
CANADA / JUDGMENT

R. v. Macdonald

2021 BCSC 371

COURT

Supreme Court of British Columbia

DECIDED

15 January 2021

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2021 BCSC 371 R. v. Macdonald

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Macdonald,

2021 BCSC 371

Date: 20210115

Docket: 34661

Registry: Dawson Creek

Regina

v.

Cole Kenneth Archibald Macdonald

Before: The Honourable Mr. Justice M. Brundrett

Oral Reasons for Judgment

Counsel for the Crown:

M.R. Blow

Counsel for the Accused:

E.K. Jones

Place and Date of Trial/Hearing:

Dawson Creek, B.C.

January 4-8, 11-15, 2021

Place and Date of Judgment:

Dawson Creek, B.C.

January 15, 2021

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INTRODUCTION

- [1] The accused, Cole Macdonald, is charged with two counts of impaired driving causing death occurring on June 24, 2016, near Chetwynd, B.C. On that date, the Crown alleges the accused drove his pickup truck while impaired by a drug, crossed over the centreline on a highway, and collided head-on with an oncoming vehicle. The collision tragically resulted in the death of Danielle Hill and Shawn Taylor, who were in the oncoming vehicle.

- [2] The evidence at trial establishes that the accused's eastbound pickup truck had fully intruded into the westbound lane of the highway occupied by the oncoming vehicle. The accused was not speeding, but he was on the wrong side of the road. Several witnesses who observed the accused at the scene and later at the hospital observed symptoms consistent with impairment. Analysis of blood and urine samples taken from the accused at the hospital confirmed the presence of drugs in his system.
- [3] It is not disputed that the accused's vehicle intruded into the oncoming lane and this was factually the cause of the collision. But for the accused's driving in this manner, the collision would not have occurred.
- [4] The primary issues at trial relate to impairment and legal causation; namely, whether the Crown has proven in all the circumstances, beyond a reasonable doubt, that the accused's ability to drive was impaired, and whether it has proven beyond a reasonable doubt that his impaired ability to drive caused the death of the two victims in the collision.
- [5] The Crown's case is based upon observations at the scene and later at Chetwynd Hospital, the hospital where the accused was transported, accident reconstruction evidence, and interpretation of toxicological tests upon hospital samples of his blood and urine. In addition, the Crown led hearsay evidence from the accused's girlfriend, now deceased, which I allowed into evidence under the principled exception to the hearsay rule.
- [6] The accused points to limitations and gaps in the body of evidence before the Court. He suggests that the symptomology observed by witnesses and the accident itself may have been due to causes other than impairment of his ability to drive. He argues that the Crown has not met its high burden of proof and that causation has not been made out.

CREDIBILITY

- [7] I generally accept the testimony of the civilian witnesses and police witnesses who testified as to their observations of the collision scene and the accused. In my view, all were earnest and forthright witnesses who were honestly attempting to relay their observations to the Court. Otherwise, the lay witnesses were not seriously challenged on their observations, and none had issues with their credibility.
- [8] In addition, I generally accept the testimony of the two expert witnesses, Corporal Wessell, the collision reconstructionist, and Jacqueline Mack, the forensic toxicologist. Both were knowledgeable, careful witnesses who gave evidence within the limits of their expertise. The parties disputed the limits and extent of their evidence. However, as with the other witnesses, their evidence was not significantly challenged in cross-examination. The hearsay evidence merits special consideration, which I deal further with below.

CIRCUMSTANCES

- [9] The motor vehicle collision at issue occurred on June 24, 2016. It is agreed to have occurred at approximately 10:50 a.m. The collision involved the accused's 2015 Ram pickup (the "Ram") and a Honda Civic (the "Civic") driven by Ms. Hill. Mr. Taylor was in the passenger's seat. Ms. Hill and Mr. Taylor were killed as a direct result of the collision. The accused was the sole occupant of his vehicle.

The Scene of the Collision

- [10] The area of the collision is located approximately three kilometres outside of Chetwynd on Highway 97, which is the highway that leads to Dawson Creek from Chetwynd. The surrounding area is rural and largely undeveloped.
- [11] The two vehicles collided slightly west of the summit of Wabi Hill. The roadway in this area has three lanes. There are two eastbound lanes going up the hill from Chetwynd towards Dawson Creek and one westbound lane. The westbound lane going towards Chetwynd is extra wide due to a pullout area on the shoulder to the north, further east. The centreline separating the east and westbound lanes is a double solid line, which is a total of 30 centimetres wide. Each yellow line is 10 centimetres wide, and there is a 10-centimetre gap between the two yellow lines. The two eastbound lanes are separated by a broken white line, and there is a white fog line on the outside lanes. All painted lines were visible and in good condition.
- [12] The slope of the hill at the scene of the collision is gradual. There is also a gradual clockwise bend in the road for eastbound vehicles where the collision occurred. A hill covered in vegetation on the interior of the curve partially obstructed visibility through the inside of the curve. Corporal Wessell, who drove the curve several times in each direction, indicated one could see oncoming vehicles from a distance as one travelled around the sweeping curve on the highway, but it would be difficult to discern the exact position of the vehicles from a distance.
- [13] The speed limit in the area is 100 km/hr, having increased from 70 km/hr partway up the hill to the west.
- [14] The two vehicles came to rest on the highway after the collision. The Ram was upside down, facing generally south across the centreline. The Civic also came to rest facing south but straddling the two eastbound lanes.
- [15] The reconstruction evidence discussed further in detail below establishes that the Civic was travelling westbound and the Ram was travelling eastbound. The area of impact was in the westbound lane.
- [16] The weather conditions on the day of the collision were warm, dry and clear. There were no issues with the road surface in the immediate area.

- [17] From the photos of and damage to the vehicles, the collision was clearly a violent one. Both vehicles suffered substantial front-end damage. The damage to the front end of the Civic is catastrophic. The entire front end of the vehicle was displaced rearward, and its roof was buckled up.
- [18] The larger Ram pickup had less but still significant damage to its front end. The hood of the Ram was displaced rearward, and its front end was pushed rearward and downward. The front bumper of the Civic was lodged in the front of the Ram. Airbags in both vehicles were deployed.

Observations by Witnesses at the Scene

- [19] The time of the accident is agreed to have occurred at 10:50 a.m.
- [20] Jonathan Sawchuck was the first witness on the scene that morning. He had been travelling to work. As he travelled eastbound toward Dawson Creek on the highway, he saw the Ram and the Civic crashed on the roadway near Wabi Hill.
- [21] Mr. Sawchuck pulled over and went to look at the two vehicles. He returned to his truck and dialled 9-1-1. After he remained on the phone with the dispatcher, he re-attended the vehicles to check on the occupants.
- [22] Mr. Sawchuck saw a man, whom I find to have been the accused, crawl out of the Ram pickup truck. The accused asked if the people in the other car were okay. Mr. Sawchuck responded that they did not look like it. There was no discussion between them.
- [23] Mr. Sawchuck observed that the accused walked with a limp; however, he did not observe any obvious signs of intoxication or impairment. I find, however, that Mr. Sawchuck's mind was preoccupied with concern for the occupants of the Civic whom he could not help.
- [24] Constable Eric Parent of the Chetwynd R.C.M.P. was the first officer on the scene, arriving at approximately 10:58 a.m. He was a relatively junior officer at the time, having become an R.C.M.P. officer six months earlier.
- [25] Soon after his arrival, Constable Parent observed the accused walking along the highway in the inside eastbound lane. He observed that the accused was not walking straight and had trouble keeping his balance. He had a cut on his right arm but no other visible injuries.
- [26] Constable Parent attempted to engage the accused in conversation about what happened, but his speech was slow and confused as if he had just woken up. Constable Parent could not figure out what the accused was saying. He observed the accused to have a flat and calm affect, in that he showed no emotion. Constable Parent found this to be a departure from other people in collisions he had encountered before or since. They were typically much more emotional, often upset, crying, shaking, or frustrated. The accused was not exhibiting any of those behaviours. His eyes had a stare as if he was "looking right through" Constable Parent.

- [27] Constable Parent also observed the accused to have some blue powder under his nose. There was no seizure or any analysis of this powder, and the evidence in this case does not support a factual finding as to the nature of the substance. Despite the Crown's submission to the contrary, I would discount its significance in this case.
- [28] Constable Parent had the accused sit in his vehicle for safety while he further investigated the vehicles at the scene. He found no signs of life in the occupants of the Civic. Inside the accused's truck, he did not see any pills, medications, or alcohol.
- [29] Jessica Krupp and her partner were the first ambulance attendants on the scene. She had been employed as an emergency medical responder for five months at the time. They were not the crew who dealt with and transported the accused.
- [30] Upon her arrival, she saw a male, whom I find was the accused, talking to a police officer. She was assigned to treat the occupants of the Civic, and her focus was on that vehicle.
- [31] Ms. Krupp also made some limited observations of the accused. She stated that the accused looked like he had been through trauma or shock. His arm was hurt, he was dazed, and he looked overwhelmed.
- [32] At one point, while the accused was walking in the company of an R.C.M.P. officer, whom I find to have been Constable Parent, she saw him staggering and uneasy on his feet. He attempted to walk but was distracted as if he had no focus and was not paying attention to where he was walking. She also described the accused as stumbling at one point. She had no direct dealings with the accused, and she could not form an opinion as to whether he was under the influence of alcohol or drugs.
- [33] Another ambulance crew arrived and dealt specifically with the accused. The ambulance "Patient Care Report," admitted by agreement for the truth of its contents, indicates the accused denied drinking and had no smell associated with ethanol on his breath. It also indicates that the accused staggered to the ambulance as if dizzy. The notes describe him as oriented to time and place but disoriented and seeming to be unaware of the seriousness of the situation. The ambulance crew transported him to the nearby Chetwynd Hospital.
- [34] I would add that Corporal Ruppenthal also attended the scene of the collision, arriving at 11:01 a.m. She did not witness the accused to have difficulty with his walk or balance. However, she did not interact directly with the accused, and her observations were very brief and made from about 50 feet away.

Observation of the Accused at the Hospital

- [35] The accused was taken directly to Chetwynd Hospital. He arrived there at 11:19 a.m. on June 24, 2016. He was turned over to medical staff at approximately 11:30. During his transport, he did not receive any medications.

- [36] At the hospital, Dr. Nicholas Bartell assessed the accused in the emergency wing. I found Dr. Bartell to be highly credible. He was extremely thorough in his examination of the accused, and he was able to relay his meticulous observations to the Court in detail.
- [37] Dr. Bartell observed an odd green powder on the accused's nostril, lips, and the outside of his clothing over his upper torso and forearms. In his experience with dozens of patients from motor vehicle accidents, the powder was not consistent with airbag powder, residue from airbag deployment. Again, however, there is no analysis of the substance, and I would not place any significance on it.
- [38] Upon examination, Dr. Bartell found that the accused had obvious difficulty with a finger-to-nose test. He found the accused's movements to be quite slow. The accused took 10 to 20 seconds to complete the test when a normal person would take a second or two at the most. The accused was able to touch his own nose but not able to touch the doctor's finger without difficulty.
- [39] The accused had an abrasion on his head, abrasions to the upper part of both thighs, and a laceration to his arm. He did not have any other injuries and was ultimately found to have no concern with respect to the possibility of suffering a seizure or a more serious head injury.
- [40] Dr. Bartell had substantial experience dealing with individuals intoxicated by drugs or alcohol and with individuals involved in motor vehicle accidents. The accused's behaviour was unlike anything Dr. Bartell had seen in a car accident patient before or since. The accused was cooperative and followed most directions. But while most car accident patients were talkative, anxious, and worried, the accused was unresponsive, lacked emotion, and had a flat or blunted affect.
- [41] His eye contact was poor. He looked at the ceiling much of the time. Dr. Bartell asked him if the lights were too bright, but he did not answer.
- [42] Dr. Bartell asked the accused several questions to which the accused did not respond. He yawned every two to three minutes. He lacked spontaneous speech and only replied with a simple yes or no answer rather than their nuances that other patients would usually give. He did not exhibit body language such as head nods to show that he was listening.
- [43] Dr. Bartell observed the accused was preoccupied with his phone and repeatedly asked for it every three to five minutes. Once the accused's arm was treated, he saw the accused trying to take the cover off his phone. Dr. Bartell asked him if he needed help, but the accused did not answer. Eventually, one of the nurses turned on the phone for the accused.

- [44] Dr. Bartell ordered urine screening tests. The accused was unable to urinate after three attempts, and samples were then obtained by way of a catheter. The samples were analyzed at the hospital and were positive for fentanyl and benzodiazepines, both of which depress the central nervous system. There was no quantitative analysis performed at the hospital. The hospital tests were screening tests only and merely confirmed the presence of the two types of drugs in the accused's system.
- [45] As Dr. Bartell was confident in his provisional diagnosis of substance intoxication, he discharged the accused at approximately 1:10 p.m.
- [46] Three other witnesses gave evidence as to their observations of the accused at the hospital. Constable Parent had arrived at the hospital just before 1:00 p.m. He stayed outside the room that the accused was in, though he made observations of the accused from the hallway from about five to ten metres away for about 10 to 15 minutes. The accused was not under arrest or detention at this point.
- [47] Constable Parent thought the accused's affect remained very calm. He was not showing any emotions. He was not nervous or shaking. He seemed detached. Constable Parent stated that the accused's speech was slow. He observed that the accused had trouble keeping his balance at one point while standing beside the hospital bed.
- [48] After consulting with Corporal Ruppenthal, Constable Parent arrested the accused at the hospital for impaired driving causing death. He read the accused his Charter rights as well a blood demand and a demand for a drug recognition expert. The accused made a spontaneous statement that the small vehicle drove into his lane.
- [49] Constable Parent then drove the accused to the Chetwynd detachment. The accused had trouble putting his boots on prior to departure. After police dealt with the accused at the detachment, he was processed and later released. The Crown did not lead evidence of further observations or events at the detachment, and no evidence was led from a police drug recognition expert.
- [50] Leona Clark was a licensed practical nurse on duty at the hospital that evening. She was not directly involved in the accused's care, but she made intermittent observations of him from the nursing station, which was nearby the trauma bay. Ms. Clark was aware of the seriousness of the accident the accused had been involved in. In her words, she was curious about the accused because he presented so unusually.
- [51] In Ms. Clark's limited observation, the accused was very quiet and unemotional. His speech was soft, slow, vague and contained. He did not seem present. He did not look around much, and he did not ask for anything. He kept his head down and was preoccupied with his phone. For Ms. Clark, this behaviour was inconsistent with that of other motor vehicle occupants involved in car accidents who are generally much more animated.

- [52] She heard Dr. Bartell questioning the accused in a loud voice and advising the accused that he had just been involved in a car accident where two people died. The accused replied words to the effect of "that's too bad." The accused's demeanour gave the impression he did not realize what happened.
- [53] Nicole Kurjata was a local resident and close friend of the accused's girlfriend, Stephanie Sadler. Ms. Kurjata drove a worried Ms. Sadler to the scene and then to the hospital. Ms. Kurjata was also a friend of the accused. Ms. Kurjata and Ms. Sadler were only at the hospital for about 10 minutes, at about noon or a little later. When asked about the accused's behaviour and demeanour at the hospital, Ms. Kurjata stated he "just looked normal, like messed up, high." She did not exchange any words with him.

Accident Reconstruction Evidence

- [54] Corporal Wessell provided expert evidence in motor vehicle collision reconstruction, including the analysis of speed and airbag control modules. His qualifications were not challenged, and I accepted his expertise in these areas.
- [55] Corporal Wessell was thorough and careful in his analysis. His evidence as to the location of the collision, position and trajectory of the vehicles, and the speed of the vehicles was well-grounded in the physical evidence from the scene, the data retrieved from the airbag control module of the accused's vehicle and common sense. He was cautious in the scope of his conclusions, and his opinions were well-supported. I accept his evidence.
- [56] Corporal Wessell's significant conclusions may be summarized as follows:
- The collision occurred in the single westbound lane. The Civic was westbound at the time of the collision in its proper lane, being the westbound lane. The accused's eastbound Ram was fully or almost completely in the westbound lane at the time of impact.
 - The two vehicles collided almost head-on.
 - There was no roadway evidence of pre-impact braking by either vehicle.
 - The only pre-impact roadway marking was a 5.8-metre long steering scuff mark left by the left front tire of the Ram as its weight was shifting onto the tire before the Ram tripped over its left side as a result of the impact.
 - The steering scuff mark began 2.42 metres from the centreline. As the Ram was 2.01 metres wide, it would have been just over a foot inside the one-foot wide centreline at the start of the mark. There was a displacement in the scuff mark toward the end of the mark made by the sudden movement of the Ram during the collision. The mark at that point was 1.96 metres inside the centreline, meaning that the passenger side of the Ram would have been overlapping with the centreline very slightly, on the wrong side of the road.

- Corporal Wessell could not say for how long the Ram had been driving on the wrong side of the road prior to the collision or what caused the Ram to intrude so substantially into the oncoming lane.

- Observations of the seatbelts indicated that all occupants were wearing their seatbelts at the time of the collision.

[57] Corporal Wessell's report makes note of a rumble strip on the centreline of the highway. A rumble strip over the centreline is visible in some of the photos showing the 20 metres or so to the west before the final rest position of the vehicles. Such features are commonly known to travellers of northern highways in British Columbia as a roadway marking designed to alert inattentive drivers that they are crossing over a line marking. However, when Corporal Wessell testified at trial, he could not say where it started or finished or how long it went on for. Hence, the Crown could not prove that the accused crossed over the rumble strip when it entered the oncoming lane. I therefore do not view the rumble strip as a significant factor in my assessment.

[58] While a power disruption caused a loss of data on the Civic's airbag control module, Corporal Wessell was able to download and interpret data from the Ram's airbag control module. That data was collected and saved, giving an electronic picture of the five seconds prior to an event in which the module sensed airbag deployment might be required.

[59] As an aside, I note that there may be a very slight lag between the collision and the "waking up" of the module. Corporal Wessell thought it might be between 1/100th and 1/10th of a second. However, the module necessarily had to activate almost instantaneously in order to quickly trigger airbag deployment. For present purposes, therefore, I will refer to time stamp zero on the airbag module as the time of impact or time of collision, but I am aware of the nature of the evidence in this regard.

[60] The data from the airbag control module supports the following conclusions of Corporal Wessell.

- The speed of the Ram at five seconds before impact was between 87 and 94 km/hr. Corporal Wessell confirmed this estimate with a calculation using the size and revolutions per minute of the Ram's tires, which indicated a speed of 89 km/hr. He was therefore satisfied that the Ram was travelling within the posted speed limit between 87 and 94 km/hr at the time of the collision.

- The brakes of the Ram were not applied in the five seconds prior to impact; nor was there any indication of the anti-lock braking system on the Ram being engaged before impact.

- The cruise control of the Ram was continuously engaged in the five seconds prior to impact.

- The steering input of the Ram was between seven and nine degrees to the right, between three and five seconds prior to impact, consistent with a gentle turn in the road. The steering was at 20 degrees at 1.6 seconds prior to impact, 43 degrees at one second prior to impact. It then moved sharply further to the right approximately in the second prior to the collision. The last reading was 82 degrees to the right at .1 seconds prior to the impact.
- The accelerator pedal was consistently applied at 33% between five seconds and .8 seconds prior to impact. It then increased sharply and was at 100% at .2 seconds prior to the collision. Corporal Wessell theorized that the accused might have hit the accelerator instead of the brake pedal just prior to the collision.
- The principal direction of force through the Ram was 4.83 degrees off centre, indicating a near head-on collision.

- [61] During the five seconds of data captured before impact, if the Ram was travelling at a speed of 90 km/hr, it would have travelled 25 meters per second or about 125 metres.
- [62] Corporal Wessell was asked in direct examination about other scenarios that could fit the analysis. While he acknowledged that the Ram could possibly intrude suddenly into the oncoming lane, and there was significant uncertainty about the prior movement of the vehicles because of the lack of physical evidence, he opined that a scenario in which the Ram drifted into oncoming traffic was most likely. He was not challenged in cross-examination on his opinion that the most likely scenario was that the Ram somehow drifted into the oncoming lane.

Toxicology Evidence

- [63] Jacqueline Mack is a forensic toxicologist employed by the R.C.M.P. She gave expert evidence on the analysis of body fluids, tissues, edible materials and drug paraphernalia for the presence of alcohol and drugs, and the interpretation of the effects of drugs and alcohol on the human body and human behaviour. As with Corporal Wessell, she was well qualified, and her antecedents were not challenged. I accept her evidence as credible and reliable.
- [64] The samples of the accused's blood and urine taken at Chetwynd Hospital were seized by the police and analyzed by the R.C.M.P.'s forensic lab. Two containers or vials of blood and one vial of urine were analyzed.
- [65] Tests on the containers of blood and urine confirmed the presence of diazepam, nordiazepam, temazepam, and fentanyl in the accused's system. These results were consistent with the hospital lab's screening results. The first three drugs are all benzodiazepines, which depress the central nervous system. Diazepam is also known as Valium. Its purpose is to slow the body down.
- [66] Nordiazepam and temazepam were active metabolites of diazepam. In other words, the second two drugs could have been metabolites produced by the accused's body breaking down the diazepam in his system. Nordiazepam is the main active metabolite of diazepam

and is not sold separately in Canada. Temazepam can be prescribed separately as a sleeping pill, but it is also a minor active metabolite of diazepam and would be seen in smaller doses if present as a metabolite. If a person with these concentrations only took diazepam, the metabolites would prolong but would not add to the overall effects.

- [67] The fentanyl found in the accused's blood was a very low or trace amount not suitable for quantitative analysis to determine its actual concentration. Ms. Mack was not able to say whether this amount of fentanyl in the accused's system was sufficient to affect his ability to drive at the time of the collision. However, she characterized it as a potent narcotic analgesic used medically to control severe pain. It is fast-acting and quickly eliminated. If it did have any effect, it would have had an additive effect to the depression of the central nervous system caused by the benzodiazepines.
- [68] The second container of blood taken from the accused was analyzed quantitatively with the following results: diazepam (992 ng/mL); nordiazepam (909 ng/mL); and temazepam (127 ng/mL). Ms. Mack stated that these concentrations are considered in the high range for therapeutic doses. One source she referenced indicated a therapeutic dose is in the range of 100 to 500 ng/mL, but another source indicated the range can be up to 1000 ng/mL depending upon the purpose for taking the drug.
- [69] Ms. Mack stated that the effects of the benzodiazepines were dose-dependent. At the concentrations in this case, the effects would likely be more significant. However, greater tolerance or long-term experience with the drugs would lessen the adverse effects.
- [70] For the average person at these doses, Ms. Mack would expect significant depression of the central nervous system. A person would have decreased alertness or possibly be inattentive. They could have slow or possibly impaired judgment resulting from processing information slower. They would also have longer reaction times to sudden situations and not be able to respond properly. Such a person could appear more sluggish or sedated, and give the impression of being in a calm state or very relaxed as if nothing bothered them. A person might appear drunk and blink or move slowly. They might be unable to stand up straight or walk a straight line.
- [71] In terms of ability to drive, Ms. Mack opined that she would expect a person with these concentrations of benzodiazepines in their system to be slower to process information, have difficulty perceiving depth, and be unable to maintain their lane positioning. They might take corners too widely or too narrowly, and could respond too late or inappropriately to emergency situations. The likelihood of actual manifestations of these effects would depend on the person's drug tolerance.
- [72] Ms. Mack opined that many of the symptoms observed by Constable Parent and Dr. Bartell, such as difficulties with balance, slow and incoherent speech, inability to verbally respond, flat affect or emotion, are commonly found in persons under the influence of central nerve system depressants such as these benzodiazepines.

The Hearsay Evidence

- [73] After a voir dire, I admitted certain hearsay evidence from Ms. Sadler at trial through the testimony of her close friend, Ms. Kurjata. I found that the statements Ms. Sadler made to Ms. Kurjata were admissible under the principled approach as being necessary and sufficiently reliable to meet the threshold reliability standard set out in *R. v. Khelawon*, 2006 SCC 57 and *R. v. Bradshaw*, 2017 SCC 35. I also indicated that I would assess the ultimate weight of this evidence at trial.
- [74] Both Ms. Sadler and Ms. Kurjata were residents of Chetwynd at the time of the collision. Ms. Sadler passed away in August 2016, two months after the collision. Ms. Kurjata was familiar with the accused as Ms. Sadler's boyfriend. The three frequently hung out together.
- [75] On the morning of June 24, 2016, Ms. Sadler called Ms. Kurjata right after the accused left with concerns about his safety. Ms. Kurjata went over to Ms. Sadler's residence and arrived at approximately 10:00 a.m., though it could have been a little earlier or later.
- [76] When Ms. Kurjata arrived, Ms. Sadler was "kind of freaking out" and wanted to smoke a marijuana cigarette to calm down. Ms. Sadler told Ms. Kurjata the following:
- the accused had just departed;
 - the accused had stayed over at her house the night before;
 - they had stayed up "all night" doing drugs on and off to get high;
 - she was taking part with him, but not to the same extent;
 - she believed the accused kept doing drugs after she fell asleep;
 - she did not think the accused could make it to Fort St. John;
 - the accused had trouble keeping his eyes open, kept drifting off, and was stumbling so bad he could barely walk. He had no business driving;
 - she feared the accused might hurt himself because he had a car accident the month prior, and she was worried the accused might hurt someone else because of his condition; and
 - she begged the accused not to drive, but he would not listen to her.
- [77] Within the first 10 minutes of her arrival, Ms. Sadler showed Ms. Kurjata a pill bottle. Ms. Sadler said it was Valium, and the accused had basically taken the whole bottle. The pill bottle Ms. Sadler held up was either empty or perhaps had one pill left. Ms. Sadler said she had only taken "just a couple."
- [78] Ms. Sadler said there should have been 30-36 pills in the bottle, and there were none left. She had thought overnight he had only taken five or six, but when she looked in the morning, they were all gone. Ms. Kurjata described Ms. Sadler as worried and scared he was going to overdose and for his safety. Ms. Kurjata had never seen Ms. Sadler that worried.

- [79] With respect to the weight to be accorded to Ms. Sadler's narrative, there are no concerns or challenges with respect to her sincerity, but there are concerns with respect to the accuracy and the reliability of her account. She consumed two Valium pills herself the previous night and was largely inferring how much Valium the accused had taken.
- [80] Ms. Sadler's consumption of Valium undermines the weight of her evidence to a degree, but I find that Ms. Sadler did not consume a great deal of intoxicants. Further, her observational evidence of the accused is consistent with the toxicological evidence and with what others observed as to the accused's symptomology at the scene and at the hospital.
- [81] Her opportunity to observe is an open question in that she went to sleep and merely inferred when she woke up that the accused had consumed all the Valium. Ms. Sadler related that they kept passing out and waking up. I take these limitations into account in assessing the weight to be applied to her testimony.
- [82] I therefore generally accept the evidence of Ms. Sadler as to the apparently significant but unknown level of consumption by the accused of Valium overnight and her observation of impairment prior to his departure from her residence just prior to the collision. However, while I accept this evidence, concerns of accuracy and reliability limit the overall weight I would place on this evidence.

PRINCIPLES OF LAW

Proof of Impairment

- [83] The accused is charged with two counts of operating a motor vehicle while his ability to operate the vehicle was impaired by alcohol or drug contrary to s. 255(3) of Criminal Code. Section 255(3) was the penalty provision at the relevant time for impaired driving causing death and incorporated by reference s. 253(1)(a), which is in issue here.
- [84] Section 253(1)(a) of the Criminal Code, which has since been repealed and replaced, provided as follows at the time of the alleged offence:

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 . . .

- [85] The mens rea for driving while impaired is the intent to drive a motor vehicle after the voluntary consumption of alcohol or a drug: R. v. Toews, [1985] 2 S.C.R. 119 at 124. Proof of the actus reus creates a rebuttable presumption as to the proof of mens rea: R. v. King, [1962] S.C.R. 746 at 763.

[86] The leading case on the proof of impairment is *R. v. Stellato* (1993), 78 C.C.C. (3d) 380 (O.N.C.A.), aff'd [1994] 2 S.C.R. 478 [Stellato]. At 384, the Ontario Court of Appeal set out the relevant test as follows:

In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out. The impairment may range from slight to great: *R. v. Stellato*, [1994] S.C.J. No. 51.

[Emphasis added.]

[87] The Alberta Court of Appeal commented on the *Stellato* decision as follows in *R. v. Andrews*, 1996 ABCA 23 [Andrews], where it set out the following principles at para. 31:

- (1) the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;
- (2) there must be impairment of the ability to drive of the individual;
- (3) that the impairment of the ability to drive must be caused by the consumption of alcohol or a drug;
- (4) that the impairment of the ability to drive by alcohol or drugs need not be to a marked degree; and
- (5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.

[Emphasis in original.]

[88] The court in *Andrews* addressed the weighing of circumstantial evidence as follows:

[33] The test of weighing circumstantial evidence of conduct in support of an inference of impairment of ability to drive has not changed to mean that equal weight should be attributed to conduct which indicates a marked departure from normal conduct and conduct which indicates a slight deviation from normal conduct. That would have the practical effect of lowering the standard of proof of the offence. It is not deviation from normal conduct, slight or otherwise, that is in issue. What is in issue is the ability to drive. Where circumstantial evidence alone or equivocal evidence is relied on to prove

impairment of that ability, and the totality of that evidence indicates only a slight deviation from normal conduct, it would be dangerous to find proof beyond a reasonable doubt of impairment of the ability to drive, slight or otherwise.

[Emphasis added.]

[89] Impairment as the cause of an accident can be inferred from the evidence: *R. v. Boomer*, 2001 BCCA 220. As noted in *R. v. Berry*, 2001 BCSC 454, quoting *R. c. Laprise* (1996), 113 C.C.C. (3d) 87 at 92 (Que. C.A.):

[25] . . . the Crown has a variety of means of proving impairment, including evidence of the accused's driving, observations such as the smell of alcohol, unsteadiness, or glassy eyes. A blood test may corroborate those observations but does not permit its own inference except where an expert has established a correlation between the blood test result and the possible impairment.

[90] In addition to the above principles, I would add the caution in *Andrews* set out by the court at para. 25 as follows:

[25] Impairment is a question of fact which can be proven in different ways. On occasion, proof may consist of expert evidence, coupled with proof of the amount consumed. The driving pattern, or the deviation in conduct, may be unnecessary to prove impairment. More frequently, as suggested by *Sissons C.J.D.C. in McKenzie*, proof consists of observations of conduct. Where the evidence indicates that an accused's ability to walk, talk, and perform basic tests of manual dexterity was impaired by alcohol, the logical inference may be drawn that the accused's ability to drive was also impaired. In most cases, if the conduct of the accused was a slight departure from normal conduct, it would be unsafe to conclude, beyond a reasonable doubt, that his or her ability to drive was impaired by alcohol. Put another way, as was done in *Stellato*, the conduct observed must satisfy the trier of fact beyond a reasonable doubt that the ability to drive was impaired to some degree by alcohol. *McKenzie* does not state a rule of law. It suggests a reasonable, common sense approach to the assessment of evidence necessary for proof. . . .

[Emphasis added.]

Proof of Causation

[91] The Crown must prove beyond a reasonable doubt that the wrongful act of impaired driving is a contributing cause of the death or bodily harm beyond the level that could accurately be described as minimal or insignificant: *R. v. Andrew* (1994), 91 C.C.C. (3d) 97 at 119 (B.C.C.A.) [Andrew]; *R. v. Gentles*, 2016 BCCA 68 at para. 14 [Gentles]. The test adopted in *Andrew* is based upon the standard expressed in *R. v. Smithers* (1977), [1978] 1 S.C.R. 506 [Smithers].

[92] In *Andrew* at 120, the court concluded as follows:

. . . Accordingly, I am satisfied that, so long as one bears in mind the distinction between a motorist driving in an impaired condition who is involved in an accident, and the motorist driving in an impaired condition whose impaired driving ability (as evidence by driving conduct, or failure to react or to make a certain judgment) comprises a contributing cause outside of the de minimis range to the victim's bodily harm or death, the Smithers test is appropriate to apply to the offences under s. 255(2) and (3): See *R. v. Power*, April 14, 1994, 23566 (S.C.C.) [since reported 89 C.C.C. (3d) 1, [1994] 1 S.C.R. 601, 29 C.R. (4th) 1].

[Emphasis in original.]

- [93] The result in *Andrew* was that the majority dismissed a defence appeal from conviction where the expert evidence of the effect of alcohol on a driver, along with the pattern of irrational driving, was sufficient to sustain the trial judge's finding of causation: *Gentles* at para. 15.
- [94] Since *Andrew*, the test for legal causation has been restated as whether the Crown has proven that the actions of the accused "were a significant contributing cause of the deaths and injury, or 'at least a contributing cause outside the de minimis range'": *R. v. Hughes*, 2011 BCCA 220 at para. 64 [*Hughes*]; *R. v. Nette*, 2001 SCC 78 at paras. 70-71; *R. v. Maybin*, 2012 SCC 24 at paras. 28-29.
- [95] In *Gentles*, a Crown appeal was dismissed where, despite a finding that the respondent had an excessive blood-alcohol level, the trial judge found that the collision was unavoidable because the victims walked into the path of the respondent's vehicle when it was almost upon them, and he had insufficient time to stop. Similarly, in *R. v. Zotich*, 2018 BCSC 1735 para. 57, Madam Justice Dillon held that "the fact of an accident itself does not prove that it was caused by impairment . . . If the accident was unavoidable, then causation has not been proven."
- [96] The impaired condition of the driver need not be the only cause of the accident. The Smithers test does not restrict the test for factual causation to the most proximate, the primary, or only cause of death. The law only requires that the impairment be a significant contributing cause of the deaths or injury, or that they were at least a contributing cause beyond the "de minimus" range: *R. v. Forward* (1998), 110 B.C.A.C. 130 at para. 13 (C.A.); *Hughes* at paras. 59-60, 64.

ANALYSIS

Was the accused's ability to drive impaired?

- [97] While the Crown suggests the accused's ability to drive was impaired, counsel for the accused submits the Crown's case has not met the requisite standard of proof in this regard. Keeping in mind that the burden of proof remains on the Crown, counsel suggested that the accused's symptoms could be due to other causes such as having been through a horrific accident with little warning that resulted in shock-related symptoms. Indeed, some of the

witnesses such as Ms. Krupp, the ambulance attendant, and Ms. Clark, the nurse, used the words "shock" or "confused" to describe the appearance and behaviour of the accused. I would therefore carefully consider the possibility that the accused was suffering some sort of confusion or impaired functioning as a result of the physical and psychological trauma of the collision.

- [98] Both Constable Parent and Dr. Bartell, the two individuals who dealt closely with the accused, observed what could be obvious signs of intoxication on the part of the accused. I accept the observational evidence in part because they had the best opportunity to observe the accused.
- [99] Constable Parent observed the accused to be unsteady on his feet, unable to walk in a straight line, unresponsive to questioning, speaking slowly, unemotional, looking past Constable Parent and seemingly unaware of the seriousness of the situation. Constable Parent stated comparatively that many people in car accidents want to tell him what happened. He found the accused's speech and emotions to be slower than what he typically saw. Constable Parent described the accused as neutral about what happened.
- [100] Dr. Bartell, who was a careful witness experienced with accident victims and intoxicated individuals, stated that the accused took an unusually lengthy amount of time to perform a simple finger-to-nose test. He observed the accused to have a flat affect atypical of other persons he had treated who had been involved in major collisions. The accused was often unresponsive, stared at the ceiling, and walked with an unsteady gait.
- [101] The ambulance crew that dealt with the accused observed him to stagger to the ambulance as if dizzy. They noted him to be in a state of disorientation, unaware of the seriousness of the situation. The word "shock?" was written on the patient care report filled out by the ambulance attendant.
- [102] The possibility of shock or profound psychological impact was put to Dr. Bartell. He stated that he found no signs of stress in the accused, no shaking or increased blood pressure. He found the accused's presentation to be inconsistent with an acute stress reaction. In acute cases, patients would shut down, be unable to verbalize, and would not be able to give time and place. Here, the accused was oriented to time and place and could follow basic commands. As with Constable Parent, Dr. Bartell said that car accident patients were often anxious and worried with quicker respiratory rates. But the accused was the opposite: his reactions were slowed and blunted from what he had seen in other patients that had been through serious accidents.
- [103] Dr. Bartell's lay opinion is admissible despite not being qualified as an expert, and he thought that the accused was intoxicated by drugs. He was sufficiently confident with the diagnosis that he did not send the accused for a CAT scan or make further recommendations for follow-up treatment. However, he acknowledged that one of the nurses issued head injury instructions to the accused upon his release from the hospital.

- [104] Ms. Kurjata, who knew the accused well, thought the accused in her brief observation looked "normal, like messed up, high." This statement is somewhat contradictory, but I interpret it as indicating the accused was intoxicated, in her opinion. She was not challenged in cross-examination on this point.
- [105] The toxicology evidence indicates that the accused had high levels of central nervous system depressants in his system. These depressants would slow down brain activity and all nervous system functions, including any voluntary muscular action and reaction time. The accused's observable behaviour at the scene and at the hospital was entirely consistent with the toxicology evidence.
- [106] Ms. Mack indicated, and I accept, that the drug concentrations in the accused's blood could result in an individual having a decreased level of alertness, slowed or impaired judgment, and a longer reaction time or an inappropriate reaction in a sudden situation. The effects could include being unable to maintain lane positioning and drifting into the oncoming lane.
- [107] As Dr. Bartell noted, the accused's motor coordination problems are not easily explainable by other causes. In addition, while the accident itself was serious, the accused's relatively minor injuries and lack of medically significant signs of head trauma do not support a psychological or concussion-related explanation for his observed symptomology. I have no evidence of physical impairment, fatigue or significant physical injury that would reasonably explain the accused's unusual symptoms and behaviour observed by onlookers.
- [108] Moreover, I find that there are no alternative explanations that could reasonably account for the bulk of the accused's symptomology observed at the scene and at the hospital. As noted, while the accused's vehicle did roll over, and he appears to have had a minor abrasion on his scalp, Constable Parent, the ambulance crew, and Dr. Bartell were all unable to observe significant signs of head trauma. The accused did not complain of concussion-related symptoms, and the symptoms he did have were not consistent with what Dr. Bartell had observed in other people suffering from head injuries or acute stress reactions. Constable Parent's comparative observations were to a similar effect. While one might possibly ascribe other causes to certain individual symptoms in isolation, I find that the totality of the accused's unusual symptoms and behaviours to be inconsistent with alternative explanations.
- [109] Together, the evidence establishes a compelling inference that the accused's motor coordination, attention span, and ability to walk, think and speak clearly were significantly impaired by drugs when he was at the scene and at the hospital. This evidence indicates the accused was at least moderately impaired at the time due to his consumption of benzodiazepines, possibly in conjunction with fentanyl.

- [110] These impairments would have adversely impacted his ability to drive a motor vehicle at the time of driving. The accused's ability to observe, focus and react were clearly diminished. He did not appear to be thinking in a normal fashion, and his ability to concentrate on the task of driving was adversely compromised.
- [111] In addition, I have no evidence to rebut the normal presumption that the accused's impaired condition was voluntarily induced.
- [112] I therefore draw the inference in all the circumstances that the accused's ability to drive a motor vehicle was impaired by the voluntary consumption of drugs at the time of the collision.
- [113] I would add that I find it unnecessary to rely on the hearsay evidence of Ms. Sadler to reach these conclusions. However, that evidence only serves to further circumstantially strengthen the inculpatory conclusions as to the accused's impairment at the time of the collision and to rule out any alternative explanations such as emotional shock.

Was the accused's impaired driving ability a significant contributing cause of the collision?

- [114] I turn to the issue of whether the accused's impaired ability to drive was a significant contributing cause of the collision that resulted in the deaths of the two named victims. The collision must be established as a significant contributing cause of the deaths, or at least a contributing cause outside the de minimus range.
- [115] I take into account the lack of evidence of a lengthier pattern of improper driving that could assist in establishing causation: *R. v. Zotich*, 2018 BCSC 1735 at para. 60. Apart from the 5.8-metre steering scuff mark, which was made very late in the sequence, there is no roadway evidence of a pre-collision driving pattern by the accused. There is no evidence of swerving or speeding or how long the accused's vehicle would have been driving on the wrong side of the road. The accused's speed of approximately 87-94 km/hr was within the posted speed limit and was appropriate for the roadway conditions.
- [116] In order to get on the wrong side of the road, the accused's truck would have had to cross the bright yellow double solid line. That centreline exists as a solid double line for a substantial distance prior to the gentle curve at the top of the hill. The two yellow lines were about a foot wide in total, including the gap between them.
- [117] Moreover, at the start of the steering scuff mark, the accused's vehicle would have been in the oncoming lane by at least a foot, though it was moving slightly back toward the centreline. At the collision point, the accused's vehicle was still almost completely in the oncoming westbound lane. It was not in its own lane as it should have been.
- [118] I turn to other factors. The bend in the road that the collision occurred on is a sweeping one. The slope of the turn was described as a gentle one that is not particularly demanding. Constable Parent indicated that the area where the collision occurred does not attract an unusually large number of collisions.

- [119] The conditions on the morning of June 24, 2016, were ideal for driving. The roadway was dry. There was no indication of ice, oil, or slippery conditions. It was a clear, warm day, and the lighting was excellent.
- [120] The width of the eastbound lanes in this area was described as average for highways in British Columbia. The westbound lane was wider than usual.
- [121] The roadway markings, such as the double solid yellow line, were clear and visible from a distance.
- [122] The Civic was a bright blue colour and was equipped with daytime running lights. The gradual turn and the vegetation on the inside of the curve would have obstructed the view of the Civic from a great distance but, as the vehicles approached each other, there should have been no difficulty perceiving its presence, even from a substantial distance away.
- [123] I do not agree with the submission that visibility of oncoming traffic from either direction would be very difficult. The photos taken at the scene do not support that submission, and in any case, a driver would reasonably expect there might be oncoming traffic in the oncoming lane as one rounded the curve.
- [124] Nor am I convinced by the argument that the driver of the Civic also apparently failed to avoid the collision. The Civic was not in the wrong lane, and I therefore do not assign significance to its failure to take avoidance measures.
- [125] Both vehicles were mechanically examined. Neither was found to have any mechanical defects that may have contributed to the collision.
- [126] I have no evidence to support the accused driving into the oncoming lane or losing control over his vehicle for an independent reason. Corporal Wessell in direct examination attempted to speculate about other reasons for the accused's vehicle being in the westbound lane but could not come up with plausible explanations consistent with the physical evidence and airbag data. No reasonable alternative explanations were explored with Corporal Wessell in cross-examination.
- [127] I have considered, for instance, whether the accused was attempting to pull into the pullout area on the north side of the road. This area would have been on the opposite side of the road up ahead of the accused's path. However, the path of the accused's vehicle and mechanical inputs are not consistent with such a possibility.
- [128] In the third, fourth, and fifth seconds prior to the collision, the data capturing mechanical inputs from the airbag control module in the Ram is largely unremarkable. The Ram was on cruise control, but the modest steering, steady speed, engagement of the cruise control system and lack of braking betrayed no sign of an unexpected event the accused was trying to cope with, a hazard that would have caused him to suddenly steer so substantially into the oncoming lane, or an emergency manoeuvre until the last second or second-and-a-half.

- [129] Hence, I cannot find support for another reasonable explanation for the accused's considerable failure to confine his vehicle to its own lane, which clearly led to the collision. On the other hand, the evidence is entirely supportive of inadvertent driving in the form of drifting substantially into the oncoming lane and failing to notice the oncoming Civic until it was far too late.
- [130] As there is no supportable evidence of another possible explanation compatible with sobriety for the collision, alternative explanations merely amount to speculation. However, even if I found that the accused did enter the oncoming lane for some reason independent of his impairment, a normal driver should have been alerted to and able to mitigate such a significant intrusion into oncoming traffic, and then slow down or steer to attempt to avoid the collision at a much earlier point. The accident data makes clear that in the five seconds prior to impact, the accused was inadvertent to the hazard he had created and did not take any corrective action until it was far too late. I am therefore compelled by common sense and inescapable inference to find that the accused's impaired condition was at least a significant contributing cause of the collision.
- [131] On the whole of the evidence, including the lack of evidence in some areas and the limitations in the available evidence, I find that the collision that resulted in the deaths of Ms. Hill and Mr. Taylor was substantially caused by the accused's impaired ability to drive brought on by his consumption of drugs. I would reject other possible causes of the collision as speculative and unsupported by the evidence.

CONCLUSION

- [132] Having considered all of the evidence, including its limitations and the absence of evidence in certain areas, I am satisfied beyond a reasonable doubt that the accused drove his vehicle while his ability to drive a motor vehicle was impaired.
- [133] Having ruled out other possible causes as unsupported on the evidence, I am also satisfied beyond a reasonable doubt that the accused's impaired ability to operate a motor vehicle was at least a significant contributing cause of his striking of the Civic and the deaths of Ms. Hill and Mr. Taylor. In fact, I find that the accused's impaired ability to drive was the substantial cause of his crossing over the centre line, failing to take evasive measures and ultimately impacting with the oncoming vehicle occupied by Ms. Hill and Mr. Taylor.
- [134] Stand up, Mr. Macdonald.
- [135] On Count 1, I find you guilty of impaired driving causing the death of Danielle Hill.
- [136] On Count 2, I find you guilty of impaired driving causing the death of Shawn Taylor.
- [137] You may be seated.

"Brundrett J."

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Prepared on 29 October 2026 · Esheria