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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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- and -	)	J. ERIC HACHINSKI
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	)	BRUCE F. BONNEY
Accused.	)	MANDEEP S. BHANGU
	)	
	)	JUDGMENT DELIVERED:
	)	August 16, 2017

GRAMMOND J.

INTRODUCTION

[1] Shortly after 4:00 a.m. on October 5, 2013, a single vehicle collision occurred on the 3700 block of Henderson Highway, north of Winnipeg. There were three occupants of the vehicle: the accused who was driving, a passenger in the front seat, and James Hayes, who was in the backseat, and who died at the scene. As a result of the collision, the accused was charged with dangerous operation of a motor vehicle causing death (s. 249(4) of the ***Criminal Code of Canada*** (*the "**Code**"*)) and impaired driving causing death (s. 255(3) of the ***Code***).

[2] On May 15, 2017 I convicted the accused of both charges, with written reasons to follow. These are those reasons.

[3] At trial, the Crown called seven witnesses, all of whom were in attendance at the collision scene:

- Officer Rhonda Mann (first police officer on scene);
- Officer Jein-Charles Di Carlo;
- Officer Taylor Burns;
- Officer Aaron Challoner;
- Corporal Joel Bernardin (forensic collision reconstruction expert);
- Crystal Dovzuk, paramedic ("**Dovzuk**"); and
- Dennis Wiwcharyk, firefighter ("**Wiwcharyk**") (first responder on scene).

[4] No defence evidence was called.

ISSUES

[5] The two issues to be determined were:

1) Whether at the time of the collision the accused drove in a dangerous manner, such that her manner of driving constituted a marked departure from the standard of care that a reasonable person would have exercised in the same circumstances; and
2) Whether at the time of the collision the accused's ability to drive was impaired by alcohol.

BACKGROUND INFORMATION

[6] The following elements of the offences were admitted by the accused: jurisdiction, the date of the offence, the identity of the deceased, the cause of death of the deceased (namely, massive head trauma caused by the collision), the identity of the accused, and that the accused was the driver of the vehicle.

[7] After the collision, first on scene were two bystanders who contacted Emergency Services at 4:08 a.m., and who remained on the scene when Wiwcharyk arrived within three to four minutes. The bystanders advised Wiwcharyk that a male remained in the damaged vehicle and that the two other occupants were waiting in the bystanders' vehicle.

[8] Wiwcharyk found the damaged vehicle, a Honda Civic, laying on its passenger side, completely off of the road and wedged in between two trees. He had no contact with the accused. Dovzuk arrived on the scene within five minutes of the call coming in and was directed by Wiwcharyk to the damaged vehicle as well as to the bystanders' vehicle. Officer Mann arrived on scene at approximately 4:15 a.m. and led efforts to secure the scene.

DANGEROUS DRIVING

RELEVANT LEGAL PRINCIPLES AND STATUTORY PROVISIONS

[9] Pursuant to s. 249 of the ***Code***, a person is guilty of dangerous driving when they operate a motor vehicle in a manner dangerous to the public, having regard to all of the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and amount of traffic that is or might reasonably be

expected to be at that place. Where a person drives dangerously and causes the death of another person, they are punishable by up to 14 years in prison.

[10] This offence was considered by the Supreme Court of Canada in ***R. v. Roy***, 2012 SCC 26, [2012] 2 S.C.R. 60 ("***Roy***"), wherein the Court stated at paragraph 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 in original]. 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.

[11] At paragraph 36 the Court stated:

> 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 [emphasis in original].

[12] At paragraph 37 the Court stated that "[s]imple carelessness, to which even the most prudent drivers may occasionally succumb, is generally not criminal", and, quoting ***R. v. Beatty***, 2008 SCC 5, [2008] 1 S.C.R. 49, rev'g 2006 BCCA 229, 225 B.C.A.C. 154 ("***Beatty***"), "[e]ven good drivers are occasionally subject to momentary lapses of attention", which will generally not give rise to a conviction for dangerous driving. At paragraph 38, the Court characterized the standard as a modified objective standard in

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".

[13] To determine whether the required objective element of fault has been proven, the Court must examine all of the evidence and draw inferences from the circumstances, including whether the accused drove in a manner that constituted a marked departure from the norm. The underlying premise is whether a reasonable person in the position of the accused would have been aware of the risk posed by the manner of driving, and would not have undertaken the activity.

[14] In ***R. v. Alves***, 2014 SKCA 82, [2014] S.J. No. 433, the Court upheld the acquittal of an accused and stated at paragraph 29 that "[r]eferences to proving speed beyond a reasonable doubt are troubling, as excessive speed is neither the *actus reus* nor the *mens rea* of dangerous driving". In that case, the accused was found to have been travelling between 93 and 99 kilometres per hour in a speed zone that was either 60 or 90 kilometres per hour (paragraphs 7 and 9), depending on whether the collision occurred in a construction zone, which was at issue. The Court held that despite the trial judge's references to speed, the correct test was applied, namely whether the manner of driving "was not dangerous to the public in all of the circumstances" (paragraph 29) and whether there was a marked departure from the standard of care referenced in ***Beatty*** and ***Roy*** (paragraphs 30 and 31).

[15] In ***R. v. Smillie***, 2003 BCCA 486, 186 B.C.A.C. 103, the Court approved the following statement made by the trial judge:

> Normally, speed alone does not constitute dangerous driving, as stated *in Regina v. Strange* and *Regina v. Hill* and *Regina v. Viln* (phonetic), however where speed is combined with surrounding circumstances and those surrounding circumstances add a component to that speed, such conduct may amount to dangerous driving. That principle is enunciated in the decisions of *Regina v. Quesnel*, *Regina v. Bickness* and *Regina v. Reed*.

[16] In that case, the Court found that the accused was driving at a speed of between 80 and 100 kilometres per hour in a 50 kilometre per hour zone on a wet road, in the dark, while attempting to negotiate a curve down a hill. The accused drove on to the gravel shoulder, and failed to apply his brakes or crank the wheel.

EVIDENCE

[17] The evidence reflected that the roadway on which the collision occurred was a 70 kilometre per hour speed zone, which increased to 80 kilometres per hour further north of the scene. Although the road was described as curvy, narrow and winding, the collision took place on a straightaway. The nearest curve to the south was approximately 100 metres away. The roadway was paved, on a flat grade and in good condition. It was an undivided, two lane highway with one northbound and one southbound lane. There were some streetlights in the area of the collision scene, though no specific evidence was presented with respect to the location of those streetlights.

[18] On either side of the roadway there were shoulders which were described as narrow and minimal, used both as walking paths and bike lanes. Beyond those shoulders there were mature trees and ditches on both sides of the road. The ditches

were described as narrow and unforgiving with a steep drop-off, to depths of between two and four feet or one to one and one-half metres.

[19] There were residences on both sides of the roadway, with driveways that connect those properties to the roadway. Those driveways have approaches that cross over the ditches.

[20] At the time of the collision there were normal driving conditions, in that the road was dry and there was no precipitation, frost, dew or fog. The temperature was above freezing. It was cloudy, but visibility was good and the road was clear. There were no pedestrians and few vehicles travelling.

[21] Officer Mann observed at the scene that:

(a) the vehicle left the road at 3743 Henderson Highway ("**3743**") and rolled end over end to 3763 Henderson Highway ("**3763**") where it landed on the approach to that property, just to the south of the driveway;

(b) the vehicle was lying on its side and roof, wedged against some trees, wheels in the air;

(c) the roof of the vehicle at the back end was compacted down;

(d) there was debris, including glass, plastic and other car pieces on the driveway at 3749 Henderson Highway ("**3749**"), about 60 feet from where the vehicle landed;

(e) the vehicle had one remaining intact window;

(f) all of the vehicle's air bags had been deployed;

(g) there was a visible face print on the driver's front facing airbag; and

(h) there were no tire marks or gouges on the roadway.

[22] Officer Challoner observed that the driver's front airbag had make-up on it, including from the eyes, cheeks and nose, and he noted that the vehicle's license plate was embedded into the approach of 3749.

[23] Officer Di Carlo testified that when he spoke with the accused, she told him that she swerved to avoid hitting an animal crossing the road and lost control of the vehicle. Dovzuk testified that the accused told her she saw an animal dart in front of the car. Wiwcharyk, who lives approximately one kilometre from the collision scene, testified that there is wildlife in the area that might cross the road, including skunks, coyotes, deer and fox.

[24] Both Officer Di Carlo and Dovzuk testified that the accused said she had consumed two drinks of rum and coke before driving.

[25] Corporal Bernardin, who has been an RCMP officer since 2005, was qualified as an expert in forensic collision reconstruction, and testified on that basis. His qualifications, which were unchallenged by the defence, include the completion of a variety of courses from 2006 to 2017, and investigation of over 150 serious collisions.

[26] Corporal Bernardin arrived at the collision site between 5:40 a.m. and 5:51 a.m., after which he examined the scene and observed that the vehicle was significantly damaged, indicative of a rollover. He followed the debris and other marks such as signs of disturbance of the earth, including turned up dirt and grass where the vehicle impacted the ground. He took a series of photographs of the area which were filed as evidence at trial.

[27] Corporal Bernardin made a series of observations at the scene and drew conclusions, including:

(a) There were no tire marks observed on the pavement of the roadway;

(b) There were tire imprints in the northbound, gravel shoulder which showed a vehicle gradually leaving the travel portion of the roadway. The left side tire was just off the roadway and the right side tire was deeper into the ditch and grass. The tire imprints led to the edge of the driveway approach to 3743, which intersected with the roadway;

(c) The "first gouge mark" was located at the end of the tire imprints where the vehicle struck the driveway approach near 3743. The gouge was created by the underbody of the vehicle hitting the ground and turning up dirt prior to the vehicle vaulting into the air and taking flight;

(d) The "second gouge mark" was located in the ditch at the base of the next driveway approach near 3749. This gouge mark was significant in size, approximately one square metre, consisting of turned over dirt and tire marks. This gouge mark was created by the vehicle's first contact with the ground after vaulting;

(e) In between the first gouge mark (the vaulting or take off point) and the second gouge mark (the first landing point after vaulting) there were underbody vehicle parts shed from the vehicle due to the damage sustained at the first gouge mark;

(f) The front license plate and front grill of the vehicle were embedded in the earth near the second gouge mark;

(g) The vehicle did not roll left to right, but most likely tumbled end over end or "pirouetted", meaning the vehicle stood on one end and rotated before continuing its trajectory;

(h) In between the second gouge mark (the first landing point after vaulting) and the final resting place of the vehicle, there were additional broken vehicle parts shed from the vehicle, including shattered glass;

(i) The final resting place of the vehicle was "tight", in that the vehicle rolled through a passage and avoided contact with a hydro pole and a group of trees;

(j) There was fresh damage to one tree at the final resting place of the vehicle. Some bark was torn off of the tree at a height of approximately 10 feet above the ground; and

(k) The rollover was extremely unpredictable and extremely violent.

[28] Having concluded that the vehicle had vaulted, Corporal Bernardin took measurements of:

(a) the take-off or vault angle of the vehicle, including the take-off angle of each of the left side tire (measured to be 2.17 degrees) and right side tire (measured to be 14.84 degrees);

(b) the distance between the vehicle's last point of contact on the ground before vaulting (the first gouge mark) and its first point of contact with

the ground after vaulting (the second gouge mark). The shortest distance between those two points was 28.3 metres, which reflects how far the vehicle travelled in the air immediately after vaulting;

(c) the difference in the elevation from which the vehicle vaulted and the elevation at which the vehicle landed at the second gouge mark. The vehicle landed at an elevation 1.27 metres lower than the height from which the vehicle vaulted; and

(d) the distance between the final resting place of the vehicle and the first gouge mark, which was approximately 58 metres.

[29] Corporal Bernardin then processed these measurements through an industry standard formula, from which he derived the speed at which the vehicle was travelling at the time of vaulting to be 99 kilometres per hour.

[30] Corporal Bernardin testified that because the vehicle vaulted from a ramp (the driveway approach to 3743) and landed at the bottom of another ramp (a ditch next to the driveway approach to 3749), it did not follow and complete the normal trajectory of a typical vaulting vehicle. In particular, the initial flight distance of the vehicle (of 28.3 metres) was reduced because at the first landing point, the driveway approach to 3749 prevented the vehicle from landing and taking off again as it would on a continuous, open path. Instead, there was resistance when the vehicle (most likely the front end of the vehicle, as the license plate was embedded in the earth) hit the bottom of the driveway to 3749 which altered its natural trajectory, forcing the vehicle to move upwards.

[31] Corporal Bernardin testified that the speed limit of 70 kilometres per hour is set by the Province of Manitoba. He noted that the surrounding area is well-populated and the ditches unforgiving. In particular, the ditches are deep, and are not wide like those which surround some other highways near Winnipeg. If a vehicle hit these ditches, especially at a high speed, the driver would be in trouble quickly, and it would be difficult to ride it out.

[32] Corporal Bernardin examined the road surface travelled by the vehicle prior to it exiting the road. He did not observe any gouges, scrapes or scallops that would suggest there was a mechanical failure. In addition, the path of the collision was in line with the northbound travel lane suggesting that the vehicle did not deviate from its path as a result of a mechanical failure.

[33] Corporal Bernardin found that the vehicle was significantly damaged throughout, and in particular the front and rear of the vehicle, from the impact to the ground after vaulting and from subsequent rolling. The cabin of the vehicle was not compromised which is not uncommon in a rollover. The vehicle's tires were in good condition, with adequate tread depth, and were the appropriate size for the vehicle. In addition, all of the vehicle's airbags were deployed, including both the front and side curtain airbags.

[34] Corporal Bernardin prepared a diagram of the collision path of the vehicle using GPS software, and concluded that its path off of the roadway was not aggressive. The vehicle appeared to have drifted off of the roadway, or had a lack of steering input, in an almost controlled manner. There was no braking before the vehicle left the roadway.

[35] Corporal Bernardin also testified with respect to the vehicle's event data recorder ("**EDR**"), also known as an airbag control module, which is a small box inside the vehicle that recorded while the vehicle was in operation, on a five second loop. If an incident occurred, the box would lock the data for the preceding five seconds.

[36] The EDR records input into the vehicle including acceleration, speed, steering, gear ratio, and braking activity. The EDR data in this case was reviewed by Corporal Bernardin approximately two months after the collision. The EDR data reflected that:

(a) The seatbelts of both the driver and the front seat passenger were unbuckled. The seatbelt use of the back seat passenger was not recorded;

(b) For the five seconds preceding the vault of the vehicle:

(i) the speed at which the vehicle was being operated ranged from 113 kilometres per hour to 117 kilometres per hour;

(ii) the accelerator pedal position ranged from 31 to 61 percent of full position and the driver did not take their foot off of the gas pedal;

(iii) the brakes were not used;

(iv) the ABS activity was off;

(v) the stability control system was on but not engaged, until one second before the vault of the vehicle at which time that system engaged automatically, without driver input; and

(vi) steering input ranged from -15 to 0, representing that the vehicle was turning to the right, until one second before the vault of the vehicle at which time the steering input was 100 to 110, representing a sharp turn to the left. Corporal Bernardin testified that the driver had negotiated the curve on Henderson Highway to the south of the collision site, and failed to correct the wheel after the end of that curve. Once in the ditch, the driver steered to the left to attempt to get back on the roadway within the last second before the vehicle vaulted; and

(c) When the vehicle landed at the second gouge mark, it decelerated to 71 kilometres per hour on impact, which represents a significant collision, such that if the vehicle contacted a surface harder than earth, such as metal or concrete, the collision would have been fatal to all occupants of the vehicle.

[37] Corporal Bernardin testified that while he had no device to determine the proper calibration of the EDR, there was no indication of an error in that data or that the data recorded by the EDR was inaccurate.

[38] Corporal Bernardin testified with respect to the difference between his take off speed calculation of 99 kilometres per hour referenced at paragraph 29 above and the EDR data of 113 kilometres per hour to 117 kilometres per hour. He attributed this difference to the fact that the vehicle vaulted from a ramp and landed at the bottom of another ramp next to the driveway approach to 3749, such that the natural trajectory

of the vehicle was altered as described in paragraph 30 above. If the vehicle had not encountered resistance at the driveway approach to 3749, the travel distance of the vehicle would have been more than 28.3 metres from the vaulting point to the first landing point and the speed that he calculated would have increased from 99 kilometres per hour, to more closely mirror the speed recorded by the EDR.

[39] Corporal Bernardin concluded that in this case:

(a) For an unknown reason, the driver of the vehicle failed to correctly negotiate a curve to the right in that after coming out of the curve, she failed to straighten out the vehicle and follow the roadway, causing the vehicle to enter the ditch. The driver had over a three second period to correct the direction of travel of the vehicle, to take her foot off of the gas and to use the brake to avoid the ditch, but failed to do so;

(b) The vehicle struck the driveway approach to 3743 and vaulted. After landing, it came to an uncontrolled stop 58.8 metres from the vaulting point;

(c) the deceased was not using a seatbelt at the time of the collision, based on the injuries suffered;

(d) The vehicle was travelling at 116 kilometres per hour or 30 metres per second (plus or minus four percent due to the EDR manufacturer's built in error factor) when it struck the approach to 3743 and vaulted, in a 70 kilometre per hour speed zone, based both on the EDR data and the measurements that he took; and

(e) Speed was a contributing factor to this collision.

[40] In other words, there was an inattentive driver travelling well above the posted speed limit and doing so at a steady pace.

[41] Corporal Bernardin testified that he has had involvement in collisions where drivers are attempting to avoid animals or other objects on the roadway. When a vehicle makes an abrupt movement on the roadway, such as a hard turn, the vehicle will travel sideways and forwards at same time. As a result, there will be obvious, easily identifiable tire marks on the roadway. In this case there were no such tire marks and the path of the vehicle entering into the ditch was almost controlled, making a slow exit from the roadway.

POSITIONS OF THE PARTIES

CROWN

[42] The Crown submitted that the accused was driving too quickly, on a narrow and winding road with unforgiving ditches. It is virtually unchallenged that the accused failed to straighten the vehicle's path after a curve in the road and drove towards the ditch. She had three seconds to correct the path of the vehicle as it drifted from the roadway, but did not do so. Rather than take her foot off of the gas and apply the brake, her speed remained steady, causing the vehicle to vault on a driveway approach and become airborne for 28.3 metres after which the vehicle landed and flipped end over end.

[43] The Crown submitted that at the time of take-off, the accused was driving at 113 to 117 kilometres per hour, or alternatively at 99 kilometres per hour as calculated by

Corporal Bernardin. The Crown maintained that in the circumstances of the specific roadway and its ditches, the manner of driving was a marked departure from the standard.

[44] The Crown submitted that regardless of the Court's conclusion relative to whether the accused's ability to drive was impaired by alcohol, the fact that she had consumed alcohol prior to driving is a factor to be considered in the assessment of her risk assumption. In addition, the Crown pointed to the fact that James Hayes did not appear to be wearing a seatbelt as an additional assumption of risk on the part of the accused.

[45] The Crown submitted that when the accused told Dovzuk and Officer Di Carlo that there was an animal on the road, she lied. She did so because she knew that her ability to drive was impaired and that she had driven dangerously, killing James Hayes.

DEFENCE

[46] The defence submitted that there is very little evidence on which to base a decision regarding the accused's manner of driving, because the only evidence is derived from the EDR, which is a five second, sterile recording of data.

[47] The defence expressed the following concerns regarding the accuracy of the EDR evidence:

(a) there could be variability in the half-second intervals at which the EDR recorded data, such that data shown at a given half-second interval could have actually occurred slightly before or after that interval;

(b) Corporal Bernardin was not trained to check error codes in the EDR;

(c) Corporal Bernardin examined the EDR approximately two months after the collision, with no indication of what happened to the EDR in those two months;

(d) a calibration of the EDR was done in the factory, and the manufacturer may have had its own interests to consider, such that the EDR may not record accurate data, and should not be taken as sacrosanct; and

(e) the EDR data should be considered in conjunction with other available physical evidence from the vehicle and the collision scene.

[48] With respect to the manner of driving, the defence submitted that while the accused was driving into ditch, the vehicle would have been travelling along the lip of the ditch, angled down to the right, and the path would have been bumpy. While the accused held the wheel straight initially, in the brief seconds available she may not have had time to think or react by taking her foot off of the gas pedal or applying the brake.

[49] The defence submitted that the accused could have been scared or shocked, and held the wheel steady, thinking she could drive out of the ditch, which was not the right thing to do, but should not form the basis for a conclusion that she was driving dangerously. If the driveway approach had not intersected with the vehicle's path of travel, the accused might have been able to successfully negotiate the vehicle out of the ditch. The defence also noted that the accused did erratically turn the wheel to the left within the last second prior to vault. The defence also questioned to what standard a 19 year-old "girl" should be held.

[50] The defence disputed the conclusion of Corporal Bernardin that the accused failed to straighten the vehicle after a curve in the road, on the basis that no curve in the road was reflected in the computer generated diagram of the scene prepared by Corporal Bernardin. Although Corporal Bernardin testified that there was a curve in the road approximately 100 metres to the south of the collision scene, he did not measure that distance.

[51] The defence acknowledged that the accused was speeding, but asked the Court to find that the take-off speed of the vehicle was 99 kilometres per hour, as calculated by Corporal Bernardin, rather than relying on the EDR, which could be inaccurate to the extent of four percent (high or low).

[52] The defence submitted that speeding alone does not give rise to criminal responsibility for dangerous driving and stated that the speed at which the accused was driving, in the context of the ditches of that particular roadway, is not a logical component of the risk assessment. This is so particularly given that the slope of the ditch in this case was not measured, and the lip of the ditch was not factored into Corporal Bernardin's calculations.

[53] The defence also submitted that there is no evidence of where speed limit signs were posted relative to the collision scene, or the accused's knowledge of that road, including how often she may have travelled it.

[54] The defence argued that for a conviction there must be an assumption of risk regarding the nature of the roadway, but in this case, there was good lighting, and the road could be travelled at high speeds as was done by Officer Mann who raced to the

scene after receiving the emergency call. As such, there was no reason to think that a difficulty would be created by speeding.

[55] The defence submitted that in assessing the assumption of risk by the accused, the Court must have regard to the amount of traffic present or expected to be present on the roadway. Since the accused was driving at 4:00 a.m., there was no traffic or pedestrians. In addition, the road conditions were good which lowers the risk assumption.

[56] The defence submitted that the collision occurred either because something "jetted" out in front of the vehicle and the accused swerved, or because there was a momentary lapse of attention, neither of which would give rise to liability for dangerous driving pursuant to the ***Code.*** Defence counsel suggested that the comments of the accused to Dovzuk and Officer Di Carlo that an animal darted in front of the vehicle are admissible to prove the truth of those statements.

[57] In summary, the defence submitted that while the manner of driving of the accused was negligent on a civil standard of proof, or may constitute careless driving pursuant to ***The Highway Traffic Act***, C.C.S.M., c. H60, it was not dangerous driving under the ***Code.***

ANALYSIS

[58] It is clear that the accused was driving at an excessive rate of speed at the time of the collision, of between 99 kilometres per hour per Corporal Bernardin's calculations and 117 kilometres per hour per the EDR data, in a 70 kilometre per hour zone.

[59] There is no evidence that the EDR data was compromised or is otherwise unreliable for any reason. Accordingly, I will consider the EDR evidence, and will do so in conjunction with other available physical evidence, both from the vehicle and the collision scene.

[60] The EDR data reflected that the accused was driving at a speed of 117 kilometres per hour at the time that the vehicle vaulted. Taking into account the four percent margin of error within the EDR data, and resolving that margin in error in favour of the accused, the rate of speed may have been as low as 112 kilometres per hour at the time of the vault according to the EDR.

[61] I find that the EDR data is consistent with the conclusions and observations of Corporal Bernardin set out in paragraph 39 above. If, however, I am wrong to rely upon the EDR evidence, I accept, in the alternative, the calculation of Corporal Bernardin that the accused was driving at a speed of 99 kilometres per hour. I also accept the reasons why his calculation yielded a lower speed than the EDR data reflected, related to the altered trajectory of the vehicle caused by the first landing point after vaulting.

[62] Having concluded that the accused was driving at an excessive rate of speed, it must be noted that speeding is not an element of the offence of dangerous driving pursuant to the ***Code***, though it is a factor that the Court can consider.

[63] Additional factors that are significant in my assessment of the accused's conduct in this case are as follows:

(a) she failed to straighten out the vehicle after a curve in the roadway;

(b) she drove the vehicle into a narrow, steep ditch for a period of three seconds;

(c) she failed to correct the vehicle's path during the three second period and return the vehicle to the roadway;

(d) she failed to take her foot off of the gas pedal at any time prior to the vehicle vaulting;

(e) she failed to apply the brake at any time prior to the vehicle vaulting;

(f) she made an erratic attempt to steer the vehicle back onto the roadway within the last second prior to the vehicle vaulting;

(g) she was driving in a residential, rural community with many driveways intersecting the roadway;

(h) she was driving on a two lane, narrow, winding roadway after dark;

(i) none of the occupants of the vehicle were wearing a seatbelt; and

(j) she had consumed alcohol prior to driving.

[64] While I accept that the accused told both Dovzuk and Officer Di Carlo that an animal darted in front of the vehicle just prior to the collision, I do not accept those statements as proof of their contents. There is, in fact, no evidence before the Court that an animal darted in front of the vehicle, and that theory is not borne out by the physical evidence, either as observed by Corporal Bernardin and Officer Mann or as recorded by the EDR.

[65] With respect to the applicable standard of care, I note the following statement of the Supreme Court of Canada in ***Beatty***, *supra,* at paragraphs 39 - 40:

> It is important however not to confuse the personal characteristics of the accused with the context of the events surrounding the incident. In the course of the earlier debate on whether to adopt a subjective or objective test, Lamer J. favoured an objective approach but, in an attempt to alleviate its potential harshness, he would have made generous allowances for factors particular to the accused, such as youth, mental development and education: see for example, *Tutton*, at p. 1434. Under this approach, the young and inexperienced driver's conduct would be measured against the standard expected of a reasonably prudent but young and inexperienced driver. This approach, however, was not favoured by other members of the Court. As Wilson J. stated in *Tutton*, this individualized approach "sets out a fluctuating standard which in my view undermines the principles of equality and individual responsibility which should pervade the criminal law" (p. 1418).
>
> Some of the language used in *Hundal* nonetheless left uncertainty about the degree to which personal characteristics could form part of the circumstances which must be taken into account in applying the modified objective test. (See for example the references to "certain personal factors" at p. 883 and to "human frailties" at p. 887.) This remaining uncertainty was later resolved in *Creighton*. Short of incapacity to appreciate the risk or incapacity to avoid creating it, personal attributes such as age, experience and education are not relevant. The standard against which the conduct must be measured is always the same - it is the conduct expected of the reasonably prudent person in the circumstances. The reasonable person, however, must be put in the *circumstances* the accused found himself in when the events occurred in order to assess the reasonableness of the conduct.

[66] On the basis of this authority, the fact that the accused was 19 years old at the time of the collision is not a relevant factor for consideration. The same is true for her level of experience as a driver and her knowledge of the road, the details of which are not in evidence in any event.

[67] I have concluded that the facts of the accused's driving when taken together, amount to a dangerous course of conduct. It was reasonable to conclude that the ditches next to this roadway could be difficult to negotiate, or that the changes in elevation caused by the intersecting driveways could lead to a collision, particularly at

high speed. A reasonable person would have foreseen the general risk of driving at an excessive speed in the manner and circumstances listed at paragraph 63 above, all of which were present because of the actions of the accused. The accused's manner of driving was dangerous when the collision occurred, viewed objectively, particularly given the nature and use of the roadway, despite the low traffic levels and good road conditions. There was a marked departure from the standard of care referenced in ***Beatty*** and ***Roy***.

IMPAIRED DRIVING

RELEVANT LEGAL PRINCIPLES AND STATUTORY PROVISIONS

[68] Pursuant to s. 253(1)(a) of the ***Code***, a person is guilty of impaired driving when they operate a motor vehicle while their ability to do so is impaired by alcohol. Pursuant to s. 255(3) of the ***Code***, where a person drives impaired and causes the death of another person, they are liable to imprisonment for life.

[69] The offence of impaired driving was considered in ***R. v. Stellato*** (1993), 12 O.R. (3d) 90, 18 C.R. (4th) 127 (Ont. C.A.), aff'd [1994] 2 S.C.R. 478, wherein the Court held that guilt may be established by proof of any degree of impairment, ranging from slight to great impairment. In other words, the Crown need not establish a marked departure from normal behavior.

[70] In ***R. v. Andrews***, 1996 ABCA 23, the Court stated that:

> **18** *Stellato* approves the principle that a conviction on a charge of impaired driving can be founded on proof beyond a reasonable doubt of slight impairment of the ability to drive. If the ability to operate a motor vehicle is impaired (even slightly) by alcohol or drugs, it is not necessary that the degree of that impairment be marked [emphasis in original].

19 The courts must not fail to recognize the fine but crucial distinction between "slight impairment" generally, and "slight impairment of one's ability to operate a motor vehicle". Every time a person has a drink, his or her ability to drive is not necessarily impaired. It may well be that one drink would impair one's ability to do brain surgery, or one's ability to thread a needle. The question is not whether the individual's functional ability is impaired to any degree. The question is whether the person's ability to drive is impaired to any degree by alcohol or a drug. In considering this question, judges must be careful not to assume that, where a person's functional ability is affected in some respects by consumption of alcohol, his or her ability to drive is also automatically impaired [emphasis in original].

. . .

23 How, then, is a judge to assess whether a person's ability to drive was impaired by alcohol?

. . .

> The effect of alcohol is subjective before it is objective and there may be dangerous impairment even though there are no objective symptoms of intoxication. However, for the practical purposes of a criminal trial, we must, at the present time, depend largely on objective symptoms.
>
> There appears to be no single test or observation of impairment of control of faculties, standing alone, which is sufficiently conclusive. There should be consideration of a combination of several tests and observations such as general conduct, smell of the breath, character of the speech, manner of walking, turning sharply, sitting down and rising, picking up objects, reaction of the pupils of the eyes, character of the breathing.
>
> If a combination of several tests and observations shows a marked departure from what is usually considered as the normal, it seems a reasonable conclusion that the driver is intoxicated with consequent impairment of control of faculties and therefore that his ability to drive is impaired.

. . .

Where one is relying on circumstances, if the combination of the conduct relied upon constitutes a sufficient departure from the conduct of unimpaired, or normal, individuals it is safe to infer from that conduct an existence of impairment of the person's ability to drive. It sets out, not a rule of law, but a helpful guide to use in assessing evidence.

. . .

31 In my view the following general principles emerge in an impaired driving charge:

(1) the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;

(2) there must be impairment of the ability to drive of the individual;

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

[71] Put another way, in ***R. v. Healey***, 2012 BCCA 24, 26 M.V.R. (6th) 6, the Court stated:

> **18** [W]e must ask whether the admissible evidence, taken as a whole, provides a sound foundation for a guilty verdict. … [T]here was in my view a body of evidence sufficient to support a conviction: the unexplained drifting of Mr. Healey's vehicle, in broad daylight in good conditions, onto the gravel shoulder and his over-correction in response; the evidence of the "fresh" odour of alcohol emanating from Mr. Healey which clearly established his recent consumption of alcohol; the presence of both empty and partially empty bottles in the vehicle and on the roadway, at least one of which was tied to Mr. Healey by his fingerprints; and observations of common indicia of impairment - slurring, glassy eyes and a flushed face. Individually some of those features may be explained but that is not the test. In *Dao*, Mr. Justice Chiasson succinctly observed, in the context of circumstantial evidence:
>
> > [16] ... The question is not whether there were other possible explanations for individual circumstances, but whether taking the evidence as a whole, it led to the only reasonable conclusion Mr. Dao committed the crimes alleged.

[72] In addition, the Court must carefully review all of the reported tests and observations which either support or negate an impairment of an accused's ability to drive, and convict only if satisfied that their ability was impaired by alcohol (***R. v. Landes*** (1997), 161 Sask.R. 305, [1997] S.J. No. 785 (Q.B.), paragraph 17).

EVIDENCE

[73] It is not disputed that the accused consumed alcohol prior to driving on the morning of the collision. She advised both Officer Di Carlo and Dovzuk that she had consumed two drinks of rum and coke. There is no evidence of when the accused consumed those drinks, or the level of alcohol content in them.

[74] Witnesses testified and the photographs reflect that there was an open beer case found on the passenger side of the vehicle and some beer cans were found among the debris. The beer cans were not counted or seized by police due to the amount of biohazard material present. Police did not determine whether the cans were opened, and the contents sprayed around inside the vehicle during the collision. Accordingly, the presence of the beer case and beer cans at the scene is of no assistance to the Court and cannot be given any weight in determining whether the ability of the accused to operate a motor vehicle was impaired by alcohol at the material time.

[75] There was also marijuana residue found in a grinder in the accused's purse. The quantity was insufficient to weigh. There is no evidence that the accused had used marijuana prior to driving or that her ability to drive was impaired by marijuana at the time of the collision. As such, the presence of marijuana residue in the accused's purse is of no assistance to the Court and cannot be given any weight in determining whether the ability of the accused to operate a motor vehicle was impaired at the material time.

[76] There was no evidence provided by the surviving passenger of the vehicle, or from any individuals who were with the accused prior to driving. The evidence of police reflected that these individuals were not cooperative with the investigation. As such,

there is no direct evidence before the Court relative to the amount of alcohol that the accused consumed before driving.

[77] The evidence upon which the Crown relied relative to observable signs of impairment included the testimony of Officer Di Carlo and that of Officer Burns.

[78] Officer Di Carlo testified that while at the collision scene he attended in the back of the ambulance, where the accused was seated on a bench. He noted a strong odour of alcohol in the ambulance. He leaned down to the level of the accused, no more than two feet away from her, and noted that she smelled of a strong odour of alcohol. He had a clear conversation with the accused and she responded to his questions. Officer Di Carlo acknowledged that he is not sure how long the accused was in the ambulance, and that in a small space, the smell of alcohol will become stronger the longer that a person who has consumed alcohol is within that space. He also acknowledged that the strength of the smell of alcohol in the ambulance could be explained by the small and enclosed nature of the ambulance cabin.

[79] Officer Di Carlo testified that given the strong odour of liquor on the accused, he started to form the opinion that the accused was impaired. This opinion was bolstered by the fact that the collision had occurred on a straight road on a clear night in a 70 kilometre per hour zone.

[80] Officer Di Carlo testified on direct examination that he believed the accused was "strongly impaired" based on the odour of liquor. On cross-examination, he agreed that he cannot say how impaired she was based solely on the odour of liquor. He also agreed that trial was the first occasion on which he said that the accused was strongly

impaired, as opposed to noting the strong smell of liquor on the accused. Neither Officer Di Carlo's notes nor his police report reflected that, in his view, the accused was strongly impaired.

[81] Officer Di Carlo also testified that when he entered the ambulance, he did not know that the airbags had deployed in the accused's face or that the vehicle had rolled over, so he did not take those facts into account. Officer Di Carlo arrested the accused for driving impaired cause death at 4:36 a.m., after consulting with Officer Challoner at the scene.

[82] Officer Burns testified that he also attended in the back of the ambulance and observed the accused for five to eight minutes. He immediately noted a relatively strong odour of alcohol within the confined cabin, coming from the accused's breath. He noted that her eyes were glossy, her speech was slurred, that she was breathing heavily and was emotional, especially relative to the deceased, James Hayes. Officer Burns testified that the ambulance was well lit and that he was a couple of feet away from the accused. He acknowledged that the odour of alcohol would be heightened in a small space, and that because he was not drinking and came in from the colder outdoors, his detection of the odour of alcohol would have been heightened. On cross-examination, Officer Burns agreed that he did not make a note of these observations of the accused until approximately 5:23 a.m., after he attended at the hospital. He also agreed that it is possible that these observations of the accused were made at the hospital and not in the back of the ambulance.

[83] Dovzuk testified that the ambulance cabin is approximately five to six feet across, eight to nine feet long and that a short adult can stand up in it. She did not smell an odour of alcohol on the accused while taking her vital signs.

[84] Dovzuk's partner, Mike Lisowick, administered (to the accused) a Glasgow Coma Scale test (a neurological assessment to assess one's level of consciousness), which is done with every patient. Dovzuk testified that approximately one-half of people impaired by alcohol have trouble with that test. The accused scored 15 out of 15. The accused could walk, hold eye contact, was oriented and alert, had normal pupils and a normal grip. The accused's pulse was racing and her blood pressure was high, but not of concern.

[85] Mike Lisowick did not testify at trial, but it was read into the record by agreement that he treated the accused and did not note the smell of alcohol on the accused during his interactions with her.

[86] Officer Di Carlo accompanied the accused to the hospital by ambulance. When they arrived, the accused was taken in on a stretcher so he did not observe her walking. Officer Di Carlo remained with the accused throughout her time at the hospital, and was still able to smell alcohol on her in a small room at the hospital (10 feet by 15 feet), when he was six to seven feet from the accused. At 6:56 a.m., they left the hospital and the accused walked to police vehicle. Officer Di Carlo did not remember the accused's gait and did not suggest that she was assisted or held up by anyone. At the station, when completing the prisoner log sheet, Office Di Carlo indicated that the accused was "intoxicated" and that there was a strong odour of liquor

on the accused. He smelled her face again at the police detachment. He observed the accused for 15 minutes from 7:35 a.m. at which time there was still a strong smell of alcohol on the accused, but she was able to respond and said that she was not feeling tired. At 8:34 a.m., the accused was lodged in a cell.

[87] Officer Di Carlo noted on the prisoner log sheet, shortly after 7:00 a.m. that the accused's speech was clear, as opposed to slurred, incoherent or confused. He testified that her voice was understandable and that she was acting normally. He noted her balance as fair, as opposed to wobbling, sagging or falling. He noted her state of mind as placid, as opposed to depressed or angry and her consciousness as alert, not confused or sleepy.

[88] Officer Burns testified that he was with the accused for more than 25 minutes at the hospital, during which time they engaged in generic conversation in the waiting room and in an examination room. The lighting was normal. Officer Burns recalled an odour of alcohol on the accused's breath, as well as glossy eyes, slightly slurred speech and emotional ups and downs.

[89] Officer Burns acknowledged that there are many potential reasons for a person to have emotional ups and downs and that the accused's emotional swings could be attributable to a person having died in a vehicle that she was driving. When the accused's mother entered the room after 6:36 a.m., the accused was crying hysterically, breathing hard and still emanating a strong odour of liquor. Officer Burns testified that while at the hospital, the accused's level of impairment remained constant

and did not change drastically. He believes that the accused was moderately impaired by alcohol.

[90] Officer Burns testified that he had no difficulty understanding the accused, that she could hold a conversation and that her wording and orientation was clear. He also testified that he did not remember seeing the accused walk, and had nothing in his notes regarding her gait. He acknowledged that if he had seen an unusual gait he would have noted it. Officer Burns also acknowledged that he had noted that the accused's eyes appeared squinty as well as glossy and that there could be many reasons for a person to have glossy or squinty eyes. When Officer Burns spoke with the accused, he was aware of the deployment of the airbags and the vehicle rollover.

[91] Officer Burns testified that a strong smell of alcohol can indicate how much a person drank when the smell is there consistently over a period of time. He also stated that he would have arrested the accused for impaired driving, as Officer Di Carlo did.

[92] He would have based the arrest on the following factors:

(a) the presence of liquor in the vehicle;

(b) the driving pattern exhibited by the accused;

(c) the collision;

(d) the smell of liquor on the accused's breath;

(e) the accused's glossy and watery eyes;

(f) the emotional ups and downs of the accused; and

(g) the slightly slurred speech of the accused.

POSITIONS OF THE PARTIES

CROWN

[93] The Crown relied upon the evidence of Officers Di Carlo and Burns who interacted with the accused, and testified that she was impaired and remained impaired for at least three hours after the collision.

[94] The Crown also pointed to the accused's admission that she had consumed alcohol prior to driving, and suggested that she tried to minimize her consumption by saying that she had only two drinks. The accused had already lied about swerving to avoid hitting an animal on the road.

[95] The Crown questioned why the accused did not react during the three seconds that the vehicle was drifting from the roadway, after she failed to straighten the vehicle from a curve in the road. The only rational answer is that her ability to drive was impaired by alcohol.

[96] The Crown submitted that while there is a checklist of common indicia of impairment, proof can take many forms, and the Court must have regard to all of the factors and the totality of the circumstances and evidence.

[97] The Crown noted that while evidence of the accused's manner of driving is not required, in this case it is so egregious that it can be explained only by impairment by alcohol. The Crown pointed to the evidence of Corporal Bernardin that:

> Operating a motor vehicle is a complex skill which requires a driver to constantly multi-task, but it is so familiar to most that it is often overlooked or taken for granted. ... [T]he driver was either distracted, directly or indirectly, or her perception/reaction abilities were greatly diminished; there were no attempts to correct the vehicle's path.

[98] The Crown argued that the question is not whether there are other explanations for the accused's symptoms, but whether, when the evidence is taken as whole, it leads to the reasonable conclusion that her ability to drive was impaired by alcohol.

DEFENCE

[99] The defence argued that:

(a) the officers on scene were affected by the dramatic and horrific accident, which influenced their opinions about the collision;

(b) the accused had been punched in the face by the airbag, such that there was dust in her eyes;

(c) Officer Di Carlo did not comment on the accused's eyes;

(d) the accused had observed a fatal injury to a friend;

(e) the accused had suffered a horrific shock, and her symptoms were consistent with that shock;

(f) the accused scored 15 out of 15 on the Glasgow Coma test;

(g) there was no evidence presented relative to the accused's gait;

(h) the accused was consistent in her statements that she had consumed two drinks of rum and coke, which are admissible to prove their truth, even though the amount of alcohol consumed by the accused cannot be assessed and there is no evidence of her tolerance to alcohol;

(i) the smell of alcohol accumulated in the back of the ambulance because it was a small space;

(j) the smell of alcohol was accentuated to Officers Di Carlo and Burns because they had been out in the fresh air before entering the ambulance;

(k) there is no evidence of whether the smell of alcohol was fresh or stale;

(l) if the smell of alcohol emanating from the accused was as strong as the Officers said it was, Dovzuk would have smelled it also;

(m) the strength of the smell of alcohol cannot be equated with a person's level of impairment;

(n) Officer Di Carlo did not recall Officer Burns entering the cabin of the ambulance;

(o) Officer Burns was unsure of whether he observed the accused's state of impairment in the ambulance or at the hospital; and

(p) on the basis of these issues with the evidence of Officers Di Carlo and Burns, the accuracy of their observations must be questioned.

[100] The defence submitted that the accused's impairment must be assessed on an objective standard and that the Crown failed to prove that the accused's ability to drive was impaired.

ANALYSIS

[101] The Crown's case is based upon circumstantial evidence. As such, in order to convict the accused, I must be satisfied beyond a reasonable doubt that her ability to operate a motor vehicle was impaired by alcohol, on the basis of the facts that have been proven. I must consider the evidence cumulatively, as a whole, as opposed to

conducting an individual examination of each indicia of alcohol impairment. I must also remember that general impairment is not sufficient. I must be convinced that the accused's ability to drive was impaired by alcohol.

[102] I am persuaded that there was a strong odour of alcohol emanating from the accused at the collision scene, at the hospital and at the police detachment, spanning over three hours, from approximately 4:30 a.m. when officers spoke with the accused in the ambulance, to close to 8:00 a.m., when the accused continued to be observed at the police detachment. I accept that the odour may have seemed stronger within the confined space of the ambulance cabin, but the odour continued for several hours, in locations that were not confined spaces.

[103] I accept that the level of a person's impairment is not correlated to the strength of the smell of alcohol emanating from the person, but I do accept that "the physical effects of the consumption of alcoholic beverages are transitory, and that the extent and strength of the indicia of consumption will diminish over time" (***R. v. Summan***, 2016 ONSC 384, paragraph 9). Accordingly, the fact that a strong odour of alcohol emanated from the accused for several hours is noteworthy.

[104] I recognize that Dovzuk and her partner did not smell alcohol on the accused, which in my view does not detract from the evidence of Officers Di Carlo and Burns. It is admitted that the accused had consumed rum prior to driving. Why Dovzuk and her partner did not smell alcohol is unknown, but I accept that different people may observe and recall various facets of the same events differently.

[105] I accept that the accused's eyes were glossy and watery. I also accept that the driver's side airbags would have deployed very quickly upon impact and would have hit the accused's face with significant force. In addition, the airbags disbursed a powder which may have landed in the accused's eyes.

[106] I also accept that the accused exhibited significant emotional ups and downs while with police, which could be explained both by the collision and by the death of James Hayes. I note that while defence counsel suggested that the accused and James Hayes were friends, there is no evidence before the Court regarding the nature or length of their relationship.

[107] I accept that the accused exhibited slightly slurred speech as observed by Officer Burns, who spoke with the accused for more than 25 minutes at the hospital. While Officer Di Carlo did not testify that the accused's speech was slurred, and noted on the prisoner log sheet that her speech was clear, I am mindful of Officer Di Carlo's evidence that English is not his first language. While he has taken English language training, I note that his seven month police training course, which concluded in 2012, was conducted in French, and that he speaks English with a thick accent. I do not suggest that Officer Di Carlo's work in this case was impeded by his language skills, but I note that his ability to hear nuances in the speech of the accused, such as a slight slur, may be different than that of Officer Burns. For these reasons, I am prepared to rely upon the evidence of Officer Burns relative to the accused's speech.

[108] Whether the observations of the accused by Officer Burns were made in the back of the ambulance at around 4:30 a.m. or at the hospital at around 5:20 a.m., the

substance of his observations was that the accused was moderately impaired. If the observations were made in the ambulance, they were closer in time to the driving and support impairment at that time. If the observations were made at the hospital, they support the fact that the accused's impairment was ongoing.

[109] I find that both Officers Di Carlo and Burns testified fairly and candidly with respect to their observations of the accused. They stated that they did not observe the accused's gait until approximately three hours after the collision, at which time they noted no issues. Similarly, both officers testified that the accused could be understood when speaking with them throughout their time with her.

[110] I accept that the accused scored well on the Glasgow Coma test, which is a measure of consciousness and basic functioning, not an evaluation of sobriety. I also accept Dovzuk's unchallenged evidence, that approximately one-half of people impaired by alcohol do well on the test. Accordingly, this evidence is not of assistance to the Court and cannot be given significant weight in determining whether the ability of the accused to operate a motor vehicle was impaired at the material time.

[111] I must also examine the driving pattern of the accused. As I have already found, the accused was driving at an excessive speed on a two-lane, narrow, winding road, after dark, in otherwise good driving conditions. She failed to follow the roadway and she drove the vehicle into a ditch for three seconds without correcting or taking her foot off of the gas. She made a last-ditch, erratic attempt to steer the vehicle back onto the roadway, which failed.

[112] The single vehicle collision that ended the accused's driving was extremely serious and violent, both in terms of the force with which it occurred and the resultant damage to the vehicle. The vehicle landed 58.8 metres from its vaulting point and pieces of debris were upon and embedded within the ground along its path. While the defence speculated as to causes of the collision, such as a momentary lapse of attention or an animal in the roadway, there is no evidence before the Court to support that speculation.

[113] I recognize that some of my findings relative to individual factors exhibiting impairment can, when taken alone, be explained by causes other than alcohol consumption. After consideration of all of the evidence, however, and in taking all of the factors together, the only rational inference that can be drawn is that the accused's ability to drive was impaired at the material time. On that basis, I am satisfied beyond a reasonable doubt that at the time of the collision the accused's ability to drive was impaired by alcohol.

CONCLUSION

[114] The accused is convicted of both charges.

_____ J.