
CANADA / JUDGMENT

R. v. McConnell

2008 BCSC 505

COURT

Supreme Court of British Columbia

DECIDED

25 April 2008

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2008 BCSC 505 R. v. McConnell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McConnell,

2008 BCSC 505

Date: 20080425

Docket: 24044-2

Registry: Vancouver

Between:

Regina

And

Jennifer Allison McConnell

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Crown

M. O'Shaughnessy

Counsel for the Defendant

O. Butterfield

Date and Place of Trial/Hearing:

March 25 to April 3, 2008

Vancouver, B.C.

INTRODUCTION

- [1] Ms. McConnell is charged with impaired driving causing bodily harm contrary to s. 255(2) of the Criminal Code, R.S.C. 1985, c. C-46, (Count 1), dangerous driving causing bodily harm contrary to s. 249(3) of the Code (Count 2), and having the care and control of a motor vehicle when her blood alcohol ratio exceeded 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(b) of the Code (Count 3). The events giving rise to these charges occurred in the early morning hours of October 2, 2005 on Highway 99 just outside of Pemberton, British Columbia.
- [2] Ms. McConnell admits that she was driving a 1992 blue Toyota Tercel in the early morning hours of October 2nd and that she had a passenger with her named Kara Ross. She also admits that the Toyota was involved in an accident on Highway 99 and, as a result of the accident, Ms. Ross was ejected from the Toyota and sustained injuries constituting bodily harm as defined by ss. 249(3) and 255(2) of the Code. Speed does not appear to be a factor in the accident. There is no evidence to suggest that Ms. McConnell was travelling in excess of the posted speed limits or at a speed that was unsafe for the road conditions at the time of the accident.
- [3] Ms. McConnell objected to the admissibility of the certificate of analysis obtained in regard to her blood alcohol level at the time of the offence on the ground that the taking of the blood sample violated her rights under s. 10(a) and (b) of the Canadian Charter of Rights and Freedoms. The court therefore heard evidence in a voir dire to determine its admissibility.
- [4] The defence also objected to the admissibility of two statements made by Ms. McConnell (the first one made at her home on the evening of October 2nd and the second one made on the evening of October 3rd at the Pemberton RCMP station) on the ground that the Crown had failed to prove the statements were voluntary. Lastly, and in the alternative, the defence objected to the admissibility of the certificate of analysis on the ground that the demand was not made as soon as practicable within the meaning of s. 254(3) of the Code. The court also heard evidence in a voir dire to determine whether the Crown had satisfied its burden of proof in regard to the voluntariness of the statements and whether the evidence established beyond a reasonable doubt that the demand was made as soon as practicable.
- [5] At the conclusion of submissions on the admissibility of the evidence heard on the voir dire, I made the following rulings with reasons to be given at the time of this judgment:

... I am satisfied that PC Gallop made the demand for a blood sample "as soon as practicable" within the meaning of s. 254(3) of the Code notwithstanding the officer could have chosen to make the demand at the accident site and contiguous with forming her opinion that there were reasonable and probable grounds to believe that Ms. McConnell was impaired. Tending to Ms. McConnell's obvious injuries was clearly a priority and the officer properly chose to ensure her safety and well being before turning her mind to the question of obtaining a breath or a blood

sample.

I am also satisfied, however, that in administering the blood demand and providing an explanation of her Charter rights, and in particular the right to speak to and instruct counsel without delay, PC Gallop violated Ms. McConnell's rights under s. 10(a) and 10(b). These breaches include:

- (a) A failure to advise Ms. McConnell the extent of her jeopardy by limiting the reason for detention to an investigation for impaired driving when it is apparent from the evidence that Ms. McConnell was unaware of the prospect of more serious charges and knew nothing of any harm to Ms. Ross or anyone else, and that PC Gallop was aware there was a passenger who had suffered injuries in the accident of sufficient severity that she required an ambulance or because she failed to exercise due diligence in regard to determining the state of the passenger's injuries. This breach of s. 10(a) led to a breach of s. 10(b) in that Ms. McConnell was unable to make an informed decision about whether to contact a lawyer before providing a blood sample.
- (b) A failure to ensure Ms. McConnell understood her Charter rights and in particular the right to counsel before proceeding to have the blood sample taken when the circumstances strongly suggested that Ms. McConnell did not understand her rights and required a further explanation as to the nature and consequences of the demand for blood samples, the jeopardy she faced, and the right to speak to counsel without delay.
- (c) By failing to provide Ms. McConnell with a reasonable opportunity to decide, after being fully informed of her charter rights and the extent of her jeopardy, whether she wished to speak to a lawyer, before proceeding to have the blood samples taken.

Having concluded that the blood samples were taken in violation of Ms. McConnell's rights under s. 10(a) and (b), and that this is conscripted evidence, I find the circumstances indicate a flagrant and serious violation of her rights, and balancing the relevant factors under s. 24(2), I must conclude the evidence of the blood samples contained in the certificate of analysis should be excluded from the trial, apart from providing evidence that on the night of the accident Ms. McConnell had consumed alcohol.

I am satisfied that the statement made by Ms. McConnell at her home in the presence of Mr. Bissell and PC Gallop has not been proven to be voluntary because the evidence does not establish an accurate record even in summary form of the extent of the statements made by the officer, Mr. Bissell, and the accused. I am also satisfied that the statement made by Ms. McConnell is inadmissible on the ground that it was elicited under a misapprehension of the nature of the police investigation. In particular, by the fact that PC Gallop failed to advise Ms. McConnell that the police investigation was now broadened to include impaired and dangerous driving causing bodily harm and, further, because PC Gallop actively misled her by stating the investigatory interview was confined to impaired driving.

I find the Crown has satisfied the burden of proving the subsequent warned statement was voluntary. I do not agree that the fact that the first statement has not been proven voluntary and was tainted by the misinformation given to Ms. Mc Connell continues to taint the second statement in light of all of the circumstances, including the clear re-issuing of the police warning and right to silence, the proper description of the extent of her jeopardy, and the re-iteration of the right to counsel.

- [6] As a consequence of these rulings, the certificate of analysis and the statement made by Ms. McConnell at her home were determined to be inadmissible. The DVD and the transcript of the warned statement were entered as part of the evidence in the trial. The parties agreed that the certificate of analysis could be considered for the limited purpose of establishing that Ms. McConnell had consumed alcohol on the night of the offence.
- [7] Based upon this ruling and, after considering the evidence and submissions of Crown and Defence in regard to the substantive offences, I find the accused not guilty on all three counts in the Indictment. I will set out the events chronologically and address the evidence included in the voir dire separately. I will then provide reasons for excluding the evidence as described above and, based upon the admissible evidence as a whole, explain why I determined that the Crown had not proven its case beyond a reasonable doubt.
- [8] CHRONOLOGY AND SUMMARY OF THE EVIDENCE
- [9] Ms. McConnell and her boyfriend, Colin Bissell, were living in Pemberton at the time of the offence. Mr. Bissell had purchased the Toyota in North Vancouver a few days before the accident and had driven it back to Pemberton. Before buying the vehicle Mr. Bissell did not have it inspected by a mechanic; however, he believed the Toyota dealership where he purchased it normally put their used cars through a thorough check because of what he had been told by their salesman. Mr. Bissell had not experienced any problems with the brakes or steering but he had not specifically checked tire pressure before October 2nd. Ms. McConnell had driven the Toyota to Whistler on September 30th to do some banking and earlier in the day on October 1st.
- [10] October 1st was a Sunday and Mr. Bissell and Ms. McConnell were planning to attend the closing party for a local restaurant / pub located in Pemberton called the Pony Express. This establishment had been open for many years and it was anticipated that there would be a large crowd at the closing party. The liquor licence permitted up to 400 people and the police noted at various times throughout the evening that there were over 375 persons in attendance.
- [11] Before going to the party Ms. McConnell and Mr. Bissell, along with their two roommates, Rohan Gillespie and James Bissell, entertained some friends at their apartment. In addition to some neighbours, Ms. McConnell invited her friend, Ms. Ross, to join them. Ms. Ross arrived with a bottle of wine. Mr. Bissell testified that he drank beer and whiskey while at the apartment but could not say if Ms. McConnell had consumed alcohol because she spent most of the time in the bathroom with Ms. Ross getting ready to go to the Pony Express. Ms.

McConnell's statement to the police indicates that she drank "a beer and a wine" at some time prior to the accident, but she cannot recall when she consumed this alcohol.

- [12] Between 9:30 pm and 10:30 pm everyone at the apartment left on foot heading for the Pony Express which was located only one or two blocks away. En route, the group was stopped by the police and those carrying beer were directed to empty their bottles. Ms. McConnell was not carrying any beer or other alcoholic beverages at this time.
- [13] Ms. McConnell's statement indicates that she has no clear recollection of what she did or drank while at the Pony Express. She recalled that the party was very crowded and that the people were "hyper and hectic." Mr. Bissell was also unable to say what Ms. McConnell did or consumed at the party because he did not spend any time with her there. Although Mr. Bissell agreed he gave a statement to the police several months after the accident that indicated a belief that Ms. McConnell had consumed six or seven drinks at the Pony Express, he did not confirm that this was accurate, that this was his current recollection, or otherwise adopt this statement as true.
- [14] At some point during the evening, Ms. McConnell and Ms. Ross left the Pony Express without Mr. Bissell and their other friends and returned to the apartment. Ms. McConnell retrieved the keys to the Toyota, got into the vehicle with Ms. Ross in the front passenger seat, and backed it out of the carport. To get the Toyota out of the carport Ms. McConnell had to manoeuvre it around Mr. Gillespie's vehicle which was parked immediately behind her and avoid striking the walls of the carport on either side of the vehicles. Because the carport was only wide enough for one vehicle, there was very little space on either side in which to accomplish this manoeuvre. Ms. McConnell drove out of Pemberton and headed in the direction of Mt. Currie on Highway 99.
- [15] A few minutes before midnight on October 1st, Mr. Smith and Ms. Thevargue were heading home to Darcy after a day trip to Vancouver. They stopped at the Shell station in Pemberton for a drink and a rest. Ms. Thevargue was driving and Mr. Smith was in the front passenger seat. They were both very tired after such a long trip and Mr. Smith had been up early that morning at 4 am. They left the Shell station about fifteen minutes after midnight and on the way out of Pemberton Mr. Smith believed he saw a vehicle coming down the hill toward them on the wrong side of the street. He is unable to say that this vehicle was the Toyota driven by Ms. McConnell and there is some doubt about his ability to see a vehicle in the stated location from his particular vantage point. Mr. Smith also told ICBC in a statement given after the accident that the first time he saw Ms. McConnell's vehicle was on Highway 99 about 500 metres north of the Shell station.
- [16] Once on Highway 99 heading toward Mt. Currie, Mr. Smith testified that while travelling along the straight stretch of road before the Lillooet River Bridge he noticed a vehicle behind them had its high beams on and that this vehicle crossed over the centre line into the lane for on-coming traffic. There is no dispute that this was the Toyota driven by Ms. McConnell. A truck behind the Toyota flashed its lights and Ms. McConnell moved back into the proper

lane of travel. The truck following behind Ms. McConnell exited the Highway at Clover Road, which is located halfway along the straight stretch of road before the bridge. There was now no other traffic except these two vehicles.

- [17] According to Mr. Smith, the Toyota was not speeding but it again wandered into the on-coming lane of traffic just before the bridge. This time, Mr. Smith testified, the vehicle went so far into the on-coming lane that it hit the dirt shoulder and this was apparent because the headlights jerked as it struck the loose gravel. In cross-examination, Mr. Smith agreed that in the preliminary inquiry he testified that "he could see a puff of dust" which indicated the vehicle hit the shoulder, and that in retrospect it was not possible for him to see this in the dark.
- [18] While travelling over the bridge Mr. Smith testified the vehicle crossed over into the oncoming lane once again and this time wandered so far to the left that it almost hit the bridge railing to the left of the white fog line. When the vehicle came off the bridge it was in the correct lane. Ultimately, he agreed that after the bridge her vehicle was always seen in its own lane.
- [19] After the bridge there is a long sweeping right turn before the Pemberton Farm Road East intersects with Highway 99. Mr. Smith lost sight of the vehicle for a short time while in this curve and then saw it take a wide turn at the Pemberton Farm Road East intersection ending up in the oncoming traffic lane. After some three to four seconds of driving in the wrong lane, he noted that the vehicle came back into the proper lane of travel. In cross-examination, Mr. Smith agreed that during the preliminary inquiry he testified that there were only three instances of crossing into the oncoming lane of travel; two before the bridge and one on the bridge. He also agreed that at the preliminary inquiry he testified that from the bridge onward he did not see the vehicle go outside its own lane of travel. Mr. Smith acknowledged his recollection was likely better at the earlier preliminary inquiry and that he cannot be certain that the vehicle swerved out of its lane after the bridge.
- [20] Mr. Smith also agreed that his evidence at trial, that the three swerves into the oncoming lane were all of the same severity, was inconsistent with his evidence at the preliminary inquiry. In this regard, at the preliminary inquiry he testified that the first swerve was less severe than the others because the vehicle did not come close to the ditch at all. Again, Mr. Smith acknowledged that his recollection was likely better at the earlier preliminary inquiry and that his recollection had faded over time.
- [21] Mr. Smith testified that Ms. Thevarge was travelling under the posted speed limit of 80 kilometres per hour, except once when he asked her to speed up after the bridge. When this occurred, Ms. McConnell got further behind because she was driving slower. He also believed that Ms. McConnell was keeping a safe distance away and at no time did anything to put them at risk.

- [22] After the Pemberton Farm Road East intersection there is a left curve in Highway 99. The roadway is very dark at this point because it is surrounded by trees and there are no street lights or light from nearby houses. As Mr. Smith and Ms. Thevarge approached this blind, dark, left hand curve, they were startled by a large, one ton flatbed truck with a trailer, which had dual wheels, and large square headlights. This truck came towards them in the opposite lane at an estimated speed of 100 kilometres per hour or faster on an inside corner that has a cautionary speed advisory. The truck was described by Mr. Smith as having a very wide back end and wide side view mirrors. Even though the truck stayed inside its lane Ms. Thevarge was frightened by it and slowed down. The small size of their vehicle accentuated the brightness of the truck's headlights. According to Mr. Smith, Ms. Thevarge also steered toward the right side of her lane as a defensive reaction. She does not recall this movement. Mr. Smith agreed that Ms. McConnell would have had the same reaction to the speeding truck particularly because hers was also a small car.
- [23] Just as the truck passed them, Mr. Smith looked back and saw Ms. McConnell's car's rear end slide into the ditch on the passenger side, upend when it hit a paved driveway, and flip over back end to front end with the entire vehicle in the air. As it completed this movement, an object was ejected from the windshield, and then the vehicle rolled at least twice, rolling over the object on the road, and coming to a stop straddling both lanes of travel. The truck did not stop after the accident. In cross-examination, Mr. Smith agreed that Ms. McConnell lost control of her vehicle just as the truck passed it. He also agreed that it was obvious her judgment was thrown off by the truck and its lights as it passed her in this manner. The ejected object turned out to be the passenger, Ms. Ross.
- [24] It must be noted that Mr. Smith's evidence concerning the accident and Ms. McConnell's driving is based entirely on his observations of the vehicle's headlights through the back window of Ms. Thevarge's moving vehicle. It was too dark to see anything else about Ms. McConnell's vehicle.
- [25] Mr. Smith informed Ms. Thevarge of the accident and she turned around at the nearest driveway and parked her vehicle so that it protected Ms. Ross who was lying still on the roadway. Ms. Thevarge called 911 as soon as she arrived at the scene. Mr. Smith checked Ms. Ross and found her still alive. He then approached the vehicle and found Ms. McConnell sitting in the driver's seat. Mr. Smith noted that she had her seatbelt on and he did not take it off. In cross-examination, he agreed that in his statement to ICBC he mistakenly said that Ms. McConnell did not have a seatbelt on. Curiously, Mr. Smith testified that the ICBC statement must be wrong because he took the seatbelt off himself.
- [26] Mr. Smith saw that there was a steady stream of blood coming from Ms. McConnell's forehead but he could not determine where the gash was located. She was not conscious, her eyes were closed, and she did not speak. Mr. Smith testified that she was in really bad shape and obviously hurt. In cross-examination, Mr. Smith agreed that Ms. McConnell did not appear to know where she was. He tried to get her name but she would not respond. He believed she was in a state of shock. Mr. Smith held her head and did not want her to move

because he feared she had a head injury.

- [27] Mr. Smith also smelled alcohol on her breath; he said it was a combination of beer and whisky. He also saw bottles of alcohol in the vehicle; some were broken and others were not. In cross-examination, Mr. Smith agreed that at the preliminary inquiry and in his statement to the police there is no mention of a mixture of alcohol smells. He also agreed that he could not distinguish the kind of liquor she might have consumed; it was only possible for him to say she was mixing drinks and it did not smell like the cider that was spilled in the car.
- [28] Mr. Smith's co-worker, Dion Pierre, was next to arrive on the scene. Mr. Pierre had some first aid training so Mr. Smith moved away from Ms. McConnell and let him take care of her. It is while Mr. Pierre was tending to Ms. McConnell that she regained some consciousness.
- [29] Mr. Smith estimates the time of the accident as 00:18 am based on the time he left the Shell station in Pemberton and the estimated two or three minute drive to the accident site. He also says the police and EHS arrived about five minutes after him.
- [30] Mr. Smith was cross-examined extensively on his own driving record which is unenviable. He was clearly wrong in his evidence at the preliminary inquiry that he had been licensed to drive for twenty years, particularly because most of this time he was either unlicensed or suspended from driving. In addition, Mr. Smith pleaded guilty to impaired driving in December 2007. While Mr. Smith's driving record does not detract from his powers of observation or his credibility generally, the fact that he was careless in giving evidence about his record and his license is a relevant consideration when assessing the reliability of his memory in general.
- [31] I find it is also a relevant factor that Mr. Smith is not an independent witness in this case. Outside of court he expressed a desire to see that Ms. McConnell had "the book thrown at her" for driving while impaired before she has been convicted of this offence. In Mr. Smith's mind, Ms. McConnell has already been convicted of impaired driving and he wants to see her punished as he was punished for his own criminal misconduct.
- [32] Ms. Thevargé also testified about her recollection of Ms. McConnell's driving and the aftermath of the accident. She saw Ms. McConnell's vehicle swerve into the wrong lane at least once on the straight stretch of the highway before the bridge. As the driver, she did not have the same opportunity to observe the vehicle as Mr. Smith and readily acknowledged that parts of her evidence were really his recollection of the events rather than her own. Indeed, Ms. Thevargé was unable to say what part of her evidence constituted her own recollection of the events as opposed to Mr. Smith's. Mr. Smith and Ms. Thevargé had obviously discussed the events since the accident and were together when they gave their statements to ICBC. Thus it is problematic to attach any weight to her evidence concerning Ms. McConnell's erratic driving.

- [33] Ms. Thevarge confirmed that the accident occurred simultaneously with the truck and trailer passing Ms. McConnell's vehicle and agreed that she was startled by the truck's speed and sudden appearance around the second part of the S curve on the highway. She also agreed the truck was travelling at an unsafe speed for this part of the road. I found that Ms. Thevarge downplayed the impact of the truck on her ability to maintain control of her vehicle which she had previously described at the preliminary inquiry and in her statement to ICBC as blinding her temporarily by its bright lights. Although she did not lose control of the vehicle, Ms. Thevarge had driven this road every day, if not twice a day, for many years and acknowledged that she was extremely familiar with this part of the highway.
- [34] A number of officers were despatched to the accident site with a call that came in about 00:11 am. The despatch message indicated that two people were injured in the accident; the driver was still in the vehicle and the passenger had been ejected. Cst. Roberts arrived at 00:13 am before EHS attended. Cst. Roberts saw the Toyota turned sideways in the middle of the highway and noted it had suffered extensive damage. The windshield was on the road, there was blood on the seats and around the interior, and hair was embedded in the mirror and the passenger A pillar. There was also an unopened cider bottle and an unbroken empty cider bottle on the floor of the vehicle. Outside the vehicle were four cider bottles; two were unopened and two were broken open. All the bottles had some liquid in them and in their immediate area on the road. A wine bottle with a cork in it was located in the ditch. None of the bottles were seized as exhibits and the photographs do not reveal whether any of the broken bottles were still capped.
- [35] Cst. Roberts noted that Ms. McConnell was still in the driver's seat and Ms. Ross was lying unconscious on the highway. A crowd of bystanders had gathered around. Ms. Roberts observed Ms. Gallop attending to the driver and heard Ms. McConnell screaming that her ponytail was too tight.
- [36] Sergeant Wright was the senior officer at the scene and he arrived at 00:25 am. He was watch commander, had 26 years experience as a police officer, and was certified as an accident investigator at level two. On arrival Sgt. Wright noted Ms. Ross was motionless on the road and was being attended to by Cst. Roberts. He later measured a distance of four meters from Ms. Ross's position to the final resting place of the vehicle.
- [37] The sergeant attended to the driver to help Cst. Gallop hold her head still until EHS arrived. They feared she might have a spinal cord injury and noted that there was a laceration on her scalp. Sgt. Wright detected an odour of alcohol coming from the vehicle and a strong odour of alcohol on Ms. McConnell's breath. Ms. McConnell knew her name but she was uncertain whether there had been any passengers in the vehicle with her. The Sergeant also recalled that Ms. McConnell was screaming and expressing that she was in a great deal of pain. Because Ms. McConnell was unsure about whether she had passengers, Sgt. Wright summoned a dog handler from Vancouver to search for other passengers. It took about two hours for the dog handler to arrive and no other injured persons were found.

- [38] When EHS arrived Sgt. Wright learned that the passenger was seriously injured and was not doing well. He was also aware that Ms. Ross left in the first ambulance, as the priority patient, while Ms. McConnell waited for the second ambulance. Sgt. Wright had all this information before Cst. Gallop left the scene following Ms. McConnell in the second ambulance. When Cst. Gallop was at the hospital in Pemberton, Sgt. Wright called her and advised her of Ms. Ross's serious condition. He has no recollection of the time this call was made or whether Cst. Gallop called him. Sgt. Wright also contacted a more experienced officer, Cst. Duffy, and directed him to attend the hospital to help Cst. Gallop prepare a blood warrant should this become necessary.
- [39] Sgt. Wright used orange paint to mark the tire tracks on the road and shoulder. He also took measurements from where the vehicle appeared to have left the road, its path off the shoulder into the ditch and passing two driveways, and its return to the road to the final resting place in the middle of the highway adjacent to a third driveway. Lastly, he marked the location of the four wheels on the vehicle to note its final resting position. These measurements and markings were later used by the accident investigation expert Cpl. McCowan.
- [40] Cst. Scott arrived on scene at 00:20 am and immediately noted the serious condition of the passenger who was lying in the middle of the road. Cst. Davidson was attending to the passenger and Cst. Gallop was helping the driver keep her neck still. Cst. Scott observed that Ms. McConnell had her seatbelt on with the shoulder strap in place. Cst. Gallop advised Cst. Scott to make sure EHS sent another ambulance for the driver because all the officers knew Ms. Ross had been severely injured and required an ambulance right away. Cst. Scott radioed for a second ambulance and advised them to hurry with the first ambulance because of the passenger's obvious need for immediate medical attention. Cst. Scott testified that all of the officers, including Cst. Gallop, would have seen Ms. Ross lying on the road in considerable distress.
- [41] After the ambulances left with Ms. McConnell and Ms. Ross, Cst. Scott got a message over the radio from Cst. Gallop that Ms. McConnell was very incoherent but claimed there may have been three or four passengers. This led to an extensive search that later included the dog handler from Vancouver.
- [42] Cst. Davidson arrived on scene at 00:19 am and noted that the weather was cloudy but dry. He saw Cst. Gallop attending to the driver while no officer was with the passenger lying inert on the road. At first Cst. Davidson thought the passenger was dead but on examination he detected a faint pulse. When EHS arrived he told them that the passenger was the priority because of her apparent injuries.

- [43] Mr. Bissell testified that when he heard the sirens he panicked and ran over to the clinic and was able to see Ms. McConnell behind the reception area. He knew that Ms. Ross was in a closed room. He was not able to speak with Ms. McConnell but later travelled with her in the ambulance to Lions Gate Hospital where she was treated and released at about 10:00 am the same day. In the emergency room the physicians pulled glass out of Ms. McConnell's scalp.
- [44] Mr. Bissell said that during their two year relationship he knew Ms. McConnell to be a very cautious driver who followed the rules and did not drive at excessive speed. He had never known her to drive while impaired and they habitually made arrangements for a drive home if they were out drinking alcohol. For three to four weeks after the accident Ms. McConnell continued to be in pain from the head injury, had headaches and slept much of the time. She had a palm sized piece of scalp missing from her head. Glass continued to come out of her wound for about three months after the accident.
- [45] Ms. Dymus, a nurse on duty at the Pemberton clinic on October 2, 2005, testified that when Ms. McConnell arrived she was strapped on a spinal board and was assessed on a scale of acuity, which measures severity of injuries between one and five, at a level two. A level one is not breathing. Ms. McConnell appeared to be very combative with the medical staff and would not co-operate; she swore and was belligerent. Ms. Dymus had to cut off her clothes and put an intravenous tube in her arm. During this process Ms. McConnell had to be restrained by two paramedics. Ms. Dymus recalled that Ms. McConnell's body and her breath smelled of a mixture of beer and alcohol; she could not say which odour came from her breath and which odour came from her body. It was just a mixture of smells. Ms. Dymus testified that the type of behaviour exhibited by Ms. McConnell could possibly be symptomatic of a head injury or impairment by alcohol. The only injury Ms. Dymus recalled was the laceration on Ms. McConnell's head.
- [46] As part of the assessment for a trauma patient, Ms. McConnell was put through a rectal examination. She had to have a urinary catheter inserted and was at first upset by this but calmed down when it was explained that she could not get up to go to the bathroom due to a possible spinal injury. Ms. Dymus noted that Ms. McConnell appeared scared and confused during part of her time at the clinic. She did not regard her speech to be slurred.
- [47] Ms. Dymus did not provide a statement to the police and refused to be interviewed by the defence. Her evidence was entirely from memory some two and one half years after the events.

EVIDENCE ON THE VOIR DIRE - CONSTABLE GALLOP

- [48] Cst. Gallop had been an RCMP officer for two-and-a-half years in October 2005. She was familiar with Highway 99 and had experience with impaired driving investigations. After receiving the despatch describing the accident, Cst. Gallop attended the scene from Pemberton and arrived at 00:17 am. On arrival she observed Ms. Ross lying motionless on the centre line and she assumed this person had been ejected from the vehicle. Cst. Gallop

went directly to the screaming driver because bystanders were dealing with the passenger. EHS had not arrived and Cst. Gallop obtained Ms. McConnell's name and birth date. Ms. McConnell was screaming for Colin and complaining her ponytail was too tight. Cst. Gallop observed that Ms. McConnell did not have a ponytail; that she had a head injury, and was bleeding. While holding her head Cst. Gallop noted a strong odour of alcohol on Ms. McConnell's breath and slurred speech. She stayed in this position for about five minutes until EHS arrived and took over. EHS placed Ms. McConnell on a spinal board, put on a neck collar, and took her to the clinic in Pemberton via ambulance. Cst. Gallop knew that Ms. Ross had left in the first ambulance but did not speak to EHS about Ms. Ross while at the scene.

- [49] While attending to Ms. McConnell at the scene, Cst. Gallop formed the opinion that she was operating the vehicle while her ability to do so was impaired by alcohol. The grounds for her belief were stated as the unexplained accident on a portion of the road that was not difficult to negotiate, the slurred speech, the odour of alcohol on her breath, and the hysterical screaming. The only record of slurred speech is contained in Cst. Gallop's report to Crown which was not completed until in or about December 5, 2005 and her report to the Superintendent of Motor Vehicles dated February 12, 2006. She also agreed in cross-examination that Ms. McConnell answered her questions at the scene clearly and appropriately. The blood demand was not read at the scene despite having formed the opinion that this would be necessary because Cst. Gallop believed Ms. McConnell's injuries were a priority and should be addressed first.
- [50] Ms. McConnell arrived at the Pemberton clinic at 00:43 am and Cst. Gallop was right behind her. The clinic is a small facility with only three distinct areas: the small waiting room, a clinic area, and a small emergency room. EHS and firefighters took the passenger into the closed off emergency room and shut the door. Ms. McConnell was placed in the clinic area while still on the spinal board. It was a chaotic scene with two doctors and two nurses moving in and out of the rooms and attending to both patients.
- [51] Cst. Gallop stood back to give the medical staff an opportunity to address Ms. McConnell's injuries. She observed that Ms. McConnell was not being cooperative with the staff, continued to scream, and pushed them away with her hands in a shooing motion. At 00:59 am Cst. Gallop noted that Ms. McConnell could not recall driving and believed there may have been three or four passengers. However, she testified that her first opportunity to speak with Ms. McConnell at the clinic was at 1:10 am.
- [52] At 1:10 am, Cst. Gallop advised Ms. McConnell that she was under investigation for impaired driving and read her a blood demand. In cross, the constable agreed that the blood demand was read first and the consent secured before Ms. McConnell was advised that she was under investigation for impaired driving. Cst. Gallop also agreed that she did not mention dangerous driving or impaired causing bodily harm and did not address her mind to these offences. When asked if she consented to the demand, Ms. McConnell answered, "Of course". At this point Ms. McConnell wanted to get up to go to the bathroom, but the medical

staff would not let her get up. A urinary catheter had to be inserted and another intravenous tube was put in. This took until 1:45 am.

- [53] At 1:45 am Cst. Gallop reminded Ms. McConnell about the blood demand that she had read earlier. Although Cst. Gallop later testified that she re-read the blood demand to remind Ms. McConnell, I do not accept this evidence as credible. In her notes taken contemporaneously, as well as her report to Crown and her 1624 incident report, Cst. Gallop specifically refers to reminding Ms. McConnell of the blood demand rather than re-reading the demand. In addition, she testified that the re-reading was not to confirm her understanding of the demand or obtain permission for the sample because these had already been obtained earlier. Thus it seems illogical to have read it again verbatim.
- [54] After reminding her of the blood demand, Cst. Gallop quickly read Ms. McConnell her s. 10(b) rights from prepared cards and again said she was under investigation for impaired driving. When asked if she understood these rights, Ms. McConnell responded two or three times that she was not impaired. Cst. Gallop considered this to be belligerent behaviour because in her opinion Ms. McConnell was intoxicated. This was the only time Ms. McConnell appeared to be belligerent with the constable. The first time Cst. Gallop referred to Ms. McConnell as being belligerent was during the preliminary inquiry; there is no reference to belligerence in her notes, her 1624 report, or her report to Crown. The constable's report to the Superintendent of Motor Vehicles described Ms. McConnell as "argumentative".
- [55] Cst. Gallop did not read the Charter rights again and went directly to the question of whether Ms. McConnell wanted to call a lawyer. She responded, "Well, no, but can you call my mom?" The constable agreed she would do so. Two blood samples were taken by the attending physician at 1:46 am. Cst. Gallop agreed that after the questions concerning her s. 10(b) rights were posed, Ms. McConnell appeared rational, co-operative and calm. She also agreed there was time to re-read the Charter rights and make sure Ms. McConnell understood the right to counsel before the two hour time limit expired. She acknowledged that the Charter rights were read quickly. Cst. Gallop believed the right to counsel was very important. She testified that, had Ms. McConnell requested an opportunity to call a lawyer and had there been no ability to allow her to do this in private, Cst. Gallop would have abandoned the blood sample.
- [56] After Cst. Gallop finished with Ms. McConnell, she observed Ms. Ross and Ms. McConnell being taken by ambulance to Vancouver. Shortly after 1:45 am Cst. Gallop says the nurse told her that Ms. Ross had a collapsed lung and internal injuries. Cst. Gallop testified that at no time prior to this point did she consider inquiring about Ms. Ross' injuries. She also had no recollection of any discussion with Sgt. Wright about Ms. Ross' injuries. Nor did she recall any discussion with Cst. Scott concerning a second ambulance.

- [57] At about 8:00 pm on October 2nd, Cst. Gallop attended Ms. McConnell's residence to address a message left about her purse and to set up an interview in regard to the pending investigation. While Cst. Gallop read Ms. McConnell the police warning before asking her questions, she failed to advise her that the investigation now involved charges for impaired driving and dangerous driving causing bodily harm even though the constable was aware these charges were being contemplated. In addition, when Cst. Gallop secured Ms. McConnell's agreement to an interview the following day, she misled her by stating that this interview would deal only with the impaired driving investigation. Even when Ms. McConnell asked the officer what charges she faced, Cst. Gallop did not mention the more serious offences. The constable did not take notes of the entire conversation between herself and Ms. McConnell, which lasted 18 minutes, and testified for the first time at the trial that Mr. Bissell was present when she came to the apartment. She had no record of what, if anything, Mr. Bissell said during the interview and had no recall of any of the conversation except what was contained in her notes.
- [58] Cst. Gallop agreed that Ms. McConnell appeared to be in pain during their first interview; she moved slowly and spoke softly and said she was not well enough to be interviewed that evening. Upon being asked questions by Cst. Gallop, Ms. McConnell said she did not recall speaking to the constable the night before, and that although she did not recall how much she had to drink, her mistake was mixing wine and beer.
- [59] On October 3rd at 8:00 pm, Ms. McConnell attended the Pemberton RCMP station and was interviewed by Cst. Gallop. She provided a warned statement but did not realize it was being videotaped. For the first time Cst. Gallop advised Ms. McConnell that the investigation was now expanded to dangerous driving and impaired driving causing bodily harm. During this statement Ms. McConnell said she had a beer and a wine and that she "blanks out" and "pees the bed" when she mixes her drinks this way. Mr. Bissell described Ms. McConnell's reaction as "passing out" or "falling asleep" when she mixes her drinks.

EXPERT EVIDENCE - CORPORAL McCOWAN

- [60] Corporal McCowan was qualified as an expert in accident reconstruction. In his opinion Ms. McConnell lost control of her vehicle on Highway 99 in the straight portion of the road immediately prior to a left curve, drove on to the shoulder past the fog line, rotated counter clockwise around the centre of mass, entered a shallow ditch where the front end dug into the gravel causing the rear end to pivot upwards, and with the front end facing downwards, rolled over end to end as it exited the ditch, and then rolled side over side an indeterminate number of times before it came to rest upright facing west and straddling the centre line. As it rolled end over end the passenger was ejected through the front windshield.

- [61] In his report Cpl. McCowan also concluded that neither the passenger nor the driver had their seatbelts on based upon an examination of the physical evidence. At the trial, however, he agreed that it was possible the driver had her seatbelt on but not her shoulder restraint. Other officers at the scene testified that Ms. McConnell still had her seatbelt on, including her shoulder strap, when she was found in the driver's seat.
- [62] In cross-examination, Cpl. McCowan agreed that his opinion concerning the mechanics of the accident was completed in February 2008 because his first report solely addressed the speed at which Ms. McConnell's vehicle was driving at the time of the accident and his estimates in that regard had subsequently been proven erroneous due to a defect in his methodology. He also agreed there was no physical evidence to support speeding in this case.
- [63] Corporal McCowan testified that the first sign of any "yaw" or loss of control over the vehicle occurred on a portion of the roadway just beyond the fog line that was covered with gravel pebbles. He testified that these pebbles would make it more difficult for a driver to control the steering of the vehicle because of the loss of traction as the vehicle slid over them. He also agreed that the safest course of action for a driver faced with a vehicle in the on-coming lane that is encroaching on their lane is to steer to the right and brake. If the on-coming vehicle came up suddenly, the natural instinct would be to steer hard to the right. Lastly, he agreed that the physical evidence found in his investigation was not inconsistent with steering to the right to avoid an encroaching vehicle in the on-coming lane. In this regard, Corp. McCowan testified that "yaw" is usually caused by excessive steering to the right then to the left to try to correct steering; this in turn causes the vehicle to rotate. Most times it is inexperience that leads a driver to respond in this manner. He also testified that if a driver is impaired it affects their ability to control steering.
- [64] Corporal McCowan agreed there was no evidence that the vehicle was driving outside its own lane or was driving erratically for some distance prior to the accident site. The corporal had examined the road as back as far as the first right curve after the bridge.
- [65] In regard to the tires, Cpl. McCowan could only test the left tires for pressure because the right tires were blown out. The left tires were slightly below normal at 27 and 26 pounds per square inch (psi). However, he agreed that if the right tire pressure had been lower than the left tire pressure, this would have made it more difficult to maintain control over the vehicle. He also agreed that low tire pressure could have been a factor in causing the vehicle to roll end over end as it came out of the ditch because it was the right side tires coming off their rims that caused the vehicle to roll and low pressure would make this occur more easily. While Cpl. McCowan ruled out a flat tire immediately before the yaw in his examination of the physical evidence, he agreed that the right tires may have been at as little as 5 psi before any physical evidence would be seen.

- [66] While the Toyota was not given a mechanical inspection after the accident, Cpl. McCowan testified that this would have been standard practice due to the severity of the passenger's injuries and regardless of what the owner might have said about the vehicle's condition. In this case he expected such an inspection would be done automatically. No mechanical inspection was carried out after the accident.
- [67] In regard to the blood on the passenger seat, Cpl. McCowan testified that it must have come from the driver due to the passenger's ejection through the front windshield. He also noted that the driver may have contacted the roof and definitely the rear view mirror during the roll-over and in spite of wearing a seatbelt.

ARGUMENT ON THE VOIR DIRE EVIDENCE

- [68] The defence argues that Ms. McConnell's rights under s. 10(a) and (b) of the Charter were violated by Cst. Gallop in two respects. First, by failing to advise Ms. McConnell that she was under investigation for impaired driving and dangerous driving causing bodily harm, the police deprived the accused of the right to know the full extent of her jeopardy when faced with the decision to seek legal advice. Second, Cst. Gallop failed to ensure that Ms. McConnell understood her right to counsel when there was substantial evidence that these rights were not understood due to her mental state and her injuries. Due to the severity of the breaches and the fact that the evidence of the blood sample was conscripted, the defence argues the certificate of analysis should not be admitted pursuant to s. 24(2) of the Charter.
- [69] In support of this submission, the defence relies upon *R. v. Anderson* (1984), 45 O.R. (2d) 225 (C.A.); *R. v. Baig*, [1987] 2 S.C.R. 537; *R. v. Hollis* (1992), 17 C.R. (4th) 211 (B.C.C.A.); *R. v. Stowe*, [1983] B.C.J. No. 1128 (Co. Ct.) (QL); *R. v. Bayard*, [1990] B.C.J. No. 2945 (S.C.) (QL); *R. v. Twan*, [1991] B.C.J. No. 3884 (S.C.) (QL); *R. v. Smith*, [1991] 1 S.C.R. 714; *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Evans*, [1991] 1 S.C.R. 869; *R. v. Turpin*, 2005 BCSC 376; *R. v. Borden*, [1994] 3 S.C.R. 145; *R. v. Sztankovics*, [1993] B.C.J. No. 1926 (S.C.) (QL); *R. v. Harder* (1989), 49 C.C.C. (3d) 565 (B.C.C.A.); and *R. v. Bloom*, 2006 BCSC 1823.
- [70] In the alternative, the defence argues the certificate of analysis is inadmissible because the demand for the blood sample was not made as soon as practicable which would have been at the accident scene. Constable Gallop knew at that time that she was investigating for impaired driving and, further, that a blood sample would be necessary due to Ms. McConnell's injuries. In support of this submission, the defence relies upon *R. v. Whitesell*, [1998] B.C.J. No. 303 (S.C.) (QL); *R. v. Colburne*, 2002 BCSC 416; *R. v. Downie*, 2005 BCPC 668; *R. v. Drohan* 2004 BCPC 329; and *R. v. Beaulieu*, 2006 BCPC 438.
- [71] The defence object to the introduction of Ms. McConnell's statements during the interview at her home on the ground that the Crown has failed to prove they were voluntary. In addition, the defence argues the statements were made in violation of her right to counsel because Cst. Gallop failed to advise her of the extent of her jeopardy. Lastly, the defence

argues that all references to the consumption of alcohol in the warned statement are inadmissible because they are tainted by the first interview and constitute a continuation of that interview. In support of this submission, the defence relies upon *R. v. Kiloh*, 2003 BCSC 209, and *R. v. Tammie*, 2001 BCSC 366.

- [72] The Crown argues that Ms. McConnell's rights under s. 10(a) and (b) of the Charter were not violated in the manner described by the defence. First, the Crown maintains that Cst. Gallop had no knowledge that the passenger had been injured such that the charges would necessarily be expanded to include impaired driving causing bodily harm. It is the time of the giving of the rights that must be examined and not in hindsight when the investigation is complete. Second, the Crown argues there is no evidence to suggest Ms. McConnell did not understand her right to counsel and clearly waived that right before giving a blood sample. The Crown argues there is no evidence that she had a head injury and the court is not entitled to speculate beyond what can be reasonably inferred from the evidence. In support of its argument, the Crown relies upon: *R. v. Todd*, 2005 BCSC 1707, *aff'd* 2007 BCCA 176; *R. v. White* (1994), 130 N.S.R. (2d) 143 (C.A.); *R. v. Deruelle*, [1992] 2 S.C.R. 663; and *R. v. Schneider* (1994), 123 Sask. R. 81 (C.A.).
- [73] If the court finds a violation of the accused's rights under s. 10(a) and (b), the Crown argues the evidence should not be excluded due to the good faith of the officer, the importance of the evidence to the Crown's case, and the serious nature of the charges. The Crown argues in favour of following the recent Ontario decisions that indicate there is no automatic exclusion of conscripted evidence even in the case of blood samples. In support of its submission, the Crown relies upon *R. v. Padavattan*, [2007] O.J. No. 2003 (Sup. Ct. Jus.) (QL) and *R. v. Stinn*, 2005 BCCA 41.
- [74] In regard to the alternative argument, the Crown says that s. 254(3) of the Code builds in a variable time frame for blood samples to be taken because circumstances such as an accident might preclude immediate action by the police. In this case Cst. Gallop satisfied the requirement to provide an explanation for her delay in making the demand which was the priority given to Ms. McConnell's medical treatment. In support of this argument, the Crown relies upon *R. v. Gairdner*, [1999] B.C.J. No. 259 (S.C.) (QL); *R. v. Pelletier*, [1990] O.J. No. 271 (Dist. Ct.) (QL); *R. v. Vanderbruggen*, [2006] O.J. No. 1138 (C.A.) (QL); *R. v. Salmon*, 1999 BCCA 740, leave to appeal to S.C.C. refused, October 11, 2000 (28193); *R. v. Colbourne*, 2002 BCSC 416; and *R. v. Nesheim*, [1996] B.C.J. No. 1575 (S.C.) (QL).
- [75] The Crown argues that both statements of the accused were voluntary and should be admitted. The Crown maintains it is not obliged to call every person present when the statement is taken: *R. v. Wert* (1979), 12 C.R. (3d) 254 (B.C.C.A.). During both the house statement and the statement at the police station the accused was given the police warning and there is no evidence of oppression, threats or hope of advantage held out to her. In support of this position, the Crown relies upon *R. v. Singh*, 2007 SCC 48. Alternatively, if the first statement is found to be tainted by the officer's conduct, the Crown argues the second statement remains admissible because there is a substantial time gap between the two

statements, Ms. McConnell was told of the new charges being investigated, she was given her Charter rights, and told she was free to leave.

REASONS FOR DECISION ON THE VOIR DIRE EVIDENCE

[76] Ms. McConnell's claim that her rights under s. 10(a) and (b) of the Charter were violated is based upon the fundamental notion that a person cannot properly waive the right to counsel unless they understand their rights and are aware of the extent of their jeopardy. The latter proposition relates to the right of the accused to know the reason for her detention under s. 10(a). As articulated by McLaughlin J. (as she then was) in *Smith* at ¶23:

We take the view that the accused's understanding of his situation is relevant to whether he has made a valid and informed waiver. This approach is mandated by s. 10(a) of the Charter, which gives the detainee the right to be promptly advised of the reasons for his or her detention. It is exemplified by three related concepts: (1) the "tainting" of a warning as to the right to counsel by lack of information; (2) the idea that one is entitled to know "the extent of one's jeopardy"; and (3) the concept of "awareness of the consequences" [of giving up the right to counsel] developed in the context of waiver.

[77] In each case the question is whether the accused had sufficient information to make her waiver of counsel valid. The accused must generally understand the jeopardy she is faced with when making a decision to dispense with legal advice. It is unnecessary that the accused have knowledge of the precise charge or of all the factual details of the case against her. Whether the accused had sufficient information also depends upon all the circumstances that have an impact on her understanding as well as what was known to the police at the time the s. 10(a) and (b) rights were explained.

[78] The obligation to ensure the accused understands the right to counsel stems from the fundamental notion that a decision not to exercise this right must be an informed one if it is to be effective in law. This is defined in *Hollis* as "an adequate and constitutionally sufficient" understanding of the right to retain and instruct counsel which, in turn, means "an understanding which is sufficient to enable the detainee to make an informed decision about whether to exercise the right" to counsel (at ¶34).

[79] There are limits to the obligations placed upon the police to ensure the accused has "an adequate and constitutionally sufficient" understanding of the right to counsel. However, if the circumstances suggest the detainee does not comprehend their rights, the police have a duty to take further steps to ensure the accused does have a sufficient understanding. As Wood J.A. says in *Hollis* at ¶40:

There are, of course, practical limits to the duty which the police have to facilitate the detainee's ability to make an informed decision whether to exercise the right to counsel. As already noted, in the absence of any evidence to suggest the contrary, a constitutionally sufficient understanding of the right will necessarily be inferred from a positive response to the question "do you understand?" Even where there is evidence of a less than perfect understanding, it may nonetheless be constitutionally sufficient.

- [80] The Crown and defence have each cited case authorities applying these principles of law. Although some of these authorities appear to be inconsistent, it is not because these general principles have been applied differently. Instead, I find that the result in each particular case turns on what the accused could reasonably be expected to know at the time she is presented with the right to counsel and what the police could reasonably be expected to know about the reason for the detention and the accused's comprehension of her rights.
- [81] Turning to the circumstances in this case, it is apparent that Ms. McConnell was completely unaware of the extent of her jeopardy beyond a charge for impaired driving. At the time her right to counsel and the demand for a blood sample were read, Ms. McConnell had no recollection of driving, did not know that she had a passenger who had been injured, and was muddled and confused about how many people had been in the vehicle. She was found unconscious and alone in the vehicle. Two police officers kept her head from moving until EHS arrived and then she was taken to the Pemberton clinic alone in the ambulance. Thus there was no opportunity for Ms. McConnell to look about the scene and take in the aftermath of the accident. There is also no evidence that anyone advised her that Ms. Ross had been a passenger in the vehicle or had been injured in the accident.
- [82] On the other hand, I find that Cst. Gallop's evidence that she was entirely unaware of Ms. Ross' serious condition lacks credibility. The despatch message that all the officers received said that two people were injured in the accident. When Cst. Gallop arrived on scene she saw Ms. Ross's motionless body lying in the middle of the road and assumed this person had been ejected from the vehicle. She also knew that Ms. Ross' injuries were serious enough to warrant an ambulance because she insisted that a second ambulance be called for Ms. McConnell. The serious condition of this passenger was obvious to every other police officer who attended the scene. Cst. Gallop also appeared to have a convenient lack of recall in regard to conversations with other officers concerning Ms. Ross' condition. While she recalled many details of the events over the lengthy delay until trial, she had virtually no memory of discussions with Sgt. Wright and Cst. Scott concerning Ms. Ross' injuries. I also found it incredible that Cst. Gallop would make no inquiries about Ms. Ross while she waited for an opportunity to make the blood demand and that the significance of Ms. Ross being behind closed doors with doctors and nurses attending to her would be completely lost on her. Lastly, from Cst. Gallop's failure to advise Ms. McConnell that the investigation had been broadened to include dangerous driving and impaired driving causing bodily harm during the home interview later on October 2nd, when she was well aware of Ms. Ross' injuries and the nature of the police investigation, I infer that she intentionally kept Ms. McConnell in

the dark about the extent of her jeopardy while they were together at the hospital.

- [83] Having concluded that Cst. Gallop knew that Ms. Ross had been seriously injured in the accident and, further, that it was obvious Ms. McConnell was unaware of this fact, it was incumbent upon the officer to address her mind to the question of what charges could flow from the accident. It was not sufficient to limit the reason for detention to an investigation for impaired driving. Impaired driving and dangerous driving causing bodily harm are far more serious charges carrying the potential for substantially greater penalties. Without this information it is apparent that Ms. McConnell did not appreciate the consequences of giving up her right to retain and instruct counsel. While someone may not necessarily seek legal advice when charged with impaired driving, the same cannot be said for a person facing the more serious charge of impaired driving causing bodily harm. Thus I conclude Ms. McConnell's rights under s. 10(a) were violated and her waiver of the right to counsel was invalid in law.
- [84] I am also satisfied that Cst. Gallop failed to satisfy her duty to ensure Ms. McConnell understood the right to counsel sufficiently to waive her opportunity to exercise this right. After reading Ms. McConnell her right to counsel, Cst. Gallop did not receive a positive response to the question of whether she understood what had been read to her. Instead, Ms. McConnell protested that she was not impaired. Nothing in this response could have given Cst. Gallop any assurance that the rights were understood. The answer was not responsive to the question at all. Instead of seeking to clarify the right to counsel or even read it again, Cst. Gallop pressed on to the question of whether Ms. McConnell wished to exercise that right.
- [85] In addition to the lack of a positive response to the question of whether she understood her right to counsel, there were additional factors that should have reasonably led Cst. Gallop to conclude Ms. McConnell did not understand what was being explained to her. Ms. McConnell was found unconscious at the scene; she had some form of head wound and was bleeding profusely. She was very confused about what had happened and who had been in the vehicle. At the clinic she was strapped to a spinal board and was exhibiting symptoms that could possibly be consistent with a head injury or impairment. Finally, it was obvious Ms. McConnell was not concentrating on the important decision at hand. She was more concerned about contacting her mother than seeking legal advice at this time. Thus, not only the unresponsive answer to this important question, but also Ms. McConnell's behaviour and obvious injuries, should have put the officer on notice that what she read had not been understood and that a further explanation was required.
- [86] In my view the facts of this case are very similar to those in *R. v. Montgomery*, [1996] B.C.J. No. 82 (S.C.) (QL). In that case, the accused was charged with impaired driving causing death and bodily harm after a severe motor vehicle accident that left one passenger dead and the other seriously injured. The accused was taken to the hospital where he was read the blood demand once, given his right to counsel based upon impaired driving only, and submitted to a blood test after waiving the right to instruct counsel. At ¶22 and 25, Colver J. held that the accused was denied the right to know the extent of his jeopardy:

Because of the likely penal consequences (having regard to both the statutory maximum and the prevailing range of sentences) following a conviction for impaired driving causing death or bodily harm, contrasted with penalties usually imposed in impaired driving cases where death or bodily harm does not ensue, can I reasonably conclude that Mr. Montgomery was properly informed either of the reasons for his detention or the reasons for the demand for the sample of his blood?

I am compelled to conclude that Const. Emond's decision to inform Mr. Montgomery that he was being investigated only for impaired driving minimized the legal consequences of Mr. Montgomery's driving. He had been trapped beneath his truck in circumstances in which he could not have been expected to either inquire as to the welfare of his friends or, for that matter, consider whether the request for samples of his blood was unusual

[87] At ¶32 in *Montgomery*, Collver J. also concluded that the police failed in their duty to ensure the accused understood the right to counsel. The vulnerable situation of the accused, trapped in a hospital bed, was an important factor:

In my view, this was a case where a young man was detained in uncommon circumstances following a catastrophic event. Those circumstances called for caution and care reflecting both the extent of his jeopardy and his need for an explanation of rights which would reasonably ensure that his difficult decision was also an informed decision. Given the cursory (albeit sufficient under more ordinary circumstances) explanation of rights and the single demand for blood samples which was made without reference to the specific offences which the officer well knew Mr. Montgomery to be facing, it is my view that there was, in all of the circumstances which I have described, a breach of Mr. Montgomery's right to retain and instruct counsel.

[88] Accordingly, I find that Ms. McConnell's rights under s. 10(b) were violated by the failure of Cst. Gallop to take any steps to ensure she understood the right to counsel before assuming there was a constitutionally valid waiver of the right.

[89] Lastly, I am satisfied that Cst. Gallop failed to provide Ms. McConnell with a reasonable opportunity to decide whether she wished to exercise the right to counsel. Immediately after revisiting the blood demand and quickly reading the right to counsel, Cst. Gallop proceeded to have the blood sample taken. No more than one minute elapsed between the reading of the right to counsel and the taking of the blood sample. Cst. Gallop acknowledged that there was no rush to have the blood sample taken within the two hour window. In addition, it was apparent that Ms. McConnell did not understand what had been explained to her and that her mind was on other matters such as contacting her mother.

[90] The right to have a reasonable time to make a decision about contacting legal counsel was recognized in *Hollis*. Even when there is no evidence to suggest the accused has a constitutionally deficient understanding of the right to counsel, the police must still offer him or her a reasonable period of time to make this important decision. The time required will depend on the circumstances and will not be a long time in any event: *Hollis* at ¶43. In this case, however, there was virtually no time set aside for Ms. McConnell to consider her

rights and there was substantial evidence to suggest she lacked a constitutionally adequate understanding of the right to counsel. While it is apparent that Cst. Gallop understood the significance of the right to counsel, having offered that she would have abandoned the blood sample had there been no opportunity to exercise this right in private at the clinic, it is equally apparent that the constable's actions deprived this important right of any practical meaning for Ms. McConnell.

[91] Turning to the final issue, should the evidence obtained in violation of Ms. McConnell's rights under s. 10(a) and (b) of the Charter be excluded from the trial pursuant to s. 24(2)? In *R. v. Collins*, [1987] 1 S.C.R. 265, the court defined the factors to be considered in the s. 24(2) analysis: (1) will the admission of the impugned evidence affect the fairness of the trial?; (2) is the breach a serious one?; and (3) what is the effect of excluding or admitting the evidence on the repute of the administration of justice?

[92] Since *R. v. Stillman*, [1997] 1 S.C.R. 607, it is clear that conscriptive evidence obtained as a result of a breach of the accused's right to counsel affects the fairness of the trial and generally should be excluded on this ground. There is also no doubt that a blood sample taken from an accused who has been denied his rights under s. 10(a) and (b) is conscriptive evidence.

[93] The Crown argues that in *Stillman* it was recognized that not all types of conscriptive evidence obtained in violation of an accused's right to counsel are automatically excluded because of the adverse impact on trial fairness. In this regard, Cory J.'s comments at ¶90 of *Stillman* are instructive:

[I]t is apparent that a particular procedure may be so unintrusive and so routinely performed that it is accepted without question by society. Such procedures may come under the rare exception for merely technical or minimal violations referred to earlier. [T]he Criminal Code provisions pertaining to breath samples are both minimally intrusive and essential to control the tragic chaos caused by drinking and driving.

[94] The Crown relies upon authorities from other provinces that have applied this proposition in drinking and driving cases. In particular, the Crown cites *Padavattan*, a recent Ontario decision involving a breath sample, where the line of authorities applying this "rare exception" test is exhaustively reviewed. While it may be that the results of a breach of s. 10(b) rights is so technical and so nominally intrusive as to mandate admission based on a balancing of interests in some drinking and driving cases, the facts of this case do not support such a conclusion.

[95] First, we are dealing with a blood sample which is far more intrusive and less routinely performed than a breathalyser test. Second, the violation of Ms. McConnell's rights was extremely serious because it resulted in a complete denial of the right to counsel. Third, it cannot be said that Cst. Gallop was acting in good faith because she either deliberately withheld crucial information from Ms. McConnell or she was completely derelict in her duty to address her mind to the extent of the accused's jeopardy. Fourth, there are multiple

violations of Ms. McConnell's rights that taken together evidence a pattern of misconduct by the police. In particular, Cst. Gallop denied Ms. McConnell's right to know the extent of her jeopardy, failed to ensure she understood the right to counsel, and denied her a reasonable time to consider whether she should contact legal counsel.

- [96] Although it has been argued that legal advice pending a breath or blood sample is extremely limited in scope and thus the harm caused by a denial of this right is nominal, this line of reasoning was expressly discredited in *R. v. Bartle*, [1994] 3 S.C.R. 173, where Lamer C.J. says at ¶62:

Although the scope of available legal advice in the impaired driving context is necessarily limited, one must be mindful of the fact that this Court has clearly stated in the past that, where the right to counsel has been infringed, it is improper to speculate about the nature of the advice that a detainee would have received and whether the evidence would have been obtained had the right not been infringed.

- [97] The Crown also relies upon *Stinn*, a decision of our Court of Appeal, in which the trial judge's decision to admit evidence of a blood sample taken in violation of the accused's rights under s. 8 of the Charter was upheld. This case must be distinguished on its facts as the trial judge concluded there were grounds for a search warrant independent of the blood sample evidence obtained by the police in violation of the accused's rights under s. 8 of the Charter.
- [98] Having concluded the breach in this case was neither technical nor minor, and that the conscriptive evidence would have an adverse impact on the fairness of the trial, I find it must be excluded pursuant to s. 24(2). I am also satisfied that the lack of good faith on the part of the officer, the multiple breaches, and the seriousness of the violations lead inevitably to a conclusion that the harm caused to the repute of the justice system by admission of the evidence far outweighs the adverse impact of its exclusion.
- [99] In light of my conclusions in regard to the Charter violations alleged by the accused, I will deal only briefly with the alternative argument that the blood demand was not made as soon as practicable. In this regard, I agree with Crown's submission that the meaning attached to this phrase as it is used in s. 254(3) of the Code is whether the demand was made within a reasonably prompt time under the circumstances. There is no requirement that the demand be made as soon as possible. The primary issue is whether the police acted reasonably and are able to provide an explanation for their decision to delay the demand.
- [100] In this case, Cst. Gallop provided a reasonable explanation for her delay in making the demand for a blood sample. In the five minutes she had with Ms. McConnell at the accident site, the officer was entirely occupied with maintaining the accused's neck position to prevent a spinal cord injury. At this time Ms. McConnell's injuries were the obvious priority. Thereafter Ms. McConnell was either being transported alone in the ambulance or being assessed for injuries by the medical staff at the clinic. The first opportunity to address the blood demand came at 1:10 am when it appeared that Ms. McConnell had received medical

attention and the administering of the demand would not interfere with the duties of the clinic's staff. In my view the officer made the only decision reasonable in the circumstances; that is, putting Ms. McConnell's health and safety ahead of making the demand and obtaining a blood sample immediately.

- [101] Turning to the voluntariness of the statements made by Ms. McConnell, it is well established that the onus rests with the Crown to prove beyond a reasonable doubt that statements made by the accused to persons in authority are voluntary. Addressing the first statement made at Ms. McConnell's home, I find that Cst. Gallop's evidence does not provide sufficient details surrounding the statements made by Ms. McConnell, the officer's statements made to illicit the admissions, and the involvement of Mr. Bissell in the conversation to establish voluntariness to the required standard. The conversation took place over a period of about 18 minutes; however, Cst. Gallop recorded in her notes only a few questions and answers without any context. In addition, the constable was unable to fill in the gaps during her testimony because she has no recollection of the discussion beyond her minimal notes. Moreover, Cst. Gallop had no recollection of what, if any, role Mr. Bissell played in the discussion. The Crown did not canvass this issue during Mr. Bissell's evidence because the constable disclosed his presence for the first time in her evidence at trial. Thus Mr. Bissell's involvement in the admissions made by Ms. McConnell has not been satisfactorily explained.
- [102] The lack of a complete record of the conversation does not render it per se involuntary; however, there must be sufficient details to satisfy the court that the statement was not induced by some impropriety or police trickery. In this case there is no context to the discussion and only a small portion of the discussion is in evidence. Indeed, Cst. Gallop conceded that she only recorded what was relevant to her investigation. In these circumstances, I find the Crown has not satisfied its onus of proof.
- [103] It was also established by our Court of Appeal in *Wert* that the Crown may be required to call persons not in authority who were present at the time of the statement or, at least, explain their involvement. In this case it is part of the Crown's theory that Mr. Bissell warned the accused against consuming beer and wine because of the adverse impact mixing drinks had on her. The Crown attempted to elicit this evidence from Mr. Bissell. The admission made by Ms. McConnell during the home interview concerned this very subject matter. As a consequence, the impact of any statements made by Mr. Bissell during this interview on the voluntariness of Ms. McConnell's admission is more than mere speculation. Accordingly, without evidence that explains his role during the interview, the Crown has failed to satisfy its onus to prove voluntariness beyond a reasonable doubt.
- [104] For all of the foregoing reasons, I find the statement is inadmissible.
- [105] Alternatively, if this conclusion is in error, I also find the statement made by Ms. McConnell is inadmissible because it was elicited in breach of her rights under s. 7, and s. 10(a) and (b) of the Charter. When Cst. Gallop attended Ms. McConnell's residence on the evening of

October 2nd, she was well aware that the police were investigating charges of dangerous driving and impaired driving causing bodily harm. Not only did Cst. Gallop fail to inform Ms. McConnell of these facts, when Ms. McConnell asked the constable specifically to identify the charges she faced, but the officer also misled the accused by informing her that the interview the constable sought would only concern impaired driving. Thus, although Cst. Gallop read the police warning and right to silence, Ms. McConnell was acting under a misapprehension of the extent of her jeopardy induced by the officer's misrepresentation of the facts. In these circumstances, I find there was a violation of Ms. McConnell's right to remain silent under s. 7 of the Charter. In addition, because the officer failed to reiterate the right to counsel based upon the new charges, I find Ms. McConnell continued to be denied these important rights stemming from the breaches committed earlier in the day.

- [106] Based upon these conclusions, I am satisfied the evidence ought to be excluded under s. 24(2) of the Charter on the ground that the evidence is conscriptive, that if admitted it will affect the fairness of trial, because the breach was serious, and due to the officer's lack of good faith.
- [107] Turning to the voluntariness of the second statement made at the police station on October 3rd, Ms. McConnell maintains any reference to the consumption of alcohol in this statement remains tainted by the finding of involuntariness in connection with the first statement. The admissibility of a confession preceded by an involuntary confession involves a factual determination of the connection, if any, between the two statements. In *R. v. I.(L.R.)*, [1993] 4 S.C.R. 504, the Court held that a subsequent confession will be involuntary if (1) the tainting features from the first statement continue to be present; or (2) the fact that the first statement was made was a substantial factor contributing to the making of the second statement.
- [108] In my view, the Crown has established beyond a reasonable doubt that the tainting features from the first statement were eliminated at the commencement of the second statement. At the beginning of the interview Cst. Gallop advised Ms. McConnell that the investigation was now broadened to include dangerous driving and impaired driving causing bodily harm which satisfied her obligation to appraise the accused of the extent of her jeopardy. She also instructed Ms. McConnell that she was free to leave at any time and was not required to answer questions. Ms. McConnell understood she could "stop talking [to the officer] at any point." Lastly, Cst. Gallop re-iterated the right to counsel, albeit not in the entirely correct form, and Ms. McConnell appeared to understand these rights and elected to waive them.
- [109] I am also satisfied beyond a reasonable doubt that the making of the first statement was not a substantial factor contributing to the second admission concerning alcohol consumption. First, the admission that she mixed "a beer and a wine" came from Ms. McConnell without being solicited by Cst. Gallop. There was also no reference, express or implied, to the admission made in the first statement. Second, at least 24 hours elapsed between the first and the second statement. Third, the accused was not detained or under arrest and was advised that she could leave at any time. Lastly, the interview was not oppressive in any

respect and the officer did not hold out any hope of advantage or make any threats to induce a confession. There was no police trickery used and there is no evidence Ms. McConnell's mental state deprived her of the ability to understand her situation and the questions being posed.

- [110] Accordingly, the recorded statement is admissible in its entirety. Apart from the involuntary statement by Ms. McConnell made at her home on the evening of October 2nd, and the certificate of analysis in respect of the blood sample, the evidence on the voir dire is now evidence in the trial. Because of my decision to exclude the certificate of analysis the Crown is unable to prove the elements of the offence in Count 3. Thus this charge is dismissed.
- [111] The final issue is the extent to which the certificate of analysis may be relied upon in regard to Count 1, impaired driving causing bodily harm. The parties agree that I may rely on the certificate for the limited purpose of establishing Ms. McConnell consumed some alcohol on the night of the accident. The evidence cannot be used to infer any particular amount of alcohol was consumed or what effect, if any, the alcohol consumption had on impairment. I note here that no expert evidence was called to interpret the readings contained in the certificate of analysis. The authorities cited in support of the proper use of the certificate of analysis are *R. v. Shewchuk*, 2006 SKQB 33, 274 Sask. R. 98; *R. v. Smurthwaite*, 2001 BCPC 287; and *R. v. Dinelle* (1986), 74 N.S.R. (2d) 162 (C.A.)

ARGUMENT ON THE SUBSTANTIVE OFFENCES

- [112] The Crown argues the evidence establishes beyond a reasonable doubt that Ms. McConnell was impaired by alcohol and that her impairment was the cause, beyond de minimus, of the accident. The defence admits that the victim's injuries were caused by the accident. In regard to the symptoms of impairment, the Crown says they include the strong odour of a mixture of beer and alcohol on her breath, Ms. McConnell's admission that she consumed beer and wine and that this mixing of drinks has had an adverse impact on her in the past, the evidence of erratic driving witnessed by Mr. Smith and Ms. Thevarge, Cst. Gallop's opinion that the accused was impaired, slurred speech noted by Cst. Gallop, her belligerent behaviour at the clinic, the certificate of analysis, the presence of cider bottles and a wine bottle in the vehicle and outside of it, and the unexplained accident.
- [113] The Crown argues that it is impermissible for the court to speculate about possible causes of the accident that cannot be reasonably inferred from the evidence. Further, the Crown says the court cannot infer that any part of the accused's behaviour was related to a head injury without medical evidence to support the existence of such an injury and the symptoms readily connected with such an injury.
- [114] The Crown also argues the offence of dangerous driving causing bodily harm has been proven beyond a reasonable doubt based upon the accused's impairment by alcohol, the erratic driving shortly before the accident, the unexplained accident, evidence that the accused was driving on the shoulder of the road, and the accused's knowledge that mixing

her alcohol had an adverse impact on her mental state. Again, the Crown maintains the court is not entitled to speculate as to possible causes of the accident that are not grounded in the evidence. It is fanciful to say that the truck caused the accident any more than animal on the road or some mechanical defect in the vehicle.

- [115] In support of these submissions the Crown relies upon *R. v. Stinn*, 2003 BCSC 966, aff'd 2005 BCCA 41; *White*; *R. v. Stellato* (1993), 12 O.R. (3d) 90 (C.A.), aff'd [1994] 2 S.C.R. 478; *R. v. Rhyason*, 2006 ABCA 367, 397 A.R. 163, aff'd 2007 SCC 39; *R. v. Colby* (1989), 100 A.R. 142 (C.A.); *R. v. Larocque*, [1988] O.J. No. 330 (C.A.) (QL); *R. v. Boomer*, 2001 BCCA 220; *R. v. Bilodeau*, 2005 BCCA 618; *R. v. Beatty*, 2008 SCC 5; *R. v. Chaston*, 2007 BCSC 1795; and *R. v. Cook*, [1997] 1 S.C.R. 1113.
- [116] The defence submits that there are very few signs of impairment and, further, many of the symptoms alleged by the Crown are equally attributable to the injuries suffered by Ms. McConnell in the accident. In particular, the defence maintains the accident is not unexplained apart from impairment; the evidence supports a rational inference that the sudden appearance of the speeding truck and trailer around a blind corner was the immediate cause of the accident coupled with the destabilizing impact of the gravel on the shoulder and the probability that the right side tires were under-inflated. There is no evidence of speeding or erratic driving at the time of the accident. The evidence of erratic driving before the accident is not credible and should be given little weight. Further, it is separated in time from the accident. In regard to the odour of alcohol, the strength says nothing about the amount consumed or the time of consumption. In addition, the defence argues it is not credible that a person could distinguish between the odour of beer and other types of alcohol and, in any event, there was evidence of alcohol odour on her clothing as well as her breath.
- [117] In regard to the bottles at the scene, the evidence does not clearly establish that any of this alcohol was consumed as opposed to being broken during the accident. The contents of the alleged wine bottle were never tested. No one other than Cst. Gallop noted slurred speech and her only note of this is some two months later in the report to Crown.
- [118] In regard to Ms. McConnell's behaviour at the scene and at the clinic, the defence argues it is just as consistent with a head injury as with impairment. The defence also maintains there is no onus on Ms. McConnell to call expert evidence to support this inference. The defence maintains Cst. Gallop's opinion in regard to impairment should be accorded little weight because it was formed early on in the investigation and without the benefit of all the evidence explaining the accident. It was also an opinion from a very inexperienced officer.
- [119] In regard to the statement given by Ms. McConnell, the defence argues its context must be considered, including: the timing only a day after the accident; she did not recall anything about the accident; her knowledge of the events was already coloured by what others had told her; the statement concerning the impact of mixing beer and wine was only speculation on her part; and it was apparent she was still suffering from her injuries.

- [120] The defence also argues there is evidence of safe driving and lack of impairment; the accused was not speeding and put no other vehicles or pedestrians at risk; there is no evidence of erratic driving on the most difficult curves in the road; she wore a seatbelt; she was coherent and responsive when dealing with police at the scene and was polite with Cst. Gallop at the clinic; she had good driving habits and habitually made plans for the drive home if she had been drinking; and there are no classic signs of impairment such as blood shot eyes and flushed face.
- [121] In support of the defence submissions the following authorities are relied upon: *R. v. Graat*, [1982] 2 S.C.R. 819; *R. v. Palsson* (October 11, 1996), Vancouver CC960474 (B.C.S.C.); *R. v. Ernst*, [1991] B.C.J. No. 3915 (C.A.)(QL); *R. v. Thandi*, [1998] B.C.J. No. 2996 (C.A.) (QL); *R. v. Bishop*, 2005 BCSC 686; *R. v. Franklin* (1997), 221 A.R. 356 (Q.B.); *R. v. Lozanovski*, 2005 ONCJ 112; *Cook*; and *R. v. Fisher*, [1992] B.C.J. No. 721 (C.A.) (QL).

DECISION

- [122] The first issue to address is whether the Crown has established beyond a reasonable doubt that Ms. McConnell's ability to drive was impaired by alcohol at the time of the accident. Whether Ms. McConnell was impaired is a question of fact to be determined on the basis of the evidence as a whole, including any inferences that may be reasonably or rationally drawn from the proven facts. In addition, in coming to a conclusion on the matter of impairment, the court is entitled to consider opinions from lay persons, as well as police officers, being careful not to accord a preference to the opinion of an officer merely because they have more experience with impaired drivers. Moreover, the weight to be applied to such opinions is entirely a matter for the judge and will depend on my view of the circumstances as a whole: *Graat* at 840. Lastly, the test for impairment is whether there was some evidence of impairment in the ability to drive caused by alcohol consumption and the test for causation is whether the accused's impairment was more than a de minimus factor contributing to the accident: *Rhyason* at ¶30.
- [123] On the evidence before me, I find there is evidence to support a conclusion that Ms. McConnell consumed alcohol on the evening of the accident; however, there is very little cogent evidence leading to a conclusion that her ability to operate a motor vehicle was impaired by alcohol.
- [124] The most significant evidence is Ms. McConnell's admission that at some point during the evening she consumed a beer and a wine and, further, that in the past combining alcoholic beverages in this manner had caused her to "blank out" or "pee the bed". Mr. Bissell described Ms. McConnell's past response to mixing alcohol as "passing out" or "falling asleep". Coupled with the presence of a strong odour of alcohol on her breath and the certificate of analysis, this evidence goes no further than establishing some amount of alcohol was consumed at some time in the evening before the accident. I cannot infer any particular amount of alcohol from this evidence. Nor can I infer when it was consumed.

- [125] As to the evidence of Ms. McConnell's past reaction to combining alcoholic beverages, her description of the usual reaction is somewhat equivocal or unrelated to her ability to drive. Mr. Bissell's evidence, that she usually falls asleep, could be relevant to driving; however, Corp. McCowan's evidence suggests the loss of control over the vehicle in this case was not caused by Ms. McConnell falling asleep at the wheel. In Corp. McCowan's opinion when the vehicle left the roadway there was physical evidence in the form of a "yaw" denoting excessive steering to the right and then to the left in order to bring the vehicle back under control. Had Ms. McCowan suddenly fallen asleep at the wheel one would not expect to find evidence of any attempts to maintain control of the vehicle. Further, without evidence of when the alcoholic beverages were combined or how long it takes for Ms. McConnell to react, it is mere speculation to conclude this was a factor in the accident.
- [126] The Crown also relies upon the evidence of erratic driving as described by Mr. Smith and Ms. Thevarge as an indication of impairment. I find the evidence of these witnesses can be given very little weight in all of the circumstances. Mr. Smith was not a reliable witness and clearly not an independent eye witness for the reasons described earlier. Mr. Smith exaggerated his evidence by adding uncertain details about additional instances of bad driving and he embellished upon the severity of the erratic driving he witnessed. Mr. Smith acknowledged that his recollection of the events had faded and it was apparent that he had filled in details over time not by memory but by reconstruction. His evidence about Ms. McConnell's seatbelt was particularly troubling in this regard. It is also apparent that Mr. Smith's opportunity to observe the alleged erratic driving was severely limited by the darkness of the night without natural or artificial light to aid him. His observations were based entirely upon the movement of the vehicle's headlights at some distance behind him. In addition, the fact he is making these observations from the front seat, and through the rear window of a vehicle travelling at 80 kilometres per hour must also be considered as limiting his opportunity to make reliable observations. Lastly, Mr. Smith was very tired when he made these observations; he had been up since 4 am that morning and it was after midnight when he observed Ms. McConnell's vehicle.
- [127] Ms. Thevarge's evidence is also suspect because she acknowledged her evidence had been influenced by what Mr. Smith had told her that he had seen. She was unable, so long after the events, to accurately distinguish between her independent recollection of the erratic driving and what Mr. Smith had described to her. Thus it is unsafe to consider her evidence as corroborating Mr. Smith's version of the events.
- [128] At best, Mr. Smith's evidence establishes that at some point between Pemberton and the accident site, Ms. McConnell's manner of driving caught his attention and he observed what he believed to be driving on the wrong side of the highway on three occasions. Given the frailties associated with Mr. Smith's eye witness account of this erratic driving, as well as his apparent bias against Ms. McConnell, very little weight can be accorded to this evidence.

- [129] The Crown argues the accident constitutes evidence of impairment because there is no explanation for it in evidence before the court. In this regard, the Crown maintains it is mere speculation to conclude the accident was caused by the sudden appearance of the truck just as it is speculation to conclude the accident was caused by mechanical failure, an animal on the roadway, or some other cause unrelated to alcohol consumption.
- [130] In my view, it is not mere conjecture to find that the sudden appearance of a large truck and trailer travelling at excessive speed around a blind corner with bright, large headlights in otherwise complete darkness was an external factor that could reasonably have caused Ms. McConnell to lose control of her vehicle in the manner described by Cpl. McCowan. Both Mr. Smith and Ms. Thevarge confirm the existence of this truck and the timing of the accident as simultaneous with its passing Ms. McConnell's vehicle. They were both startled by the sudden appearance of the truck and its unsafe speed around the blind corner. Ms. Thevarge was temporarily blinded by its lights and Mr. Smith testified that the small size of Ms. McConnell's vehicle would have accentuated the impact of the truck's large, bright headlights. While Ms. Thevarge did not lose control of her vehicle, she was very familiar with Highway 99 and Mr. Smith testified that she nevertheless defensively steered to the right and away from the oncoming truck.
- [131] Corporal McCowan's evidence also introduces other external factors based on the physical evidence at the scene. The presence of gravel on the shoulder where the first evidence of "yaw" is found would likely have made it more difficult for Ms. McConnell to control the vehicle even travelling at a safe speed. In addition, low tire pressure may have been a factor in the dislodging of the right side tires from the rims which, in turn, caused the vehicle to flip over. The fact the left side tires were below average air pressure and Mr. Bissell did not check his tire pressure when he purchased the vehicle a few days earlier is evidence from which it may be inferred that the right tires could also have been below normal air pressure. Thus I am satisfied that there was an alternate explanation for the accident inconsistent with or apart from impairment that is based upon reasonable inferences drawn from the evidence.
- [132] Turning to the other signs of impairment, Ms. McConnell's behaviour at the scene of the accident and later at the Pemberton clinic can be regarded as abnormal and symptomatic of impairment. In particular, her belligerence toward the hospital staff could be interpreted as a sign of impairment. Ms. McConnell's behaviour, however, must be examined in light of all of the relevant circumstances.
- [133] First, I do not accept Cst. Gallop's evidence that Ms. McConnell had slurred speech. Corporal Wright, a veteran police officer with 26 years of experience did not note any slurring of her speech. Ms. Dymus, the attending nurse, was also of the view that Ms. McConnell's speech was not slurred. Finally, Cst. Gallop made no note of slurred speech until her report to Crown which was completed two months after the accident. She also included no details in regard to the slur; i.e. whether it was slight or significant and whether it was constant or intermittent. Nor did Cst. Gallop note where and when she detected

slurred speech. Where such important details are absent from contemporaneous records of the events, and not recorded at all until some two months after the events, their reliability is suspect: Lozanovski at ¶14 and 21.

- [134] Second, Ms. McConnell's belligerence and lack of co-operation with the medical staff is equally consistent with her having been in a very traumatic accident, being confused and scared about her physical condition, having a painful laceration to the scalp, and suffering from a possible head trauma. Just as this behaviour may be interpreted by a lay person as a sign of impairment, I do not regard expert medical evidence as a necessary pre-condition to drawing what must be regarded as common sense conclusions pointing toward a different cause for the behaviour.
- [135] Ms. McConnell had been found unconscious after a serious motor vehicle accident in which the vehicle rolled a number of times. The expert evidence suggests she may have struck her head on the roof of the vehicle and the rear view mirror as it rolled. There was a large palm sized laceration on the back of her scalp with glass embedded in it. Ms. McConnell had bled profusely at the scene and Cpl. McCowan attributed the large amount of blood on the passenger seat to the driver. At the clinic Ms. Dymus assessed Ms. McConnell as a 2 on the acuity scale which meant only those patients who had no pulse or were not breathing should be seen in priority to her. Both at the scene and later in the hospital she was confused about who was in the vehicle and did not recall driving. Throughout this period she was screaming that her ponytail was too tight yet she had no ponytail. It is also apparent from Ms. McConnell's statement that she feared IV's because of bad experiences in the past and, according to Cst. Gallop's evidence, the nurses connected her to two intravenous tubes. She also had to suffer the indignity of a having a urinary catheter inserted and a rectal examination while she lay immobilized and strapped to a bed to prevent a spinal cord injury. There is also the evidence of Ms. Dymus, who is a registered nurse, that Ms. McConnell's behaviour at the clinic could possibly signal some form of head injury or impairment. In my view, from this evidence it is reasonable to infer Ms. McConnell's belligerence could be related to the traumatic impact of the accident, her actual medical condition, and the fear of what was unknown about the extent of her injuries just as equally as it could be related to impairment. Thus it is a neutral factor and cannot be given any weight in favour of the Crown's case.
- [136] While this conclusion may appear to be in conflict with the reasoning in Chaston, each case must be decided on its own facts. In Chaston, there was very little evidence that the accused had suffered any type of head injury and, indeed, there was evidence to suggest his trip to the hospital was precautionary only. The ambulance attendant did not give evidence that she saw any indications of a head injury. In this case, Nurse Dymus agreed the symptoms exhibited were possibly related to a head injury. In addition, Ms. McConnell was found unconscious as a result of a trauma to her head. Moreover, the accused in Chaston exhibited several other signs of impairment that are absent of this case.

- [137] Lastly, the inferences I have drawn from the evidence relate to more than just the possibility of a head injury and encompass what I regard as within the range of expected responses to a traumatic accident. My conclusion in this regard is supported by the reasoning of the court of appeal in *Fisher* where at ¶12, without any expert medical evidence, the court inferred that, "The conduct and demeanour of the appellant after the collision was as consistent with the emotional trauma following on what occurred as it was with impairment."
- [138] The Crown also relies on the presence of alcohol in the vehicle at the time of the accident as evidence of impairment. There is no evidence, however, to support a conclusion that any, except one of the cider bottles, was empty or partly empty before the accident. Three of the six bottles were definitely unopened. The two broken bottles found outside the vehicle were not seized, the photographs of them were inconclusive, and none of the officers could recall if their caps were still on. Much of the liquid was also spilled from the broken bottles on the road. There was one empty bottle of cider found in the vehicle; however, its presence cannot be used to infer that the driver was consuming alcohol because there was also a passenger in the vehicle, a passenger who had been drinking alcohol earlier in the evening, and who had brought a bottle of wine to Ms. McConnell's apartment. In addition, Mr. Smith testified that the odour of alcohol on Ms. McConnell's breath did not smell like the cider he saw in the vehicle. Lastly, the wine bottle discovered near the vehicle had a cork in it. This evidence suggests no one was consuming alcohol while driving.
- [139] Finally, the Crown relies upon the opinion of Cst. Gallop that Ms. McConnell was impaired. Bearing in mind the caution expressed in *Graat* that no greater weight should be given to this kind of opinion evidence from police officers, and considering the other relevant factors, I find her evidence on this point is unreliable. First, the opinion was based upon assumptions that have not proven to be accurate. In particular, Cst. Gallop believed the accident was unexplained and was unaware of the external factors contributing to it. Second, Cst. Gallop relied on the presence of slurred speech which I have found to be unsupported by the evidence. Third, I find that Cst. Gallop mistakenly characterized Ms. McConnell's behaviour as belligerent simply because she protested the allegations of impairment. She also failed to accord any significance to the trauma experienced by Ms. McConnell as a result of the accident when evaluating Ms. McConnell's failure to co-operate with the hospital staff and ignored the fact that in all other respects Ms. McConnell was polite and respectful of her as a police officer.
- [140] In addition to the weaknesses identified in the evidence relied upon by the Crown, there is evidence supporting an inference that Ms. McConnell's ability to drive was not impaired. To manoeuvre the Toyota out of the small carport at her apartment, Ms. McConnell had to back the vehicle around another vehicle parked directly behind it avoiding the walls of the carport and the other vehicle. There is no evidence of any damage to either the other vehicle or the walls of the carport. There is also evidence that Ms. McConnell was wearing

her seatbelt. This showed good judgment on her part that one might not expect from a person who is impaired. Mr. Smith's evidence supports a conclusion that Ms. McConnell was at all times travelling at or below the posted speed limit. Finally, Corp. McCowan testified that there was no evidence of any unusual driving or tire marks off the roadway as far back as the right corner after the bridge, which is some distance before the accident site. Mr. Smith also confirmed that after the bridge there were no further instances of erratic driving.

[141] Considering the evidence as a whole, and having due regard for the weaknesses identified in the evidence relied upon by the Crown, as well as the evidence that is inconsistent with impairment, I find the Crown has not proven impairment beyond a reasonable doubt. Accordingly, it is unnecessary to address the issue of causation. I acquit Ms. McConnell on Count 1, impaired driving causing bodily harm.

[142] Turning to Count 2, dangerous driving causing bodily harm, the test for s. 249(3) of the Code was recently considered by the Supreme Court of Canada in Beatty at ¶43:

(a) The Actus Reus

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

(b) The Mens Rea

The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required mens rea. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

[143] Beatty also clarifies that the consequences of the driving do not automatically render the driving dangerous. It is the manner in which the vehicle is operated that is the focus of the inquiry. As Charron J. says at ¶46:

As the words of the provision make plain, it is the manner in which the motor vehicle was operated that is at issue, not the consequence of the driving. The consequence has no bearing on the question whether the offence of dangerous operation of a motor vehicle has been made out or not. The court must not leap to its conclusion about the manner of driving based on the consequence. There must be a meaningful inquiry into the manner of driving. The consequence, of course, may assist in assessing the risk involved, but it does not answer the question whether

or not the vehicle was operated in a manner dangerous to the public.

[emphasis in original]

[144] Turning to the case at hand, I have concluded that the Crown has failed to prove that Ms. McConnell's ability to operate a motor vehicle was impaired by alcohol. Accordingly, impairment cannot be used a factor in deciding whether the Crown has proven the offence of dangerous driving in this case.

[145] Further, applying the reasoning of Beatty, I cannot leap to a conclusion that Ms. McConnell was driving dangerously because she had an accident. There must be evidence in regard to the manner of driving that would reasonably lead to this conclusion. At the time of the accident there was no evidence of driving that could be considered a marked departure from the standard of care of a reasonable person. Ms. McConnell was travelling at or below the posted speed limit; she was not observed outside her lane of travel at any time after the bridge; and Corp. McCowan's observations confirm there was no physical evidence to support erratic driving or operation of the vehicle outside the proper lane of travel as far back as the first right curve after the bridge. Moreover, in regard to the cause of the accident, my conclusion concerning the impaired driving charge is equally applicable to Count 2. There is an alternate explanation for the accident based upon inferences reasonably drawn from the proven facts that is inconsistent with dangerous driving as a cause.

[146] In my view, the only evidence tending to support the Crown's case in regard to dangerous driving is found in Mr. Smith's evidence. As discussed earlier, however, the frailties associated with Mr. Smith's eye witness evidence, as well as his apparent bias against Ms. McConnell, render his observations about her erratic driving unreliable. As a consequence, I find it would be unsafe to convict Ms. McConnell of dangerous driving based upon his evidence standing alone. While Ms. Thevarge also testified about her observations of erratic driving, she cannot be regarded as a corroborative witness in light of the fact that she cannot distinguish between what she saw and what Mr. Smith has described to her as his observations. Accordingly, for these reasons I must acquit Ms. McConnell on Count 2.

Conclusion

[147] Ms. McConnell is acquitted on all three Counts in the Indictment.

"The Honourable Madam Justice Bruce"

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Prepared on 29 October 2026 · Esheria