
CANADA / JUDGMENT

R. v. White

2020 BCSC 1274

COURT

Supreme Court of British Columbia

DECIDED

28 July 2020

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2020 BCSC 1274 R. v. White

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. White,

2020 BCSC 1274

Date: 20200728

Docket: 72605-2

Registry: Prince George

Regina

v.

Vanessa White

Before: The Honourable Mr. Justice R.S. Tindale

Oral Reasons for Judgment

Counsel for the Crown:

T. Bauman

Counsel for the Accused:

R. Diab

Place and Date of Trial:

Prince George, B.C.

July 20 - 23, 2020

Place and Date of Judgment:

Prince George, B.C.

July 28, 2020

[1] THE COURT: The accused, Vanessa White, is charged by way of indictment on Court File Number 72605-2 with the following single count:

on or about the 4th day of July, 2017, at or near Tete Jaune Cache, in the Province of British Columbia, did operate a motor vehicle, in a manner that was dangerous to the public having regard to all the circumstances including the nature, condition, and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably be expected to be at that place, and thereby did cause the death of Dwayne Needham, contrary to Section 249(4) of the Criminal Code.

Background

- [2] On July 4, 2017, a collision occurred just before 6:36 a.m. between a black Saturn vehicle driven by Dwayne Needham and a Dodge Ram 1500 pickup truck driven by Vanessa White, the accused (the "Collision").
- [3] The Collision occurred near Jackman Road north of Valemount, British Columbia, on Highway 5.
- [4] Prior to the Collision the Dodge pickup truck was travelling northbound and the Saturn was travelling southbound. The accused was attempting to pass a logging truck at the time of the Collision and the Collision occurred on the shoulder of the southbound lane.
- [5] The Collision tragically caused the death of Mr. Needham.
- [6] The mechanical condition of neither the Saturn vehicle nor the Dodge pickup was a material factor in the Collision.
- [7] At the time of time of the Collision, the accused had a probationary Class 5 Quebec driver's licence which she had had for approximately 13 months prior to the Collision.

Evidence

- [8] The accused, pursuant to s. 655 of the Criminal Code of Canada, made a number of admissions on this trial which have been marked as Exhibit 7.
- [9] The Crown called three witnesses, those being Dennis Neuman, Brian Sommers, and Sgt. Jarrett Hughes.
- [10] The accused called one witness on this trial, that being Trevor Dinn.
- [11] Both Sgt. Hughes and Mr. Dinn were called as expert witnesses in the field of collision reconstruction.

[12] A brief summary of the evidence is as follows.

Crown

Dennis Neuman

[13] Dennis Neuman is 59 years of age and has been employed as a commercial truck driver for approximately 40 years.

[14] On July 4, 2017, he was driving his 2014 Kenworth logging truck on Highway 5 outside of Valemount, British Columbia. Mr. Neuman testified that the speed limit is 70 kilometres per hour through the community of Valemount and then it changes to 100 kilometres per hour.

[15] Mr. Neuman testified that he was hauling 61-foot spruce logs and that the limit on highway loads is that the logs have to be under 25 metres in length.

[16] Mr. Neuman testified that once he was in the 100-kilometre-per-hour speed zone, he engaged the cruise control on this truck. The cruise control was set at 100 kilometres per hour.

[17] Mr. Neuman testified that he travelled about six or seven kilometres and came to a point in the highway where there were two rises in the highway. As he started up the second rise, he saw a vehicle approximately one-half to three-quarters of a kilometre behind him. He said this vehicle was a Dodge pickup truck.

[18] He testified that as he was starting down the second rise in the highway, he noticed a small car travelling southbound towards him. It appeared to be doing normal highway speed. As the car came closer towards him and was less than half a kilometre away, he noticed that it swerved side to side in its lane. He said the car was a black or dark blue Saturn.

[19] Mr. Neuman said that he was fixated on the Saturn because he thought it may be having mechanical problems. He also noticed the light from the Dodge pickup truck which was purple in colour in his sideview mirror. Mr. Neuman estimated that the Dodge pickup truck was an eighth of a mile behind him at this point and he estimated that the Dodge pickup truck was travelling at 150 kilometres per hour

[20] Mr. Neuman said the Saturn slowed down to 20 kilometres an hour and drove to the right completely across the fog line. As the Saturn drove past Mr. Neuman, he looked in his sideview mirror and saw the Dodge pickup truck which was now in the southbound lane. Mr. Neuman estimated that the Dodge pickup truck was 40 to 50 metres behind him. Mr. Neuman said that within two seconds after he passed the Saturn, he heard a horrific crash.

[21] Mr. Neuman put on the brakes in his vehicle and called 911. He said that the Dodge pickup truck had one working headlight.

[22] Mr. Neuman testified that the Saturn vehicle did not have its headlights on.

- [23] Mr. Neuman did not see the Collision. He testified that the weather was good, the sky was clear, and the roads were bare and dry. He said that the sun was on the right side of his truck and he did not notice any obstructions on the highway or to anyone's vision.
- [24] Mr. Neuman testified that in the area of the Collision, there were two rises in the road. He said that there was no reason that the driver of the Dodge pickup truck would not be able to see the Saturn vehicle. He did not feel there was any reason that the Dodge pickup truck could not have pulled back in behind his truck.
- [25] Mr. Neuman testified that he recently took some odometer readings of the area where the collision occurred and estimated that when he first saw the Dodge pickup truck, it would have been approximately one kilometre behind him and about two-and-a-half kilometres from the Collision site.

Brian Sommers

- [26] Brian Sommers is 30 years of age and possessed a valid driver's licence on July 4, 2017. He is a paramedic and, in July 2017, he was in a romantic relationship with the accused. He testified that relationship ended about one year after the Collision.
- [27] Mr. Sommers testified that the accused, in July 2017, was working at a car dealership and he accompanied her to Victoria, British Columbia, to pick up a used truck for her employer.
- [28] Mr. Sommers said they drove one vehicle to Victoria and exchanged it for a Dodge pickup truck. They stayed in Victoria for a couple of days and celebrated Canada Day on July 1, 2017, in Victoria.
- [29] Mr. Sommers and the accused left Victoria on Sunday, July 3, at approximately 11:00 a.m. and travelled to Edmonton. They proceeded through Kamloops, British Columbia, and then they slept for four or five hours at a rest stop and then began their trip to Edmonton in the early morning hours of July 4.
- [30] Mr. Sommers testified that they stopped in Valemount for gas and breakfast at the A&W Restaurant and, at that time, the accused began driving the Dodge pickup truck.
- [31] Mr. Sommers testified that he saw the logging truck which was approximately 50 metres in front of the Dodge pickup truck. The logging truck was going slower than they were and he estimated that they were travelling at 110 kilometres an hour.
- [32] Mr. Sommers testified that the accused steered the Dodge pickup truck into the oncoming lane to see if anyone was there. They had a dotted line and it appeared to him that it was a good place to pass. Mr. Sommers did not see any cars at that time and he said that he thought there was room to pass.
- [33] As the Dodge pickup was passing the logging truck, Mr. Sommers said a car came into view and he thought the car was a Saturn.

- [34] Mr. Sommers testified that as the car came over the hill, there was no time to react and he remembers a loud bang and he believes that the Dodge pickup truck flipped a couple of times. He did not lose consciousness. He confirmed that he and the accused were both wearing their seatbelts.
- [35] Mr. Sommers checked himself after the accident and then checked the accused for injuries. The accused said that her back hurt and he put her in the C-spine position to stabilize her neck and then got out of the truck to check on the driver of the Saturn. Mr. Sommers testified that the driver of the Saturn had no pulse and he was not in a position to remove the driver because he did not have any equipment.
- [36] The accused was transferred by ambulance to hospital and Mr. Sommers accompanied her in the ambulance.
- [37] Mr. Sommers agreed on cross-examination that the accused moved into the oncoming lane to check to see if there were any vehicles and then he said that she moved back into her own lane. The accused then began passing the logging truck and accelerated. He said he did not see any cars at that point. Mr. Sommers said that they were approaching the end of the logging truck when he saw the Saturn vehicle come over the rise in the road. He thought it was possible to complete the pass, however, it would be close and everything happened quickly. He said the Dodge Ram pickup was at passing speed and the accused tried to make the pass. However, she put on the brakes and went towards the southbound shoulder.
- [38] Mr. Sommers said on cross-examination that the Dodge pickup truck was too far up on the logging truck to pull back behind it.

Sgt. Jarrett Hughes

- [39] Sgt. Jarrett Hughes was qualified as an expert in the field of collision reconstruction. Sergeant Hughes prepared a Technical Collision Reconstruction Report which has been marked as Exhibit 1 on this trial.
- [40] Sgt. Hughes attended at the scene of the Collision at approximately 11:57 a.m. on July 4, 2017. He examined and took photographs of the scene including road marks, the vehicles, and he delegated to other officers the task of taking measurements of the scene.
- [41] Sgt. Hughes opined to the following in his Technical Collision Reconstruction Report:
1. The Dodge pickup truck was northbound on the southbound side of the road when it impacted the southbound Saturn which had pulled to the right onto the southbound road edge in an attempt to avoid being impacted by the Dodge pickup truck;
 2. At impact, the Saturn was oriented diagonally over the southbound road edge facing slightly to the southwest; the Dodge pickup was facing northbound on the southbound shoulder with the left front tire off of the southbound road edge;

3. The speed of the Saturn at impact cannot be determined; the Dodge pickup was travelling at 115 to 127 kilometres per hour at impact; and
 4. The Collision was avoidable.
- [42] Sgt. Hughes testified that there were a number of variables that he could not account for because the vehicles were rolling and tumbling down a hill. He said that he was not able to do any calculations using what he called traditional methods.
- [43] Sgt. Hughes was left with using data recorded by the Event Data Recorders ("EDR") on the two vehicles.
- [44] Sgt. Hughes testified that with regard to the Saturn, five seconds before Collision, the speed was recorded as 70 miles per hour or approximately 113 kilometres per hour. Sgt. Hughes testified that, in his opinion, the speeds recorded for the three seconds prior to the collision were likely erroneous.
- [45] Sgt. Hughes said that there were two events recorded on the Dodge pickup truck's EDR. There was a front collision and then a rear collision. Sgt. Hughes testified that there is an error rate of plus or minus four percent with regard to the EDR which he took into account. He also testified that the Dodge pickup truck had oversized tires which if the vehicle was not calibrated for those tires will create an error in the speed recorded. Sgt. Hughes took that into account when determining the speed range at impact for the Dodge pickup truck.
- [46] Sgt. Hughes testified that he had five seconds of data from the Dodge pickup truck with which he was able to calculate a speed range and provide information regarding the application of the vehicle's accelerator and brakes.
- [47] Sgt. Hughes had two members take measurements to determine the minimum distance that the two vehicles, that being the Dodge pickup truck and the Saturn, would be visible to one another. He determined that distance to be 526 metres.
- [48] Sgt. Hughes said that he calculated the maximum speed of the Saturn at 116 kilometres an hour. He calculated the maximum speed of the Dodge pickup truck taking into account the oversized tires and he said that that maximum speed was 150 kilometres an hour.
- [49] Sgt. Hughes calculated that at those speeds over the 526 metres it would take the two vehicles 7.1 seconds to meet. Sgt. Hughes opined that if the driver of the Dodge pickup truck made the decision to brake and stop or brake and pull in behind the logging truck, the collision could have been avoided.
- [50] Sgt. Hughes testified that the average perception time of drivers is 1.5 seconds. He said that it would take the driver of the Dodge pickup truck approximately 1.3 seconds to slow to 100 kilometres an hour which was the speed of the logging truck, another 2.8 seconds for the driver of the Dodge to decide and execute to pull in behind the logging truck.

- [51] Sgt. Hughes opined that this would take approximately 5.78 seconds. He calculated that the Dodge pickup truck and Saturn would have been 168.13 metres apart had the Dodge driver decided to take evasive action. Sgt. Hughes opined that there would have been approximately 4.05 seconds where the accused could have had the additional time to react and return to the northbound lane and avoid the Collision.
- [52] Sgt. Hughes testified that there was no way based on the physical evidence to establish where the logging truck was at the time of the Collision.
- [53] Sgt. Hughes opined that a hypothetical assuming that the Saturn vehicle was travelling at 20 kilometres an hour when it passed the logging truck seemed on the low side in terms of speed.
- [54] Sgt. Hughes agreed on cross-examination that the Collision occurred at a point where there were dotted lines on the highway.
- [55] Sgt. Hughes agreed on cross-examination that he assumed that the Dodge pickup truck had not been calibrated for its oversized tires. He also agreed that he was not saying that the Dodge pickup truck was travelling at 139 to 150 kilometres an hour, but rather this was a speed range that he had calculated.
- [56] Sgt. Hughes agreed on cross-examination that perception responses among drivers are a highly variable quantity.
- [57] Sgt. Hughes agreed on cross-examination that there was no way to calculate the Dodge pickup truck's speed prior to five seconds before the collision. He agreed that there were a lot of possibilities including that the Dodge pickup truck could have been travelling at 110 kilometres per hour prior to the pass.
- [58] That was the case for the Crown.

Defence

Trevor Dinn

- [59] Trevor Dinn was qualified as an expert witness in the field of Collision Reconstruction. Mr. Dinn provided a Vehicle Incident Report which has been marked as an exhibit on this trial.
- [60] Mr. Dinn opined to the following in his Vehicle Incident Report:
1. the Dodge pickup truck's impact speed was likely about 121 kilometres an hour;
 2. the Saturn's impact speed was likely about 56 kilometres per hour;
 3. the Saturn was likely travelling at a speed of 113 kilometres prior to braking to impact;

4. if the Dodge pickup truck's computer was not adjusted for the slightly oversized tires, the Dodge pickup truck was likely travelling at about 146 kilometres an hour about 2.8 seconds prior to impact; if the tire size had been adjusted within the computer and the possible four percent error of the Event Data Recorder's reported speed is accounted for, the speed reduces to 135 kilometres an hour;
 5. the Dodge pickup truck could have been travelling at a speed as low as 108 kilometres an hour 10 seconds prior to impact;
 6. the accused could have made the decision to pass from within her lane when the Saturn was more than 526 metres and behind the visibility obstruction of the hill;
 7. both drivers likely began to perceive the hazard of the oncoming vehicles between four and five seconds prior to the crash, and then both veered towards the shoulder, then back toward the road, and then finally towards the shoulder where they impacted; these sequence of events would have complicated an avoidance response and likely hindered the brake application of the accused; and
 8. contributing factors to this event likely involved the inability of the accused to determine the appropriate distance to complete a safe passing maneuver. This occurs more often at higher speeds and larger distances which were apparent in this incident; the accused was an inexperienced driver which would have made errors more likely; the accused may also have misjudged the logging truck's speed to be slower which then may have contributed to her misjudging the amount of time required to complete the pass.
- [61] Mr. Dinn confirmed that the accuracy of an EDR is plus or minus four percent. He opined that the data from the Saturn was accurate at five, four and, in his view, three seconds prior to the collision. He agreed that the last two seconds of data were likely erroneous.
- [62] Mr. Dinn opined that both drivers made an error when they both went to the shoulder at the same time, went back into the southbound lane, and then back to the shoulder.
- [63] Mr. Dinn provided a number of tables in his report calculating the different speeds of the Dodge pickup truck taking into account the various potentials for error in determining the speed.
- [64] Mr. Dinn in Table 4 of the Vehicle Incident Report combines the speed data and the braking data of the Saturn with the adjusted speed data, minimum speed data, braking data, acceleration data, and orientation of the Dodge pickup truck.
- [65] Mr. Dinn opined that it takes about three to three-and-a-half seconds to perform a normal lane change. He opined that the Dodge pickup truck could have been in its lane about eight or more seconds prior to the impact.

- [66] Mr. Dinn opined that the Collision was not avoidable using the assumption made by Sgt. Hughes if a deceleration rate of 3.9 metres per second squared was used. Mr. Dinn did, however, say that the collision was avoidable if the accused decided to abort the pass early on in the maneuver.
- [67] Mr. Dinn opined that drivers are unable to accurately judge distance and closing speed due to large distances. Because the vehicles were more than 500 metres apart, Mr. Dinn opined that, in this case, the ability to accurately determine the closing speed of the vehicles would not have occurred until the vehicles were about 200 metres apart from each other.
- [68] Mr. Dinn did testify that a passing maneuver is one of the most complex maneuvers to make on a two-lane roadway.
- [69] On cross-examination, Mr. Dinn agreed with Sgt. Hughes that if the accused had applied maximum braking in the Dodge pickup truck, she may have been able to get back in behind the logging truck. He also agreed that the passing maneuver in this case becomes more complicated because of the length of the logging truck.
- [70] On cross-examination, Mr. Dinn agreed that the accused was speeding. He also agreed that there was probably not enough time to complete the pass without the Saturn braking or pulling over to the side.
- [71] On cross-examination, Mr. Dinn agreed that drivers make more errors at higher speeds. He also agreed that it is possible that the Dodge pickup truck was travelling at a higher rate of speed prior to five seconds before the impact.
- [72] On cross-examination, Mr. Dinn opined that if the logging truck was travelling at 100 kilometres an hour and the Dodge pickup travelled 2.5 kilometres in the same time that the logging truck travelled 1.5 kilometres, the speed of the Dodge pickup truck would have to have been in excess of 167 kilometres an hour. Mr. Dinn testified that this hypothetical is not consistent with the data from the Dodge pickup truck's EDR.
- [73] On cross-examination, Mr. Dinn agreed that at higher speeds, an inexperienced driver who lacked a familiarity with the vehicle, that these factors would increase the likelihood of an error being made.
- [74] That was the case for the accused.

Position of the Parties

Accused

- [75] The accused concedes that the Crown has established the actus reus of the offence of dangerous driving causing death on the basis that she drove in the southbound lane when Mr. Needham's vehicle was in close proximity to her vehicle.

- [76] The accused, however, argues that the mens rea component of the offence has not been proven beyond a reasonable doubt. The accused argues that in assessing the mens rea of dangerous driving, the question is whether there is a reasonable probability that the accused's driving did not constitute a marked departure.
- [77] The accused submits that there is a reasonable possibility that the reasonable driver would have done what she did in the circumstances of this case.
- [78] The accused argues that both Sgt. Hughes and Mr. Dinn agreed that it was possible that her speed was 110 kilometres an hour prior to the Collision.
- [79] The accused notes that Mr. Sommers testified that she steered the Dodge pickup truck briefly into the southbound lane to take a peek to see if it was clear before starting her pass. The accused argues that there is no evidence of how many seconds prior to the collision she changed lanes for the pass.
- [80] The accused argues that Mr. Sommers testified that when he saw the Saturn he did not perceive it as an immediate hazard.
- [81] The accused argues that both of the experts called in this trial agreed that it was possible that she accelerated to a high speed in response to seeing the Saturn and that she may have been close to the back of the logging truck when she made the choice whether to abort or make the pass.
- [82] The accused argues that given the fact that she may have been further than 200 metres from the Saturn she would have had difficulties assessing its closing speed. There is a reasonable possibility that the accused's decision to complete the pass was a decision that a reasonable driver may have made in the same situation.
- [83] The accused argues that it is possible that when she was alongside the logging truck, she would have been travelling at a speed of 135 kilometres per hour assuming that the Dodge pickup truck had been recalibrated for the oversized tires and taking into account the four-percent error in the EDR. The accused argues that there is a reasonable possibility that a reasonable driver would have reached this speed in an effort to complete the pass.
- [84] The accused argues that the evidence is unclear what her speed was prior to the pass at the time she spotted the Saturn and her speed during the pass.
- [85] The accused argues that Mr. Neuman's evidence should not be given much weight because, at the preliminary inquiry, he conceded that when he first saw the Dodge pickup truck, it was one-quarter of a kilometre behind him and he testified that he was fixated on the Saturn in the final seconds before the Collision.

- [86] The accused argues that Sgt. Hughes agreed that there is no physical evidence or data where the Dodge pickup truck was relative to the logging truck prior to the Collision. Sgt. Hughes did not know whether the Dodge pickup truck had been recalibrated for the tires. Sgt. Hughes also agreed that the Dodge pickup truck's range of speed between five and 2.8 seconds prior to the collision could have been 129 to 135 kilometres per hour.
- [87] The accused argues that without knowing the location of the logging truck in relationship to the Dodge pickup truck when the accused made her decision to pass, it is unclear that the reasonable person would have made a different assessment about passing or that they would not have attempted to complete the pass.
- [88] The evidence does not establish a sustained period of speeding or some other conduct that unequivocally amounts to a marked departure.
- [89] The accused argues that a marked departure lies in the conduct of the status or knowledge of the driver.

Crown

- [90] The Crown argues that the accused's decision to pass the logging truck was not a momentary lapse in attention, but rather she made a series of deliberate poor decisions that culminated in the fatal Collision.
- [91] The Crown argues that the accused's failure to first perceive and avoid the risk that any reasonable driver would have perceived amounted to a marked departure from the standard of care expected of a reasonable driver.
- [92] The Crown notes that Mr. Neuman was very clear that the Dodge pickup truck closed the distance on him at a high rate of speed and his observations are corroborated by the EDR data. Mr. Neuman estimated that the speed of the Dodge pickup truck was 150 kilometres per hour.
- [93] The Crown notes that a passing maneuver at highway speeds is one of the most complex maneuvers a driver can make and it is particularly complex when passing a loaded logging truck.
- [94] The Crown argues that the evidence of Mr. Neuman should be preferred to that of Mr. Sommers because Mr. Sommers was fatigued and sitting in the passenger seat of the Dodge pickup truck and, in addition, he was distracted by his food and coffee when the accused began her pass of the logging truck.
- [95] The Crown notes that both Sgt. Hughes and Mr. Dinn were in agreement on much of the evidence and shared the same opinions. The Crown notes that both Sgt. Hughes and Mr. Dinn testified that the accused could have aborted the pass and returned to her lane, though Mr. Dinn said that decision would have had to have been made early on in the pass.

- [96] The Crown argues that the accused was travelling at a high rate of speed as she caught up to the logging truck which was likely in excess of 140 kilometres an hour.
- [97] The Crown argues that it is relevant that the accused was an inexperienced driver and unfamiliar with the Dodge pickup truck.
- [98] The Crown argues that it is possible that the accused was travelling at an excessive speed as defined in s. 148 of the Motor Vehicle Act, RSBC 1966 ch. 318.
- [99] The Crown argues that they have clearly made out the actus reus of the offence of dangerous driving.
- [100] The Crown further argues that they have proven beyond a reasonable doubt the mens rea component of dangerous driving. The Crown argues that a reasonably prudent driver would foresee the risk of colliding with an oncoming vehicle while passing a logging truck at a high rate of speed and that all reasonable drivers would have taken steps to avoid this collision.
- [101] The Crown argues that when the accused's driving pattern is viewed in its totality it establishes a marked departure from the standard of care expected of a reasonable driver in the circumstances of this case.
- [102] The Crown argues that the accused's driving at a high rate of speed while it was approaching the logging truck was negligent and illegal and she made a series of bad decisions in attempting to pass a logging truck in a vehicle that she was unfamiliar with.
- [103] The Crown argues that the accused sped in a sustained manner for a period of time approaching one minute in order to catch up with the logging truck. She failed to delay the pass until she was sure that it was safe, and she swerved into the Saturn at the last minute impacting it in its position over the fog line.
- [104] The Crown argues they have proven beyond a reasonable doubt that the accused committed the offence of dangerous driving causing death.

Decision

- [105] The accused is charged pursuant to s. 249 of the Criminal Code of Canada which was the operative provision at the time of this offence. The relevant portions of that section read:

249(1) Every one commits an offence who operates

- (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

.

(4) Every one who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment of a term not exceeding fourteen years.

[106] This proceeding is a criminal trial and the burden of proof is on the Crown to prove the essential elements of the offence beyond a reasonable doubt. The Crown must prove the actus reus of the offence and the mens rea of the offence.

[107] The Supreme Court of Canada in *R. v. Roy* [2012] 2 S.C.R. 60 explained the actus reus of the offence of dangerous driving at para. 34:

In considering whether the actus reus has been established, the question is whether the driving, viewed objectively, was dangerous to the public in all of the circumstances. The focus of this inquiry must be on the risks created by the accused's manner of driving, not the consequences, such as an accident in which he or she was involved. As Charron J. put it, at para. 46 of *Beatty*, "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" (emphasis added). A manner of driving can rightly be qualified as dangerous when it endangers the public. It is the risk of damage or injury created by the manner of driving that is relevant, not the consequences of a subsequent accident. In conducting this inquiry into the manner of driving, it must be borne in mind that driving is an inherently dangerous activity, but one that is both legal and of social value (*Beatty*, at paras. 31 and 34). Accidents caused by these inherent risks materializing should generally not result in criminal convictions.

[108] In this trial, the accused has conceded that the Crown has proven beyond a reasonable doubt the actus reus of the offence of dangerous driving. That is to say, viewed objectively, the driving of the accused was dangerous to the public in all of the circumstances.

[109] It is clear that the Crown has proven beyond a reasonable doubt that the accused was operating the Dodge pickup truck and attempted to pass Mr. Neuman's logging truck at a high rate of speed when the Saturn vehicle was in close proximity to her vehicle.

[110] I find that this manner of driving by the accused in all the circumstances was dangerous to the public.

[111] The contentious issue on this trial is whether or not the Crown has proven beyond a reasonable doubt the mens rea component of the offence of dangerous driving. The Supreme Court of Canada in *Roy* discussed the mens rea component of dangerous driving at paras. 36 - 38:

[36] The focus of the mens rea analysis is on whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances (*Beatty*, at para. 48). It is helpful to approach the issue by asking two questions. The first is whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the second question is whether the accused's failure to foresee the risk and take steps to

avoid it, if possible, was a marked departure from the standard of care expected of a reasonable person in the accused's circumstances.

- [37] Simple carelessness, to which even the most prudent drivers may occasionally succumb, is generally not criminal. As noted earlier, Charron J., for the majority in Beatty, put it this way: "If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy" (para. 34). The Chief Justice expressed a similar view: "Even good drivers are occasionally subject to momentary lapses of attention. These may, depending on the circumstances, give rise to civil liability, or to a conviction for careless driving. But they generally will not rise to the level of a marked departure required for a conviction for dangerous driving" (para. 71).
- [38] The marked departure from the standard expected of a reasonable person in the same [page 77] circumstances - a modified objective standard - is the minimum fault requirement. The modified objective standard means that, while the reasonable person is placed in the accused's circumstances, evidence of the accused's personal attributes (such as age, experience and education) is irrelevant unless it goes to the accused's incapacity to appreciate or to avoid the risk (para. 40.). Of course, proof of subjective mens rea - that is, deliberately dangerous driving - would support a conviction for dangerous driving, but proof of that is not required (Charron J. at para. 47; see also McLachlin C.J. at paras. 74 - 75; and Fish J. at para. 86).
- [112] The Crown's theory is that the accused was travelling at a high rate of speed in the range of 150 kilometres an hour as she approached Mr. Neuman's logging truck and initiated her pass. Crown bases their theory on the evidence of Mr. Neuman as well as the speed range estimate for the Dodge pickup truck calculated by Sgt. Hughes.
- [113] Mr. Neuman testified that the Dodge pickup truck could have been travelling as fast as 150 kilometres per hour as it approached his logging truck. He came to that opinion based on where he perceived the Dodge pickup truck to be when he first saw it in his sideview mirror.
- [114] Mr. Neuman testified at trial that he saw the Dodge pickup truck a half a kilometre to three-quarters of a kilometre behind him. Mr. Neuman also testified that, recently, he used the odometer on his vehicle to measure the distance he was away from the Dodge pickup truck when he first saw it which he said was approximately one kilometre.
- [115] Mr. Neuman agreed on cross-examination that at the preliminary inquiry he said that the Dodge pickup truck was about a quarter kilometre behind him when he first saw it.
- [116] Mr. Neuman also said that he measured how far the Dodge pickup truck travelled to the collision site and he said that was about 2.5 kilometres. In other words, the Dodge pickup truck made up a kilometre on Mr. Neuman's logging truck in approximately two-and-a-half kilometres.

- [117] I have difficulty with Mr. Neuman's evidence in this regard for the following reasons.
- [118] Mr. Dinn calculated that the Dodge pickup truck would have had to have been travelling in excess of 160 kilometres an hour to correspond with Mr. Neuman's evidence.
- [119] Sgt. Hughes testified that because of the nature of this Collision and the fact that the Dodge pickup truck rolled over, he could not use traditional methods to estimate speed because there are too many variables when the vehicles are rolling down an embankment. Both Sgt. Hughes and Mr. Dinn calculated the Dodge pickup's speed based on that vehicle's EDR.
- [120] Both of these experts testified that a vehicle's EDR is generally accepted to have an error rate of plus or minus four percent. They also both agreed that because the Dodge pickup truck had oversized tires, if its computer had not been recalibrated for the tires, a further 3.4 percent would have to be added to the speed range.
- [121] Sgt. Hughes opined that the maximum speed range of the Dodge pickup truck was between 139 to 150 kilometres per hour preceding the collision.
- [122] I do have any evidence to determine whether or not the Dodge pickup truck was calibrated for the oversized tires. Sgt. Hughes gave some anecdotal evidence that when he was a police officer and pulled over a person for speeding who had oversized tires, they would often say their speedometer was not working properly because of the tires.
- [123] Sgt. Hughes agreed that devices can be purchased to calibrate a vehicle's computer to take into account the oversized tires.
- [124] The evidence is that the Dodge pickup truck was being transported by the accused in the course of her employment from one dealership to another. The evidence is that the mechanical condition of the Dodge pickup truck did not contribute to the collision. I have no basis to conclude one way or another if the Dodge pickup truck was calibrated for the oversized tires.
- [125] Mr. Dinn, however, opined that if the Dodge pickup truck's computer was calibrated for the oversized tires and taking into account the accepted error in the EDR, the minimum speed for the Dodge pickup truck could be as follows:
- i. 130 kilometres an hour five seconds before the collision;
 - ii. 132 kilometres an hour four seconds before the collision;
 - iii. 135 kilometres an hour three seconds before the collision;
 - iv. 135 kilometres an hour 2.8 seconds before the collision;
 - v. 135 kilometres an hour 2.3 seconds before the collision;
 - vi. 132 kilometres an hour two seconds before the collision;
 - vii. 125 kilometres an hour one second before the collision; and

viii. 111 kilometres an hour at impact.

- [126] Mr. Sommers testified that the Dodge pickup truck was travelling at 110 kilometres an hour as it approached the logging truck. Mr. Sommers also testified that the accused moved the Dodge pickup truck into the oncoming lane briefly to peek out and see if there was any oncoming traffic. He then testified that the accused commenced to pass after that.
- [127] While I accept that Mr. Neuman is a professional driver and was trying to be as accurate as possible, I do not accept his evidence in relationship to how far the Dodge pickup truck was behind him when he first saw it or his estimate of the Dodge pickup truck's speed as it approached the logging truck.
- [128] I say this because Mr. Neuman, when he first saw the Dodge pickup truck, there was nothing unusual about it or the manner in which it was being driven for him to mark the spot where the Dodge pickup truck was. He also gave different evidence at the preliminary inquiry and at the trial as to how far the Dodge pickup truck was behind him.
- [129] In order for Mr. Neuman's measurements to be accurate, which he took a number of years after the collision, the Dodge pickup truck would have had to have been travelling in excess of 160 kilometres an hour which neither of the experts calculated as a top speed range for the Dodge pickup truck.
- [130] The Crown argued that Mr. Sommers' evidence may not be reliable because he was fatigued and focused on his breakfast when the accused was driving the Dodge pickup truck. However, I did not take from Mr. Sommers' evidence that he was fatigued such that he was not aware of what was going on, nor did I take from his evidence that he was solely focused on eating his breakfast.
- [131] Mr. Sommers described in some detail the manner in which the accused was driving as she approached the logging truck and the fact that she peeked out to ensure that the lane was clear.
- [132] Mr. Sommers testified that the accused was driving the Dodge pickup truck at 110 kilometres as they approached the logging truck. This estimate accords with the evidence of Mr. Dinn as to the potential, albeit minimum, rate of speed of the Dodge pickup truck that it could have been travelling prior to the accused initiating the pass.
- [133] I accept Mr. Sommers' evidence that the accused was driving the Dodge pickup truck at 110 kilometres an hour as she approached the logging truck. I also accept Mr. Sommers' evidence that the accused peeked out with the Dodge pickup truck to see if there was any oncoming traffic and then went back into her lane before ultimately initiating the pass.
- [134] Finally, I accept the evidence of Mr. Sommers that when the accused initiated the pass that it appeared to him that it was safe to do so.

- [135] Sgt. Hughes opined that in a worst-case scenario if the accused was travelling at 150 kilometres an hour when she initiated the pass and the Saturn became visible to her at 526 metres, the accused could have avoided the Collision by returning to her lane. Sgt. Hughes opined that the average perception time of drivers is 1.5 seconds. It would take the Dodge pickup truck 1.3 seconds to slow to 100 kilometres an hour, which was the speed of the logging truck, and another 2.8 seconds for the accused to execute the lane change back behind the logging truck. Sgt. Hughes opined all these maneuvers could take up to 5.78 seconds and that would have left approximately 160 metres between the Dodge pickup truck and the Saturn.
- [136] Mr. Dinn agreed that the accused could have pulled in behind the logging truck. However, he opined that this decision would have had to have been made early on in the pass.
- [137] Both Sgt. Hughes and Mr. Dinn agreed that there was no way to account for the position of the logging truck in relationship to the Dodge pickup truck prior to and during the Collision.
- [138] Mr. Dinn also opined that if vehicles are more than 200 metres apart, it is difficult to detect an oncoming car's closing speed.
- [139] Mr. Neuman testified that when he saw the Saturn, it began to swerve within its lane and he was fixated on that vehicle. He also testified that the Saturn was less than half a kilometre ahead of him when he saw it swerve and it did not have its lights on. I accept Mr. Neuman's evidence in this regard because of his driving experience and the fact that he was fixated on that car directly viewing it.
- [140] Both Sgt. Hughes and Mr. Dinn agreed that the Saturn prior to taking evasive action was likely travelling at 113 kilometres an hour. Both of these experts agreed that the Saturn's EDR was not functioning correctly between three and two seconds prior to the Collision. Sergeant Hughes also testified that travelling at 113 kilometres on the highway was a good speed which I took to mean that it was not unreasonable in the circumstances.
- [141] Based on the evidence of Mr. Sommers and Mr. Neuman, I find that when the accused initially peeked out, the Saturn vehicle was not visible when she began to pass and the Saturn vehicle was, however, visible -- sorry, when she peeked out, the Saturn was not visible, but when she began her pass, the Saturn vehicle would have been visible, though it would have been more than 200 metres ahead of her making it difficult to determine the closing speed of the Saturn which was also compounded by the fact that the Saturn did not have its lights on.
- [142] While I have no direct evidence or opinion evidence as to where the logging truck was in relation to the Dodge pickup truck prior to the Collision, the only inference that I can draw based on all the evidence is that when the accused applied her brakes to the Dodge pickup truck at approximately 2.3 seconds prior to the Collision, the logging truck impeded the accused's ability to return to the northbound lane.

[143] There is no doubt that the accused caused the Collision which tragically took the life of Mr. Needham. The issue that has to be decided is whether or not the accused's driving was a marked departure from the standard of care expected of a reasonable person in the accused's circumstances. In order to determine this issue, I make the following findings:

1. On July 4, 2017, at the time of the Collision, the roads were bare and dry, it was a sunny day, and the sun did not negatively impact the accused's visibility
2. There were no mechanical defects with either of the Dodge pickup truck or Saturn which contributed to the Collision.
3. Alcohol or drugs were not a factor in the Collision.
4. The accused was driving the Dodge pickup truck at the time of the Collision.
5. That the logging truck driven by Mr. Neuman was travelling at a constant 100 kilometres per hour.
6. The Dodge pickup truck was travelling at approximately 110 kilometres an hour as it approached the logging truck.
7. The accused peeked out with the Dodge pickup truck before initiating the pass, at which point the Saturn was not visible.
8. When the accused began to pass the logging truck, the Saturn would have been visible; however, the Dodge pickup truck and the Saturn vehicle were at least 200 metres apart based on the evidence of Mr. Neuman and it would have been difficult to estimate the closing speeds of either vehicle.
9. During the pass, the accused accelerated the Dodge pickup truck to 135 kilometres an hour.
10. That, unfortunately, both the accused and Mr. Needham initially took evasive action by driving towards the shoulder of the southbound lane and then mirrored one another going back into the southbound lane and ultimately back to the shoulder where the Collision occurred.
11. The logging truck, just prior to the Collision, impeded the accused's ability to move the Dodge pickup truck back into the northbound lane.

[144] In addition, the Crown argued that the accused, who was a relatively new driver in an unfamiliar vehicle, should have taken greater caution before initiating a dangerous and complex maneuver such as passing a logging truck at highway speeds.

- [145] Other than the fact that the accused was a new driver, I do not have any evidence as to her ability to drive. The evidence suggests that the accused drove the Dodge pickup truck part of the way from Victoria to the Collision site. While the Dodge pickup truck was a new vehicle to the accused, as I said, she did drive it for a period of time prior to the Collision. I am putting little weight on the evidence that the accused is a new driver and that the vehicle was new to her.
- [146] In my view, based on all of the evidence, and in particular the evidence of Sgt. Hughes and Mr. Dinn, a reasonable person could have foreseen the risks and taken steps to avoid the Collision if possible.
- [147] However, based on all of the circumstances, the decision to complete the pass or abort this maneuver had to be decided in seconds. Given the lack of evidence as to where the logging truck was situated during this incident, the difficulty in perceiving closing speeds at a distance of over 200 metres, the lack of bad driving evidence prior to initiating the pass, the fact that the pass was initiated at a spot on the highway where it was legal to do so, and my finding that the speed of the Dodge pickup truck as it approached the logging truck was 110 kilometres an hour, and that the Dodge pickup truck accelerated to 135 kilometres an hour as it attempted to pass, in my view, the Crown has not proven beyond a reasonable doubt that the accused's failure to perceive the risk and take steps to avoid it if possible was a marked departure from the standard of care expected of a reasonable person.
- [148] For all the above reasons I find the accused not guilty.

"The Honourable Mr. Justice Tindale"

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