence of the accused that he is 99 percent positive that he would not have had cocaine in his possession on June 9, 2010. For the reasons previously stated, Mr. Locke has been found by the Court to be an untruthful and unreliable witness. I reject his evidence that he did not have cocaine in his possession; and, after engaging in a W.D. analysis, I find that based on the evidence I do accept, that the evidence proves beyond a reasonable doubt that Mr. Locke knew he had a substance he believed to be cocaine in his mouth. Therefore, the Crown has proven the required elements for possession in this case - physical contact, knowledge and control - beyond a reasonable doubt, and I find Mr. Locke guilty of Count 11.

IX. Conclusion

[284] For these reasons, I find the accused, Joshua Alan Rai Locke, guilty of Counts 1 and 2 on the Indictment: the offences of criminal negligence in the operation of a motor vehicle, causing the deaths of Courtney Siegmund and Chelsea Cook respectively, contrary to s. 220(b) of the Code. I also find him guilty of criminal negligence causing bodily harm to Terri-Lynn McAuley contrary to s. 221 of the Code in relation to Count 7 on the Indictment.

[285] With regard to the offences charged in Counts 5 and 6 on the Indictment, I find the accused, Joshua Alan Rai Locke, guilty of having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 mg. of alcohol in 100 ml. of blood, having care and control of a motor vehicle, and causing an accident resulting in the deaths of Courtney Siegmund and Chelsea Cook respectively, contrary to s. 255(3.1) of the Code. With regard to Count 9, I also find Mr. Locke guilty of having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 mg. of alcohol in 100 ml. of blood, having care and control of a motor vehicle, and causing an accident resulting in bodily harm to Terri-Lynn McAuley, contrary to s. 255(2.1) of the Code.

[286] With regard to Counts 3 and 4, counts of Impaired Operation of a Motor Vehicle causing the deaths of Courtney Siegmund and Chelsea Cook respectively, offences contrary to s. 255(3) of the Code, I enter conditional judicial stays. I also enter a conditional judicial stay with regard to Count 8, Impaired Operation of a Motor Vehicle causing bodily harm to Terri-Lynn McAuley, contrary to s. 255(2) of the Code.

[287] With regard to Count 10, the charge of breach of the term on a recognizance that Mr. Locke abstain absolutely from the consumption or possession of non-medically prescribed illicit drugs, contrary to s. 145(3) of the Code, I acquit Mr. Locke.

[288] Finally, I convict Mr. Locke of Count 11, a charge of unlawful possession of a controlled substance, to wit cocaine, contrary to s. 4(1) of the CDSA.

"The Honourable Madam Justice Arnold-Bailey"

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