
CANADA / JUDGMENT

R. v. Wengenmayr

2012 BCSC 1786

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1786 R. v. Wengenmayr

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wengenmayr,

2012 BCSC 1786

Date: 20121130

Docket: 75152

Registry: Kelowna

Regina

v.

Cody Richard Wengenmayr

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment

Counsel for the Crown:

D. Ruse

Counsel for the Accused:

D.B. Johnson

Place and Date of Trial:

Kelowna, B.C.

September 17-21, October 10

and 12, 2012

Place and Date of Judgment:

Kelowna, B.C.

November 30, 2012

- [1] Mr. Wengenmayr stands charged that on August 30, 2010, while his ability to operate a motor vehicle was impaired by alcohol, he operated a motor vehicle and thereby caused bodily harm to Iris Alphonse contrary to s. 255(2) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], and caused the death of Trey Alphonse, contrary to s. 255(3) of the Code. He is also charged with having the care and control of a motor vehicle when the concentration of alcohol in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood and causing an accident that resulted in bodily harm to Iris Alphonse contrary to s. 255(2.1) of the Code and causing the death of Trey Alphonse contrary to s. 255(3.1) of the Code. He is further charged with dangerous driving causing bodily harm to Iris Alphonse contrary to s. 249(3) of the Code and causing the death of Trey Alphonse contrary to s. 249(4) of the Code.
- [2] This is my decision following six days of trial.
- [3] The following admissions of fact were made:
- 1) On August 30, 2010, Trey Alphonse and Iris Alphonse were struck by a 1991 Honda, British Columbia licence number 067 THE, (the "Honda").
 - 2) As a result of the collision, Trey Alphonse sustained numerous injuries including the following:
 - a. massive head trauma;
 - b. right side fracture of C1 cervical spine;
 - c. blunt cardiac trauma;
 - d. right clavicle fracture;
 - e. bilateral fracture of the pelvis.
 - 3) At 2:40 a.m. on August 31, 2010, Trey Alphonse died as a result of the injuries sustained. He was six years old at the time of his death.
 - 4) As a result of the collision, Iris Alphonse sustained a fractured lower left leg and soft tissue injuries to her left hip. Ms. Alphonse was 36 years old at the time of the collision.
 - 5) Paul Abel is an expert in automotive mechanics. On September 9, 2010, he examined the Honda and determined there was no mechanical reason which would have caused the collision.

- [4] I will now review the facts derived from the evidence at trial and, where necessary, make findings of fact.
- [5] The tragic circumstances of this case occurred about 10:15 p.m. on August 30, 2010. Iris Alphonse and her six-year-old son, Trey Alphonse, were crossing Highway 97, or Harvey Avenue as it is also known, in Kelowna. It is a six-lane highway with three lanes in a westerly direction and three lanes travelling east.
- [6] Ms. Alphonse and her son began crossing Harvey Avenue from the curb on the south side of the highway. She held his hand and he pulled a toy scooter behind him. There was no crosswalk where they crossed. The nearest crosswalk was about 75 meters to the east at the Dilworth intersection.
- [7] They managed to cross five lanes safely but when they entered what I will call the curb lane on the northern-most side of the highway (sometimes referred to by witnesses as the HOV lane), they were struck by the Honda which was travelling westbound. As indicated in the agreed facts, as a result of the collision, Ms. Alphonse was seriously injured and Trey Alphonse died.
- [8] It is clear from the evidence, and I so find, that the driver of the Honda at the time of the collision was the accused, Cody Wengenmayr. The only other occupant of the vehicle was Dustin Corney. Mr. Corney testified that Mr. Wengenmayr was driving the Honda at the time that it struck Ms. Alphonse and her son.
- [9] I will turn now to the circumstances preceding the accident.
- [10] Around 5:00 p.m. on the day of the accident, the accused had met with Mr. Corney at another friend's residence in Kelowna. Mr. Corney said that the three of them "hung out" in the front yard while their friend was working on his car and they had a "few beer." He was not sure if one of them was drinking cider but believed that each of them was drinking beer. He said that he drank about four regular-sized cans of beer and thought that the accused consumed the same number but was not sure and was not counting. There was no evidence as to whether the accused had consumed any liquor before meeting at the friend's residence.
- [11] Mr. Corney testified that about 7:30 or 8:00 p.m., he and the accused drove to the accused's residence which was a few blocks away from their friend's. The accused was the driver. Mr. Corney said that because they had been drinking they decided to spend some time at the accused's residence to get some of the alcohol out of their systems before the accused drove him home. He said that while they were at the accused's residence he did not have anything to drink and he did not see the accused have anything to drink.

- [12] Mr. Corney said that they left the accused's residence just after 10:00 p.m. Mr. Wengenmayr was driving the Honda and Mr. Corney was a passenger in the front seat. They travelled to Highway 33 and then turned left into the middle lane of Highway 97 and continued westbound. At some point he said that the accused changed into the curb lane. He said not many other vehicles were around them.
- [13] They travelled westward through the Dilworth intersection while talking and with music playing. Glancing over towards the accused, Mr. Corney said that he noticed two figures to the left of the Honda. He said that he saw a mother running across the highway holding her son's hand and he was dragging a scooter in his hand. He noticed that the woman was just coming into the left side of the curb lane and he said "look out" to the accused. The Honda then struck Ms. Alphonse and Trey Alphonse. He said that the accused swerved but does not recall if there was any braking. He described the woman being hit by the passenger side of the front bumper and the boy being tossed over the hood of the vehicle as well as forward with the momentum of the vehicle. They then turned off the highway and into a nearby parking lot about 50 feet from the scene of the accident.
- [14] Based on the evidence of Mr. Corney it is clear that before the collision the accused would have had an unrestricted view ahead and to the left side of the Honda. Mr. Corney had time to see the woman and child coming into the curb lane. He also recalled that while there were few vehicles around there was an SUV in the middle lane and behind them by a few vehicle lengths. He did not say that there was any vehicle blocking the view ahead or to the left of their vehicle.
- [15] From the time that they left the residence of the accused until the collision, Mr. Corney said he did not see the accused consume any alcohol. He also said from the time of the collision until the police began speaking with them the accused did not drink any alcohol.
- [16] Mr. Corney's recollection of the speed of the vehicle was that it was travelling a "little over" 60 k.p.h., but not over 65 k.p.h. However, he somewhat equivocally testified that he could not recall if the vehicle might have been travelling 90 k.p.h. or more.
- [17] Two witnesses, Jordan Larue and Noah Lansing, were standing near their vehicle in the Denny's parking lot adjoining the area where the collision occurred. They both described hearing a crash or a crunching sound followed by, or at least simultaneously with, the sound of tires screeching. They both noticed an object rolling down the highway and discovered that it was a young child. They also testified that they saw an SUV stopped behind the Honda immediately after the collision occurred.
- [18] A number of witnesses who were operating vehicles in the vicinity of the collision testified as to their observations.
- [19] Robert Rosten was travelling west on the highway in the course of his work as a project manager for an engineering company. As he went through the Dilworth intersection he said that he had a clear view of the roadway. He said that there were two or three vehicles

between him and the collision and he did not see any brake lights ahead of him before the collision. He was in the lane next to the median and planning to turn to the south into the Orchard Park Mall when he noticed a vehicle in the curb lane swerving and then something flying into the air that he thought was a deer. He slowed his vehicle and proceeded to turn into the Orchard Mall.

- [20] Chad Smith, an audio/video technician, was on his way to work and turned onto the highway from Highway 33 at the same time as the accused. He began travelling west in the median lane and observed the Honda travelling west in the middle lane. He said that he was travelling about 5 or 10 k.p.h. above the posted speed limit of 60 k.p.h. He said the Honda started pulling away from him and was travelling at a greater speed. He did not notice when the Honda switched into the curb lane.
- [21] As he was travelling westbound Mr. Smith testified that he saw some shadows moving in front of the lights in the area of the median and going across the highway from his left to his right. He observed the shadows go in front of two cars and then noticed the Honda strike something and something flying into the air. He also noticed an SUV behind the Honda in the lane to the left of the Honda. When he first saw the shadows and noticed the Honda strike something he said he was about 100 meters behind the Honda. Exhibit 5 is a map where Mr. Smith marked the area where he was when he first saw the shadows and where the Honda was.
- [22] Scott Robinson was travelling west in the middle lane of the highway when he testified that he observed a Honda with two occupants. He said that he first noticed the Honda in the median lane before it moved behind him and into the curb lane. He described the Honda passing his vehicle and marked that on a map that is Exhibit 4. He said that the Honda had pulled ahead of his vehicle by about a car's length when he noticed a mother and child starting to run across to the median from the south side of the highway, hesitate and then continue to "hustle" across the westbound lanes of the highway. He described the woman leading the child and the child dragging a little scooter. He said it was nighttime but there was a lot of light from the mall and it was easy to see.
- [23] He said it was obvious to him that they were going to cross the westbound lanes so he started to slow down and had time to stop. He said he did not have to make an emergency stop. He said that if he had not stopped he would have hit them. He noticed ahead of him that the Honda kept on driving and said he could see what was about to happen. The Honda then clipped the woman and struck the boy who was thrown over the car and 40 or 50 feet down the highway.
- [24] Mr. Robinson said that there was no other vehicle nearby and nothing blocking his or the Honda driver's vision. He testified that he did not see the brake lights of the Honda come on until the collision occurred.

- [25] He described the Honda swerving to the left after it hit the boy. He was stopped in the center lane at that point in time.
- [26] He said that when the Honda started to pull away from the scene of the collision he thought it was going to leave the scene so he followed it into a nearby Denny's parking lot. He then went over to the driver of the Honda and started yelling at him. He said he was very emotional at the time because he had just seen a little boy die for no reason. He said while at the time he was very upset and wanted to hit the driver, he does not want more families to suffer and now feels sorry for the driver.
- [27] On the map which is Exhibit 6, Mr. Robinson marked where he first saw the woman and child with an "A" in a red square. The red "B" is where he stopped and the dotted line from "X" to "Y" is where he saw the mother and child crossing the highway.
- [28] Mr. Robinson said that when he crossed the Dilworth intersection he was travelling in excess of 70 k.p.h. He had not looked at the speedometer but said that he frequently speeds when he is driving and on that highway he normally travels at about 70 k.p.h.
- [29] The police arrived at the scene shortly after the collision which occurred about 10:15 p.m. Constable Stanviloff saw the child in the curb lane and a woman administering CPR which he took over doing. Shortly after, an ambulance arrived and a medic took over the care of the child.
- [30] Constable Scott Butts arrived on the scene about 10:20 p.m. and was given the task of securing the scene and making sure that nothing was moved. He observed the woman on the side of the highway and the scooter. He walked towards the boy where the medics were attending to him and noted medical paraphernalia where the boy was lying. He said that these items and the scooter remained in the same position for the whole time that he was at the scene. He remained at the scene until Corporal Johns, the accident reconstruction expert, arrived at 2:16 a.m. the next morning. He then assisted her with placing numbered cones and taking measurements. He said nothing had been moved by the time that Johns arrived and took photographs. He described the photos in Exhibit 2 as depicting the area where the accident occurred.
- [31] Constable Meid arrived a few minutes after the collision. He examined the Honda and observed an open can of Rock Creek cider in the cup-holder. He said it was a 355 milliliter can and the alcohol content was 5%. It was open and only partially filled.
- [32] Constable Lucash arrived about 10:25 p.m. He described observing a lot of activity at the scene. He said the accident scene was lit with street lights and he had no difficulty seeing what was going on around him. He has been a qualified breath technician since 2003 and has conducted between 250 and 275 impaired driving investigations in the past. After being directed to the driver of the Honda, who I have found to be the accused, Constable Lucash spoke with the accused and the accused provided his driver's licence to him. Constable Lucash testified that the accused had watery eyes and he noticed a moderate scent of liquor

on his breath. He did not observe any other signs of impairment. He then read the demand to the accused to use the approved screening device or "asd." The accused used the asd and a fail reading resulted indicating that his blood/alcohol reading was in excess of 100 mg of alcohol in 100 ml of blood. He then informed the accused that he was under arrest for impaired driving causing bodily harm.

- [33] Constable Lucash read his Charter 10(b) rights and the police warning to the accused and placed him into the rear seat of his police vehicle. He left the scene with the accused at 10:46 p.m. and arrived at the RCMP detachment at 10:52 p.m.
- [34] The accused was administered his first breathalyzer test at 12:19 a.m. on August 31, 2010, with an approved instrument known as a BAC Datamaster C, by Constable Churchill, a qualified technician. A second test was administered at 12:39 a.m. Constable Lucash observed him before and between the giving of the two samples and said that the accused did not burp, vomit or regurgitate. He said the accused appeared the same in court as he did when he dealt with him after the collision. He estimated that the accused weighed between 150 and 160 pounds. I note that the driver's licence of the accused indicates that his weight is 66 kilograms.
- [35] Constable Churchill provided Constable Lucash with the breathalyzer certificate showing the result of the two tests. He photocopied and signed it and provided the signed copy to the accused. Constable Lucash escorted the accused to the lobby of the Detachment where he met and left with his mother at 1:38 a.m.
- [36] Constable Churchill, a qualified technician on the BAC Datamaster C breathalyzer, testified regarding the breathalyzer testing of the accused. He checked the instrument and determined that it was in proper working order. He discussed any medical conditions with the accused and explained to him how to give a sample of his breath. He noted an odour of liquor on the breath of the accused and an odour of liquor in the breathalyzer room. At 12:19 a.m. the instrument analyzed the breath sample from the accused as 110 milligrams of alcohol in 100 millilitres of blood. He then readied the instrument for a second test and confirmed that the instrument was working properly. The second breath sample from the accused at 12:39 a.m. showed 90 milligrams of alcohol in 100 millilitres of blood.
- [37] Michael Rosland testified after the court accepted him as an expert in the area of forensic alcohol toxicology. His expertise encompasses matters involving the absorption and elimination of alcohol by a human, the pharmacology of alcohol and the effects of alcohol in a human on the operation of a motor vehicle. He also has expertise in the use and operation of a BAC Datamaster C breathalyzer.
- [38] Extrapolating from the breathalyzer results and using the lowest of the two breathalyzer readings, Mr. Rosland testified that the blood alcohol level of the accused at 10:15 p.m. (being the time of the collision), would have been between 114 and 138 milligrams of alcohol in 100 millilitres of blood. Mr. Rosland made three assumptions in arriving at that conclusion. Firstly, that the accused eliminated alcohol from his body at the rate of 10 to 20

milligrams per hour. He said 90% of humans eliminate alcohol at that rate. The remaining 10% have a greater elimination rate. Secondly, he assumed that the accused had not consumed any alcohol in the 30 minutes prior to operating the vehicle and, thirdly, that the accused had not consumed alcohol between the time that he was driving and the time that the breath tests were administered.

- [39] Mr. Rosland said that for a male, like the accused, who weighs 66 kilograms to have had a blood/alcohol level of 80 mg in 100 ml of blood at the time of the collision he would have had to have consumed 1 to 1.6 355 ml cans of Rock Creek Cider with 5.5% alcohol by volume, 1.7 to 2.7 ounces of liquor with 40% alcohol by volume, 1.1 to 1.9 standard-size cans of beer with 5% alcohol by volume, remaining unabsorbed in his stomach as a theoretical minimum and in actuality it would have to be 1.5 to 2 times that quantity. He said that it takes about 30 to 40 minutes after a last drink for an individual to reach the peak alcohol concentration in their blood. Alcohol would start to show in a person's blood five minutes after their last drink and after 15 minutes, 80% of the alcohol would be absorbed.
- [40] The evidence establishes that the accused did not consume liquor of that quantity or type at a time that would have left it unabsorbed in his stomach when the collision occurred or thereafter.
- [41] As to the effect of alcohol on the human body, Mr. Rosland said that its effects depend upon the quantity present in the body. He said that when blood/alcohol levels reach 100 mg per 100 ml of blood, all individuals, regardless of their tolerance of alcohol, would be impaired in the operation of a motor vehicle.
- [42] He testified that the impaired ability to operate a motor vehicle occurs because such operation is a complex task involving scanning for hazards, observing traffic signals, maintaining a certain speed and controlling a vehicle in an appropriate lane. Alcohol impairs the ability of an individual to do two things at once and the brain will focus on one thing or another. Alcohol impairs vision and visual acuity, depth perception, recovery from the glare of oncoming lights and peripheral vision. He said that alcohol also impairs reaction time such as the time to react to a red light and determine that the brakes must be applied. He said an impaired person takes longer to process the required steps to take. He opined further that facing oncoming lights, the ability of the brain to process an object with the light behind is impaired by alcohol. He said he would expect all of these impairments to be found at the 114 to 138 mg per 100 ml blood/alcohol level.
- [43] With regard to the blood/alcohol readings of the accused, Mr. Rosland testified that having heard the evidence of Constable Churchill, the BAC Datamaster C had been used properly. He said that if the instrument was operating properly, then the readings would be accurate. As I noted, Constable Churchill had tested the instrument and testified that it was operating properly before administering the tests to the accused.

- [44] Mr. Rosland testified as to the effect on the blood/alcohol level of a 66 kilogram male of consuming four standard-size cans of beer containing 5% alcohol by volume starting at 5:30 p.m. and ending at 8:00 p.m., assuming they were consumed at an equal rate over that time. He said, in effect, that the actual blood/alcohol level of that person at 10:15 p.m. would be less than 80 mg of alcohol per 100 ml of blood. If that person had consumed four standard cans of Rock Creek cider containing 5.5% alcohol by volume in the same time period, in effect, their actual blood/alcohol level at 10:15 p.m. would also be less than 80 mg of alcohol per 100 ml of blood.
- [45] Corporal Clover Johns testified as an expert in forensic accident reconstruction. She attended the scene of the accident at 2:16 a.m. on August 31, 2010. She was shown the place where the boy had come to rest after the collision, near some medical paraphernalia, and the location of his small scooter. I am satisfied from all of the evidence that the location of the boy and his scooter referred to by Corporal Johns was unchanged from the immediate aftermath of the collision and I so find.
- [46] She described the scene where the collision occurred. She said that the roadway was straight with six lanes and a left turn lane. The asphalt was dry and in good repair. The posted speed limit was 60 k.p.h. The area was lit by street lights and there were no permanent vision obstacles.
- [47] Photo 23 of Exhibit 2 shows the start of tire skid marks from the Honda at the yellow cone numbered "20." From the vicinity of the start of the skid marks on the road she could see 250 meters in either direction.
- [48] In a diagram that is Exhibit 11, Corporal Johns placed an icon under the words "Harvey Avenue" which shows the location of the boy in the curb lane after the accident. This location is also shown as marker 24 in photo 43 of Exhibit 2. The medical paraphernalia around the location of the boy is shown in photo 15 of Exhibit 2. Photos 11 and 12 depict the location of the scooter. It is also indicated on her diagram.
- [49] Based on the location of the scooter and marker 24 and the distance between those points, Corporal Johns calculated the speed of the Honda when it struck the woman and child. Although she could not determine the exact point of impact she considered the area of impact to be where the scooter came to rest, because in her view the collision must have occurred at least where the scooter was located. Using the location of the scooter as the impact point she determined the speed at which the boy was accelerated to have reached marker 24. The result was a minimum speed of between 58 and 62 k.p.h. This speed is usually less than the speed of the vehicle involved in the collision but never greater.

- [50] The evidence establishes that as a result of being struck by the Honda, Ms. Alphonse ended up near the side of the highway close to the "Artisan" sign depicted in photo 20 of Exhibit 2. If the point of impact were at the Artisan sign, Corporal Johns said that the child would have been accelerated to a speed of between 69 and 79 k.p.h. The vehicle speed would usually be greater than that but not less.
- [51] By using the scooter as the point of impact, Corporal Johns arrived at the lowest minimum range of speeds of the Honda at the time of the collision.
- [52] Referring to a copy of her diagram in Exhibit 14, she said that it shows where the vehicle would have been able to come to a complete stop at different speeds after seeing, reacting and applying the brakes. The range shown is from 20.8 meters at a speed of 60 k.p.h. to 46.85 meters at a speed of 90 k.p.h. Referring to the red lines in that diagram, the start of the red lines is where the brakes of the vehicle would have had to have been applied if it was to stop at the location of the scooter, or the point of impact.

Issues

- [53] The issues in this case are firstly whether, at the time of the collision, the accused was impaired or had a blood/alcohol level in excess of 80 milligrams per 100 millilitres of blood and secondly, if so, did his impairment cause the collision.

Submissions

- [54] The Crown submits that Mr. Wengenmayr should be convicted of impaired driving causing death and bodily harm. If he is convicted of those offences, then the Crown says the other charges should be conditionally stayed based on the Kienapple principle.
- [55] The Crown says that the evidence establishes that the blood/alcohol level of the accused at the time of the collision was between 114 to 138 mg in 100 ml of blood and thus, as all persons with that blood/alcohol level, the accused was impaired in the operation of a motor vehicle.
- [56] While there is no doubt that Iris Alphonse put herself and her son in harm's way, the Crown says that they could have been seen by the accused and his failure to see them and avoid striking them was due to his impairment.
- [57] The Crown submits that the test for causation was established by the Supreme Court of Canada in *R. v. Smithers*, [1978] 1 S.C.R. 506, and has been applied subsequently by the British Columbia Court of Appeal. The Crown says that this test has been satisfied and that the evidence has established that the impaired driving of the accused was a contributing cause of the death of the child and the bodily injury of his mother and not just a minimal or insignificant cause.

- [58] Defence counsel argues that I must consider that the accident occurred at night with imperfect street lighting at a location on the highway where there was no crosswalk. Ms. Alphonse and her son were jaywalking and thus, committing an offence under the Motor Vehicle Act. A driver would not have expected a pedestrian to cross, especially an adult holding a child with a scooter. He submitted that this was an accident that no one could have avoided whether sober or impaired. He submitted that Ms. Alphonse caused this accident, not Mr. Wengenmayr.
- [59] Counsel submits that the accident occurred because Ms. Alphonse created an emergency situation, not because of anything that Mr. Wengenmayr did. He suggests that if it had not been for the fact that the accused had alcohol in his system, Ms. Alphonse may have been charged with criminal negligence causing death.
- [60] Counsel says that I should find that the SUV driven by Mr. Robinson was alongside the accused at or just prior to the collision, and Ms. Alphonse and her son put themselves in a position of harm when they walked in front of the accused's vehicle.
- [61] Defence counsel submits that the evidence of Mr. Robinson should not be accepted because it conflicts with other witnesses such as Mr. Rosten and Mr. Smith. He says Mr. Robinson's evidence is unreliable and biased because he was angry and completely focused on the death of the child and therefore his evidence is unreliable. Constable Lucash testified that at the scene he had to calm Mr. Robinson down. The evidence also established that Mr. Robinson had threatened to kill the accused if he left the scene.
- [62] Counsel argues that Constable Lucash, an experienced impaired driving investigator, who was with the accused from 10:25 p.m. until 1:00 a.m., only noticed that the accused had glassy eyes and the odour of liquor on his breath. He did not observe the accused to have any problems walking, reaching for his driver's licence, or other motor skills.
- [63] Defence counsel submits that if you extrapolate back from the blood/alcohol readings when the breathalyzer tests were administered, the level of the accused at 8:00 p.m. would have been between 135 and 180 mg per 100 ml, and he would have demonstrated obvious signs of impairment at 8:00 p.m., which were not noticed by Mr. Corney.
- [64] Counsel says that in determining the speed of the accused's vehicle, the range of 58 to 62 k.p.h. should be used because that is the speed estimated by the expert, Corporal Johns.
- [65] Defence counsel agrees that the Smithers test applies in this case but argues that the other cases relied upon by the Crown can be distinguished. He submits that *R. v. Horton*, 2003 SKQB 510 (CanLII), is a decision which deals with facts more closely resembling the facts in this case. He further submits that *R. v. De Gantis*, 2011 BCCA 437, is authority for the proposition that speed alone is insufficient to found a conviction for dangerous driving.

Analysis

[66] I will deal first with the counts in the indictment charging the accused with impaired driving and driving with over 80 mg of alcohol in 100 ml of blood causing death and bodily injury.

[67] Sections 255(2), (2.1), (3) and (3.1) of the Code provide:

(2) Everyone who commits an offence under paragraph 253(1)(a) and causes bodily harm to another person as a result is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

(2.1) Everyone who, while committing an offence under paragraph 253(1)(b), causes an accident resulting in bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

(3) Everyone who commits an offence under paragraph 253(1)(a) and causes the death of another person as a result is guilty of an indictable offence and liable to imprisonment for life.

(3.1) Everyone who, while committing an offence under paragraph 253(1)(b), causes an accident resulting in the death of another person is guilty of an indictable offence and liable to imprisonment for life.

[68] Sections 253(1)(a) and (b) of the Code provide:

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

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

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

[69] Constable Churchill, a qualified technician on a BAC Datamaster C breathalyzer, after checking that the breathalyzer was in proper operating condition, administered the breath tests to the accused. The results of the test as shown in the breathalyzer certificate were a reading at 12:19 a.m. on August 31, 2010, of 110 mg of alcohol in 100 ml of blood and at 12:39 a reading of 90 mg of alcohol in 100 ml of blood. Michael Rosland, a qualified trainer on different breath testing instruments including the BAC Datamaster C, heard the testimony of Constable Churchill and said that he had used the instrument properly.

[70] Defence counsel submits that if the court accepts the readings of the breathalyzer then, extrapolating back to 8:00 p.m. on August 30, 2010, the readings of the accused would have been between 135 mg and 180 mg of alcohol per 100 ml of blood and that he would therefore have shown signs of impairment that were not noticed by Mr. Courtney.

- [71] Although they were not put to the expert, Mr. Rosland, I will assume that the extrapolated results submitted by defence counsel are accurate. In my view, one explanation is that sometime before 8:00 p.m. on the day of the accident the accused consumed more liquor than the three or four beer that his friend Mr. Courtney believed he had consumed. As Mr. Rosland said, if between 5:30 p.m. and 8:00 p.m. the accused had only consumed four cans of beer containing 5% alcohol by volume, then his blood/alcohol level at 10:15 p.m. on that day would have been less than 80 mg per 100 ml. As the evidence establishes that the breathalyzer was operating properly and was properly operated by Constable Churchill, a reasonable inference to draw from the results of the tests and the extrapolation is that the accused had consumed more liquor than the three or four cans of beer suggested by Mr. Corney.
- [72] I do not attach a great deal of weight to the observations by Mr. Corney of the accused's degree of impairment. While Mr. Corney acknowledged that the accused had been drinking during the afternoon and testified that because he and the accused had been drinking they decided to stay at the accused's residence to get "some of the alcohol" out of their systems, he was vague about how much beer the accused had consumed. His only comment about symptoms of impairment was that he did not observe any problems when the accused drove from Beach's residence to his residence nor did he see the accused driving erratically. His evidence suggests that each of the accused, Jeff Beach and he had consumed four beer; however, he says that he does not know if all of the beer was consumed. He was also not sure whether someone was also drinking cider at Beach's residence. He said that he did not notice the partially consumed can of cider in the Honda. Further, Mr. Corney was not shown to be a person with any experience in observing symptoms of impairment. In addition, I consider that as a friend of the accused, Mr. Corney's evidence would likely have tended to put Mr. Wengenmayr's actions that day in the most favourable light.
- [73] I accept the evidence of Mr. Rosland that the blood/alcohol level of the accused at 10:15 p.m. on August 30, 2010, was between 114 to 138 mg in 100 ml of blood. Accordingly, I find that the accused was committing an offence under s. 253(1)(b) of the Code at the time of the collision.
- [74] With regard to the offence under s. 253(1)(a) of the Code, the Supreme Court of Canada in *R. v. Stellato*, [1994] S.C.J. No. 51, affirmed the principle stated by the Ontario Court of Appeal in that case that if the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence of impaired driving has been made out.
- [75] Considering the circumstances of the collision including the serious injury of a mother and child and the signs of alcohol consumption by the driver of the vehicle, the arresting officer had reasonable grounds to believe that the offence of impaired driving causing bodily harm had been committed by the accused. When those circumstances are considered together with the evidence of Mr. Rosland that at the blood/alcohol level of the accused at the time of the collision his vision, visual acuity, depth perception, peripheral vision, judgment and reaction time would all have been impaired by alcohol, I find that at the time of the collision

the accused was impaired in the operation of a motor vehicle and thereby committed an offence under s. 253(1)(a) of the Code.

[76] I will next consider whether as a result of committing an offence under s. 253(1)(a) of the Code the accused caused bodily harm to Iris Alphonse and caused the death of Trey Alphonse as provided in s. 255(2) and s. 255(2.1) of the Code. I will also consider whether, while committing an offence under s. 253(1)(b) of the Code the accused caused an accident resulting in bodily harm to Iris Alphonse and resulting in the death of Trey Alphonse as provided in s. 255(3) and s. 255(3.1) of the Code.

[77] In *R. v. Smithers*, [1978] 1 S.C.R. 506, the Supreme Court of Canada enunciated the test to be applied in determining the cause of death in a manslaughter case and said that the Crown was required to establish that the act of the accused, in that case kicking the victim, was at least a contributing cause of death outside the *de minimis* range.

[78] This test was applied by the B.C. Court of Appeal in determining causation under s. 255(3) and (3.1) of the Code in *R. v. Andrew*, [1994] B.C.J. No. 1456. At para. 17, Cumming J.A. said:

I am satisfied that, so long as one bears in mind the distinction between a motorist driving in an impaired condition who is involved in an accident, and the motorist driving in an impaired condition whose impaired driving ability (as evidence (sic) by driving conduct, or failure to react or to make a certain judgment) comprises a contributing cause outside of the *de minimis* range to the victim's bodily harm or death, the *Smithers* test is appropriate to the offences under s. 255(2) and (3).

[79] This test was approved again by the Supreme Court of Canada in *R. v. Nette*, [2001] 3 S.C.R. 488, where the Court said that the causation standard in *Smithers* remained valid and applicable to all forms of homicide but suggested that the wording of the test be changed in jury charges and said that the standard could be phrased in positive terms using a phrase such as "significant contributing cause" rather than in negative terms such as "not a trivial cause" or "not insignificant."

[80] In determining causation I accept that the action of Iris Alphonse with her child crossing a six-lane highway at an unmarked location at night time contributed to some extent to the accident and the resulting injuries to her and to the death of her child. That is not the end of the matter. It is necessary to determine if the impaired driving of the accused was a contributing cause outside the *de minimis* range to the injuries and death or to the accident which resulted in the injuries and death.

[81] The evidence of Jordan Larue and Noah Lansing establishes that the collision occurred either just before or simultaneously with the sound of screeching tires. Although their evidence regarding where they were standing in relation to Mr. Larue's vehicle was in conflict, in my view that has no bearing on the evidence of what they heard when the collision occurred. Corporal Johns said that there would have been a brief period of time after braking was initiated until the wheels locked up. This evidence satisfies me that the

accused initiated little to no braking before the Honda struck the Alphonses.

- [82] Mr. Larue also observed something rolling down the highway and saw the Honda switching from the curb lane towards the middle lane some 20 meters east of the object on the road. Significantly, Larue also noticed that an SUV was behind the Honda. Mr. Lansing similarly heard the crash and then observed something rolling down the road. He saw the Honda and said the next closest vehicle was an SUV which was in the middle lane and few car lengths behind the Honda. The SUV referred to in the middle lane is clearly the vehicle which was driven by Scott Robinson. The location of that SUV behind the Honda at or close to the time of the collision was also confirmed by the evidence of Mr. Corney and Mr. Smith.
- [83] While driving his SUV, Mr. Robinson observed the Honda strike two pedestrians. Accordingly his testimony is very important in determining the cause of the collision.
- [84] The accused argues that Mr. Robinson is a biased and unreliable witness because he was entirely focused on the death of the child and angry at the driver of the Honda, the accused. In my view, the fact that Mr. Robinson was upset and even angry because of the Honda striking the child does not detract from the reliability of his testimony. He described how events unfolded on the evening of the accident in a clear manner and his description is not inconsistent with the evidence of other witnesses except that it is not clear that the Honda was in the median lane before it switched into the curb lane of the highway, as Mr. Robinson had thought. In my view, that inconsistency does not detract from his evidence regarding the position of the Honda in the curb lane before the collision and his observations immediately before the collision occurred. There was nothing in his testimony that suggested a bias against the accused. Rather, he showed the human emotion of being upset from having witnessed the striking of a small child by a motor vehicle.
- [85] The evidence of Mr. Robinson, who I accept had not consumed any alcohol, was that just before the collision he was driving his SUV, a 2008 Ford Escape, in the median lane and saw the Honda go past his vehicle and pull ahead of him by about a car's length. He said that looking westbound he saw a woman with a child holding a scooter run from the south side of the highway to the median. He said that he saw them pause at the median and then begin to cross the highway in front of him. He described them as "hustling" across. He said there was "tons of light" from the mall and it was easy to see them. He said it was easy for him to see that they were going to cross the highway so he started to slow down to let them cross. He testified that he had enough time to take his foot off the gas and to stop without making an emergency stop. His evidence indicates that he had enough time to realize that the Honda was going to strike the pedestrians. When he saw the Honda strike them he said that he was stopped about 6 to 8 car lengths behind the Honda.
- [86] There is no evidence to suggest that Mr. Robinson's SUV blocked the view of the accused such that he could not have seen Ms. Alphonse and her son crossing the highway. The passenger, Mr. Corney, did not testify that there was anything blocking the view from the Honda to the left. Indeed, even after turning towards the accused from looking out the

passenger window, Mr. Corney had time to see the mother, the child and the scooter coming into the curb lane in front of the Honda. The evidence establishes and I find that when the accused was approaching the scene of the collision he had an unrestricted view of the highway in front of him and to the left side of his vehicle.

- [87] The evidence of Chad Smith is consistent with that of Mr. Robinson. On the night of the accident he was travelling west on the highway in the median lane and described the Honda pulling away from him in the curb lane and being about 100 meters in front of him when he saw some shadows moving across the highway. He then saw the Honda strike something that flew into the air. I infer from Mr. Smith's evidence that the movement of the woman and child across the highway was noticeable from a distance of about 100 meters away.
- [88] The evidence of Scott Robinson and Chad Smith was that they were travelling at about 65 to 70 k.p.h. when the Honda went past them just prior to the collision; however, neither of those witnesses confirmed their speed from their speedometers.
- [89] With regard to the evidence of the accident reconstruction expert, Clover Johns, she used the location of medical paraphernalia as the resting point of the child. This point was marked with marker number 24. There is no evidence from any witness suggesting that the resting point of the child immediately after he was struck was other than at that location. Johns' testimony was that by ending up at that position the child had been accelerated to a speed of between 58 to 62 k.p.h. and the Honda would have been travelling faster than that. While the evidence of Johns, Robinson and Smith suggests that the Honda was probably travelling in excess of 65 k.p.h. at the time of the collision, because of the uncertainty of the estimates of speed by Robinson and Smith and the uncertainty regarding the point of collision expressed by Johns, I find that the speed of the Honda at the time of the collision was at least 65 k.p.h.
- [90] The accused relies on a decision of the Saskatchewan Queen's Bench in *R. v. Horton*, 2003 SKQB 510 (CanLII0), in arguing that he should be acquitted of impaired driving causing bodily harm and death. In that case the accused, who was found to be impaired, was driving a vehicle that struck a pedestrian who was jaywalking.
- [91] The facts in *Horton* are distinguishable from those in the case at bar. In *Horton* there was no independent eyewitness whose evidence indicated that *Horton* failed to keep his vehicle under proper control or was failing to keep a proper look out in the circumstances. In the case at bar, Mr. Robinson was close to the scene and near to the Honda when he observed the vehicle driven by the accused before and as it struck the pedestrians. He testified that as soon as he saw the pedestrians he was able to come to a stop without slamming on his brakes and at the same time realized that the accused vehicle was going to hit them. Unlike the *Horton* case, in the case at bar the testimony of Mr. Robinson, establishes that the accused could have or should have seen the victims earlier and been able to take the necessary action to avoid striking them.

- [92] Considering all of the evidence including the circumstances surrounding the striking of the Alphonses by the Honda and in particular the evidence of Scott Robinson, whose vehicle was a car length or so behind the Honda, that he had no difficulty stopping his vehicle to avoid hitting the Alphonses and that there was nothing obstructing the view of the accused to the front or the left of his vehicle, as well as the evidence of Mr. Rosland regarding the effect on the accused when his blood/alcohol level was between 114 to 138 mg in 100 ml of blood, I have no reasonable doubt in finding that the impaired driving ability of the accused was at least a contributing cause of the accident and the resulting bodily harm to Ms. Alphonse and the death of Trey Alphonse outside the de minimis range.
- [93] Accordingly, I convict Mr. Wengenmayr of the offences referred to in Counts 1, 2, 3 and 4, namely impaired driving and driving with over 80 mg of alcohol in 100 ml of blood and thereby causing bodily harm to Iris Alphonse and causing the death of Trey Alphonse.
- [94] While it could also be concluded that the operation by the accused of the Honda while he was impaired amounted to dangerous driving, the Crown has asked the Court to apply the Kienapple principle to the charges in Counts 5 and 6. Accordingly, they are conditionally stayed.
- [95] This matter should now be adjourned to a date for sentencing.

"Bowden J."

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