Citation: *R. v. Holbein,* 2023 YKTC 12

Date: 20230526
Docket: 21-05569
21-00769
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

BYRON RONALD JAMES HOLBEIN

Appearances:
Neil Thomson — Counsel for the Crown
Lee Kirkpatrick — Counsel for the Territorial Crown
Amy Steele — Counsel for the Defence

REASONS FOR JUDGMENT

[1] Byron Holbein is before the Court on two separate Informations for offences contrary to both the *Criminal Code*, and the *Motor Vehicles Act* RSY, 2002, c. 153 ("*MVA*").

[2] The Information alleging offences contrary to the *Criminal Code* includes six counts from February 2, 2022, contrary to ss. 320.18 (x3), 320.16(1), 320.15(1), and 320.13(1) ("*Criminal Code* Information").

[3] The Information alleging offences contrary to the *MVA* includes six counts from February 2, 2022, contrary to ss. 39(1)(b), 87(2), 94(1)(a), 266, 186(a), and 59(b) ("*MVA* Information").

[4] The trial commenced in a blended *voir dire* to address Mr. Holbein's allegation that there were violations of his *Charter* rights. I provided my decision on the *voir dire* on April 17, 2023, and the trial proceeded to conclusion on the same date.

[5] Prior to the trial continuation, defence counsel conceded that Counts 1, 2, and 6 on the *MVA* Information would be made out in the defence case through Mr. Holbein's testimony. Crown then withdrew Counts 3, 4, and 5. The remaining trial issues are in relation to the *Criminal Code* Information.

Facts

[6] Given that the trial proceeded by way of a blended *voir dire*, with the evidence from the *voir dire* being admitted at trial, I will repeat the facts that are relevant to the trial issues.

[7] On February 2, 2022, at approximately 9:30 in the morning, Rachel Guay was driving in a blue Honda Fit and turning left from the Alaska Highway onto the Two Mile Hill heading into downtown Whitehorse when her vehicle was struck by a grey Ford F150 (the "truck") driven by Mr. Holbein traveling through the intersection northbound on the Alaska Highway. The front passenger side of the truck collided with the rear passenger side of the car. The impact was significant and caused the Honda Fit to

collide with a third vehicle waiting to turn onto the Alaska Highway. Ms. Guay was determined to be at fault for the accident.

[8] Dashcam video from the third vehicle involved captured the collision and was entered at trial as Exhibit 1. The video depicts the car driven by Ms. Guay spinning around on the snow after the collision. Despite the dramatic impact on the car, the truck does not appear to slow significantly from the impact and continues in a forward motion in the same lane northbound on the highway. Mr. Holbein continued to drive the truck northbound on the Alaska Highway without stopping.

[9] Several kilometres north of the scene of the accident Scott Smeeton observed the truck driving northbound on the Alaska Highway below the speed limit, repeatedly speeding up and slowing down. Mr. Smeeton followed the truck, describing what he witnessed as a driver unable to control the truck and driving at “50 or 60” kilometres per hour on the highway. The truck was swaying back and forth, at one point drifting into the oncoming lane. He noticed significant damage to the front passenger side of the truck and that the front passenger tire was pointed inward while the driver was attempting to drive straight, describing it as “pigeon toed”. Mr. Smeeton called the RCMP to report the driving and followed the truck until it veered across the oncoming lane and into the snowbank on the far side of the highway a short distance passed the intersection of the Alaska Highway and the North Klondike Highway. The truck was stopped with the front end in the snowbank and the rear end protruding into the southbound lane of the Alaska Highway. Mr. Smeeton then observed Mr. Holbein exit the vehicle and walk northbound on the Alaska Highway.

[10] The truck was stopped in a position that was dangerous to vehicles travelling southbound on the Alaska Highway. Shortly after Mr. Holbein left on foot, a highway plow operator stopped next to the truck with its lights flashing to warn oncoming traffic of the hazard.

[11] Cpl. Anderson of the Whitehorse RCMP attended at the location of the truck which was approximately 13 kilometres from the scene of the motor vehicle accident. By that time, he had learned that the license plate on the truck was expired and belonged to Mr. Holbein, and that Mr. Holbein was subject to a *Criminal Code* driving prohibition.

[12] At 10:23 a.m. Cpl. Anderson located Mr. Holbein walking northbound on the Alaska Highway approximately 2.5 to 3.0 kilometres from the truck. He was arrested for leaving the scene of an accident under the *MVA* and for driving while prohibited under the *Criminal Code*.

[13] Following the arrest, Cpl. Anderson proceed to conduct a safety search of Mr. Holbein during which he located a couple of knives, a bottle of morphine pills, and a set of keys later confirmed to be for the truck. He was still on the side of the highway with Mr. Holbein about one to two minutes after the arrest when Cpl. Dunmall arrived.

[14] Cpl. Dunmall had been at the scene where the truck was left on the highway prior to attending at the location where Cpl. Anderson located Mr. Holbein. The truck was left in a dangerous position and would be towed. Cpl. Dunmall proceeded to conduct a cursory search of the vehicle and noted:

a) The vehicle was turned off and the keys were not in the ignition;

b) The vehicle was unlocked;

c) There were no signs of distress in the vehicle, such as a deployed airbag, damaged windshield, blood, or other bodily fluid;

d) She did not locate registration or insurance documents for the vehicle;

e) She did not locate any keys in the vehicle;

f) She located court documents belonging to Mr. Holbein in the glove box, along with a can of unopened alcoholic beverage called Hey Y'all; and

g) She located two opened and empty cans of Hey Y'all in the rear seat of the truck.

Cpl. Dunmall testified that it was approximately -30 Celsius outside during the investigation. Upon approaching Mr. Holbein, Cpl. Dunmall leaned towards him and observed the smell of alcohol on his person. Mr. Holbein objected to her proximity to him, and in light of the prevalence of the Omicron variant of COVID-19 in the Yukon at that time, she respected his objection. She was unable to confirm if the smell of alcohol was coming from his breath. Her observations of Mr. Holbein included:

(i) The odor of alcohol on his person;

(ii) Long eye blinks;

(iii) Relaxed facial muscles;

(iv) Constricted pupils;

(v) White buildup on the corners of his mouth, referred to as "cotton mouth"; and

(vi) Possible slurred speech.

[15] In addition to these observations, she had observed the unopened and the empty cans of Hey Y'all alcoholic beverages in the truck. She was aware of the significantly damaged truck being driven approximately 13 kilometres from the scene of the accident in a manner that was such a marked departure from the norm that the RCMP had received complaints from more than one civilian, including Mr. Smeeton, who was concerned enough to follow the vehicle as he was reporting his concerns. She had observed the way the truck was left front first in the snowbank and protruding dangerously into the lane of oncoming vehicles. She further believed that the driver had a clear intention of separating himself from the vehicle by leaving on foot.

[16] Based on all the information she had learned in relation to the truck ownership, the driving, the dangerous abandonment, and her observations of Mr. Holbein, she formed the suspicion that Mr. Holbein had committed an alcohol related driving offence and issued him an Approved Screening Device ("ASD") demand. Cpl. Dunmall then placed Mr. Holbein in Cpl. Anderson's police vehicle, which had the Watchguard audio and video running to capture the back seat.

[17] Cpl. Dunmall proceeded to make eight separate attempts to obtain a suitable ASD sample from Mr. Holbein. During this time, Mr. Holbein was coughing and

complaining about pain in his head and in his chest while, at the same time, denying that he had been driving. Cpl. Dunmall noted that the health concerns only arose after she made the ASD demand and believed that he was being non-compliant as opposed to not being able to provide the sample. She observed his ability to take deep breaths, exhale, and speak which led her to believe he was able to provide the sample. She noted him blocking the air flow, biting the breath tube, intentionally withholding breath, and not providing a consistent sample. After the eighth unsuccessful attempt to provide a sample of his breath, Cpl. Dunmall placed Mr. Holbein under arrest for driving while prohibited and for refusal to provide a breath sample. Cpl. Anderson then asked Mr. Holbein if the truck was insured. Mr. Holbein advised that there was insurance on the truck and that it could be located in the glove box which he knew, at the time, to be untrue.

[18] After being advised that he was under arrest by Cpl. Dunmall, Mr. Holbein requested to seek medical attention. Cpl. Dunmall transported Mr. Holbein to the Whitehorse General Hospital where she waited with him at general intake until they could see a doctor. He was able to see a doctor and was medically cleared at 12:19 p.m.

[19] On February 2, 2022, Mr. Holbein was subject to two *Criminal Code* driving prohibitions and was serving a conditional sentence with a term prohibiting him from driving.

Evidence of Mr. Holbein

[20] Mr. Holbein is 52 years old and resides off the North Klondike Highway outside of the city limits of Whitehorse. He suffers from a medical condition involving tumours in his hip and is prescribed time release morphine to manage the pain. He has two prescriptions for morphine as he requires both 10 milligram and 15 milligram slow-release morphine pills to combine to take 50 milligrams twice a day.

[21] On February 2, 2022, Mr. Holbein's morphine prescription was empty, and he desperately needed to refill it. He "tried calling a few friends" but could not find anyone to drive him downtown to fill the prescription. He decided to drive himself in the truck which did not have registration or insurance. He drove to Shoppers Drug Mart to fill the prescription, then to a second location to purchase a six-pack of Hey Y'all alcoholic beverages.

[22] Mr. Holbein then drove out of downtown Whitehorse at the south end of town, the opposite direction of his residence. At the Alaska Highway he turned north and proceeded to the intersection where the collision occurred. He was not wearing a seat belt and the collision caused him to hit his chest on the steering wheel and his head on the windshield. Hitting his head caused him to see "silver sparkles". He does not know why he kept driving after the collision, explaining that he was confused.

[23] Mr. Holbein tried turning the steering wheel after the collision but says that it would not turn. He could not pull the truck over given the steering limitations. He eventually "just stopped" when he realized that he could not turn the wheels, referring to

the location where the truck was left on the highway. He does not know why he did not stop earlier. He knew something was wrong but did not know what.

[24] Mr. Holbein testified that there was one spot on the left-hand side of the highway that he could pull over but recalls there being too much traffic coming in the opposite direction to do so.

[25] After stopping and exiting the truck, he “just started walking”. He was trying to walk home and did not realize that he was going the wrong way. He explained that he walked along a powerline near the highway on a skidoo trail rather than on the shoulder of the highway.

[26] Mr. Holbein explained that he told Cpl. Anderson that he was in pain at the side of the highway when he was arrested because his chest was really sore.

[27] Regarding the ASD samples, he explained that he could not blow because his chest hurt too much.

[28] While at the hospital, Mr. Holbein was still in a lot of pain and recalls spitting up blood. He states that the doctor that discharged him did not provide a diagnosis and just advised that he could go. He does not recall them taking any x-rays or assessing him for a concussion.

Issues

[29] I will address the following issues in relation to the *Criminal Code* Information:

1. Credibility of the Witnesses:

a. Cpl. Anderson;

b. Cpl. Dunmall; and

c. Mr. Holbein.

2. Can Mr. Holbein be convicted on all three offences for operating a conveyance while prohibited?

3. Did Mr. Holbein fail without reasonable excuse to stop at the scene of the accident?

4. Did Mr. Holbein operate a conveyance in a manner that was dangerous to the public?

5. Did Mr. Holbein fail or refuse to provide a sample of his breath into the ASD?

Credibility of the Witnesses

[30] The British Columbia Supreme Court addressed the assessment of witness credibility and reliability in the decision of *R. v. Dionne*, 2022 BCSC 959, at paras. 37 to 39:

> 37 Reliability has to do with the accuracy of a witness's evidence, such as whether they have a good memory, if they are able to recount the details of the event, and whether the witness is an accurate historian: *R. v. Nyznik*, 2017 ONSC 4392 at para. 15.
>
> 38 Credibility relates to the witness's veracity. A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case. Sometimes, an honest witness will be trying their best to tell the truth and will believe the truth of what they are relating, but nevertheless

> be proven to be mistaken in their recollection. Although honest, their evidence is not reliable: *Nyznik* at para. 15.
>
> 39 Determining the credibility of a witness requires the court to consider a number of factors. These include the internal and external consistency of the witness's evidence, motive to fabricate, the inherent plausibility of the evidence in the context of the case as a whole, and demeanour: *R. v. Swain*, 2019 BCSC 1300 at para. 48.

Cpl. Anderson

[31] Cpl. Anderson had the Watchguard video running in his police vehicle for the duration of the stop and arrest of Mr. Holbein. He did not wear the portable microphone while outside of his police vehicle, limiting the reliance on the video during the arrest and search of Mr. Holbein. While I have concerns about the lack of audio recording, his interaction with Mr. Holbein was limited and assisted by the Watchguard video which recorded the times. Cpl. Anderson testified in an honest and forthright manner, and I find that I am able to accept the evidence of Cpl. Anderson as both credible and reliable.

Cpl. Dunmall

[32] Cpl. Dunmall’s interactions with Mr. Holbein were brief before placing him in the back seat of Cpl. Anderson’s police vehicle. There was both audio and video Watchguard recording of the interactions between Mr. Holbein and Cpl. Dunmall while he was in the rear seat of the police vehicle. The entire exchange in relation to the formal ASD demand and the eight attempts to obtain a sample from Mr. Holbein was captured on the recording. Cpl. Dunmall testified in an honest and forthright manner in both direct and cross-examination and I find that I am able to accept the evidence of Cpl. Dunmall as both credible and reliable.

Mr. Holbein

[33] Mr. Holbein's evidence was vague and inconsistent with the facts of the investigation. Many aspects of his testimony were problematic in that they were implausible, defied common sense or otherwise lacked credibility. Problematic aspects of his testimony include:

a) That his morphine prescription was suddenly out on February 2, 2022, leaving him with no choice but to drive himself to town to fill his prescription. The urgencey arose on this date despite him taking the morphine twice a day, every day. He would have been aware of the state of his morphine prescription each time he took it. This explanation for driving due to the urgency of being out of morphine defies common sense;

b) He testified that he drove in order to fill his empty prescription for morphine, which he takes twice a day by combining two different prescriptions of 10 milligram pills and 15 milligram pills. However, when he was arrested, he only had one bottle of morphine pills in his possession and he failed to explain this discrepancy. His explanation that he drove to town and filled his prescription lacks credibility;

c) His explanation for not stopping at the scene of the accident because he hit his head and was confused contradicts the evidence of Cpl. Dunmall that there was no evidence inside the truck of Mr. Holbein hitting the windshield from inside. She testified that she was

specifically looking for signs of injury or trauma when she searched the truck because the driver had walked away on foot. On cross-examination she was unshaken in her opinion that a hard blow to the windshield from the inside would cause the glass to spider, meaning that it is designed to be less rigid from the inside and to crack with pressure;

d) His testimony that he could not turn the steering wheel of the truck is implausible. He managed to navigate the damaged truck 13 kilometres down the Alaska Highway that required navigating hills, and many turns in both directions;

e) His explanation of there being one place to pull over on the left side of the highway defies common sense as there were multiple opportunities on both sides of the highway, depicted in the Watchguard video, as well as the ability to pull over onto the shoulder of the highway at any time. He was driving in the direction of his home and would be aware of the opportunities to pull over;

f) His explanation that he eventually “just stopped” on the highway is inconsistent with the fact that the truck drove across the oncoming lane, front first, into the snowbank, leaving the rear end of the truck protruding into the oncoming lane and causing a hazard;

g) His decision to walk along a skidoo trail instead of the shoulder of the highway despite being in significant pain defies common sense.

Walking in the snow on a skidoo trail is significantly more difficult than walking on the cleared shoulder of the highway;

h) His assertion of being in medical distress and coughing up blood at the hospital is inconsistent with the doctor clearing him without any testing or diagnosis;

i) His insistence that he did not consume any of the six-pack of Hey Y'all beverages that he picked up that morning right before driving to the location of the accident, contradicts the evidence that there was only one full can of Hey Y'all remaining in the vehicle and two empty cans located in the back seat.

[34] Mr. Holbein was driving an uninsured and unregistered vehicle while prohibited from driving under the *Criminal Code* and in breach of his conditional sentence order, giving him significant motivation to fabricate his evidence. I find that Mr. Holbein was not a credible witness and I reject his evidence regarding the events of February 2, 2022. Having made this finding, I am mindful that as I consider each count on the *Criminal Code* Information, I must apply the three-step procedure as set out by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742:

- First, if you believe the evidence of the accused, obviously you must acquit;

- Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit; and

- Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Can Mr. Holbein be Convicted on all three Offences for Operating a Conveyance While Prohibited?

[35] Based on the testimony of Mr. Holbein, defense counsel did not dispute that he was driving while prohibited and was silent on whether convictions should be entered for each of the three counts contrary to s. 320.18 on the *Criminal Code* Information. Crown's position is that Mr. Holbein should be convicted on all three counts.

[36] The counts in question are not well particularized, with two counts having identical wording for offences contrary to orders made on April 12, 2021, and one count with identical wording except for being contrary to an order made on October 13, 2017. The three orders were filed together as Exhibit 2 at trial.

[37] The two counts for offences contrary to orders made on April 12, 2021, arise from a sentencing on that date wherein Mr. Holbein received a five-year driving prohibition and a twelve-month conditional sentence with a condition to "not drive a motor vehicle at any time". The order on October 13, 2017, was a five-year driving prohibition.

[38] All three orders in question ran concurrently. However, the counts arise from the same single incident of driving. There is no question that Mr. Holbein was driving on February 2, 2022, and is guilty of driving while prohibited. The question that remains is

whether or not any of the counts should be judicially stayed which requires an analysis as set out in *R. v. Kienapple,* [1975] 1 S.C.R. 729. The *Kienapple* analysis was set out by the Ontario Court of Appeal in *R. v. Adjei*, 2013 ONCA 512, at paras. 69 and 70:

> 69 Under *Kienapple*, the relevant inquiry when an accused invokes the rule against multiple convictions is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences: *Kienapple*, at p. 750. Where two or more offences contain the same or substantially the same elements, application of the rule is triggered: *Kienapple*, at p. 751.
>
> 70 The decision in *Kienapple* does not prohibit a multiplicity of convictions, each in respect of a different factual incident: *R. v. Prince*, [1986] 2 S.C.R. 480, at p. 491. The rule does, however, bar multiple convictions for offences that arise from the same transaction: *Prince*, at p. 491. The factual nexus requirement is satisfied where it is the same act of the accused that grounds each of the charges: *Prince*, at p. 492. Where one act ends and another begins is often not easy to define and requires evaluation on a case-by-case basis: *Prince*, at p. 492.

[39] The Crown submission that convictions could be entered on all three offences relied on s. 590(1) of the *Criminal Code*, which states:

> 590 (1) A count is not objectionable by reason only that
>
> (a) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an indictable offence the matters, acts or omissions charged in the count; or
>
> (b) it is double or multifarious.

[40] The British Columbia Supreme Court addressed the application of s. 590 of the *Criminal Code* in *R. v. James*, 2021 BCSC 1408, at para. 54:

> However, the situation in relation to the charges against Mr. James is different from that in *Black & McDonald* and the other cases on which the Crown relies. In those cases, the charges described as overlapping, duplicating, or alternative all charged different types of offences. In *Black*

> *& McDonald*, for example, the charges (for each accused) all related to the same industrial accident that killed a worker, but they alleged violations of different provisions of Ontario's *Occupational Health and Safety Act* or the applicable regulation. Here, by contrast, not only does count 1 allege the same unlawful conduct as is alleged in counts 2, 3, and 5; it also charges the same *Criminal Code* offence (under s. 122) in relation to that conduct. While the charges in *Black & McDonald* overlapped, in charging different offences in respect of generally the same conduct, count 1 does not merely overlap with the other counts on the indictment against Mr. James, it duplicates those charges.

[41] Counts 1, 2, and 6 on the *Criminal Code* Information all allege the same unlawful conduct and charge the same *Criminal Code* offence. I find that in the circumstances the *Kienapple* rule applies, and I judicially stay Counts 2 and 6 of the *Criminal Code* Information. There will be a finding of guilt entered on Count 1 for the offence contrary to s. 320.18 of the *Criminal Code*.

Did Mr. Holbein Fail Without Reasonable Excuse to Stop at the Scene of the Accident?

[42] Count 3 on the *Criminal Code* Information alleges an offence contrary to s. 320.16(1) of the *Criminal Code* which states:

> 320.16 (1) Everyone commits an offence who operates a conveyance and who at the time of operating the conveyance knows that, or is reckless as to whether, the conveyance has been involved in an accident with a person or another conveyance and who fails, without reasonable excuse, to stop the conveyance, give their name and address and, if any person has been injured or appears to require assistance, offer assistance.

[43] The Court set out the *actus reus* of the offence in *Dionne,* at paras. 26 and 27:

> 26 Section 320.16(1) imposes a positive obligation on a driver involved in an accident to do the following three things:

> a) stop;
>
> b) give their name and address; and
>
> c) offer assistance if a person has been injured or appears to require assistance.
>
> 27 The actus reus of the offence is met if the accused fails to do any one of these three things.

[44] Mr. Holbein acknowledges that he was in the accident on February 2, 2022, involving Ms. Guay and that he did not stop. The *actus reus* of the offence is established beyond a reasonable doubt.

[45] The *mens rea* required for the offence was addressed in *Dionne* at paras. 28 to 32:

> 28 The *mens rea* for an offence under s. 320.16(1) and (3) is knowledge or recklessness that they were involved in an accident, and knowledge or recklessness as to whether death or bodily harm ensued.
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> 29 Knowledge can be proven by either actual knowledge or imputed knowledge based on wilful blindness: *R. v. Edwards*, 2020 BCCA 253 at para. 95.
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> 30 In *R. v. Farmer*, 2014 ONCA 823 at para. 26, the court explained wilful blindness as occurring when an accused becomes aware of the need for some inquiry, but declines to make the inquiry because the accused does not "wish to know the truth". Put another way, an accused is wilfully blind if they shut their eyes because they know or strongly suspect that "looking would fix [them] with knowledge".
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> 31 The deliberate nature of wilful blindness was expressed by Justice Moldaver in *R. v. Morrison*, 2019 SCC 15 at follows:
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> > [98] Wilful blindness exists where an accused's "suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries...Wilful blindness has been characterized as "deliberate ignorance" because it connotes "an actual process of suppressing a suspicion". [citations and references omitted]

[46] Mr. Holbein may have been confused after the accident, but he knew there was something wrong when he could not turn the truck steering wheel properly. His response to why he did not stop was “I don’t know”. He further stated that he “knew something was wrong”, but that he “didn’t know what”.

[47] On these facts, I find that there was imputed knowledge on the part of Mr. Holbein based on wilful blindness. The *mens rea* of the offence is established beyond a reasonable doubt.

[48] Based on my findings regarding the credibility of Mr. Holbein, I do not accept that he was confused by hitting his head during the accident to the extent that it raised a reasonable excuse for not stopping. While he was operating the truck which was not insured and not registered at a time that he was subject to a driving prohibition and in breach of a conditional sentence order, he struck another car in a major intersection. He did not stay at the scene of the collision. He left the area and travelled approximately 13 kilometres before stopping. He claimed to be confused due to hitting his head during the accident, but there was no confirmatory evidence of a head injury, and his evidence has been rejected in that regard.

[49] Even if there was a subjective basis for his confusion, which I reject, I find that objectively a reasonable person would have stopped the truck immediately once they realized that the steering was not working. Mr. Holbein has failed to establish a reasonable excuse for failing to stop on a balance of probabilities.

[50] I find Mr. Holbein guilty on Count 3 of the *Criminal Code* Information for the offence contrary to s. 320.16(1) of the *Criminal Code*.

Did Mr. Holbein operate a Conveyance in a Manner that was Dangerous to the Public?

[51] Dangerous operation of a conveyance is set out in s. 320.13(1) of the *Criminal Code*:

> 320.13 (1) Everyone commits an offence who operates a conveyance in a manner that, having regard to all of the circumstances, is dangerous to the public.

[52] The Supreme Court of Canada addressed the *actus reus* of dangerous driving in *R. v. Roy*, 2012 SCC 26, 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. … 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.

[53] Mr. Holbein was not at fault for the accident with Ms. Guay. The allegation of dangerous operation relates to him driving the damaged truck from the scene of the accident 13 kilometres down the Alaska Highway to the location where he drove across the oncoming lane, front first, into a snowbank.

[54] As I noted in the *voir dire* ruling, the Alaska Highway is a major roadway connecting the Yukon and Alaska to northern British Columbia. It supports significant traffic of all types, both private and commercial. Mr. Smeeton described Mr. Holbein as “a driver unable to control the vehicle” noting that the truck was swaying back and forth, and at one point drifting into the oncoming lane. Mr. Smeeton’s observation that the

truck appeared “pigeon toed” is supported by pictures entered as Exhibit 5 at trial showing the front passenger side tire pushed inward. Mr. Holbein’s evidence was that he could not turn the steering wheel.

[55] I find that the manner in which Mr. Holbein drove the truck along the Alaska Highway for 13 kilometres endangered the public, creating a significant risk of damage or injury to other travellers on the highway. Mr. Holbein’s conduct could very well have caused a serious accident on the highway.

[56] The Court in *Roy* addressed the *mens rea* of dangerous driving at para. 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.

[57] Mr. Holbein’s driving caused Mr. Smeeton significant concern, resulting in him turning his vehicle around and following the truck as he reported what he saw to the RCMP. Based on this evidence, and the admissions of Mr. Holbein regarding the inability to steer the truck, I find that a reasonable person would have foreseen the risk and taken steps to avoid it. Mr. Holbein did not make any effort over the 13 kilometres travelled to pull the truck over, and I find that his behavior was a marked departure from the standard of care expected of a reasonable person in the accused's circumstances.

[58] I find Mr. Holbein guilty on Count 5 of the *Criminal Code* Information for the offence contrary to s. 320.13(1) of the *Criminal Code*.

Did Mr. Holbein Fail or Refuse to Provide a Sample of His Breath into the ASD?

[59] The Ontario Court of Justice addressed the offence under s. 320.15(1) of the *Criminal* Code in *R. v. Arudselvam*, 2022 ONCJ 445, at paras. 90 to 92:

> 90 The Crown must therefore establish three elements to prove the accused committed an offence under s. 320.15 (1):
>
> (i) There was a lawful demand made;
>
> (ii) The accused knew the demand was made;
>
> (iii) A failure or refusal by the accused to produce the required sample.
>
> 91 It is well established that when considering whether the Crown has proved beyond a reasonable doubt that the accused has failed to comply with a breath demand, the court must look at all of the circumstances of the entire transaction between the police officer and the accused.
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> 92 Once the Crown proves these elements of the refusal offence, an accused can still avoid a conviction if he or she establishes a reasonable excuse on a balance of probabilities.

[60] The exchange between Cpl. Dunmall and Mr. Holbein is captured on the audio and video recording from the Watchguard in the police vehicle. Mr. Holbein was placed in the vehicle and then read the demand from the RCMP prepared card. I addressed the "reasonable suspicion" of Cpl. Dunmall in the *voir dire* ruling, concluding that she had the requisite grounds. I find that a lawful demand was made to Mr. Holbein.

[61] Mr. Holbein acknowledged that he understood the demand after it was made. He did not contradict this understanding in his testimony. I find that Mr. Holbein knew that the demand was made.

[62] On the recording, Cpl. Dunmall is seen making eight attempts to obtain a valid sample from Mr. Holbein, all of which failed. She is heard explaining to him on each occasion why the sample failed in order to assist him in providing a suitable sample. She takes a break for several minutes during which she sits in the front seat of the police vehicle and engages Mr. Holbein in conversation. After the break, she explained that based on her observations of him, including his ability to engage in conversation and taking deep breaths, that he could provide a sample. She further explained that if he did not provide a suitable sample, he would be charged with a *Criminal Code* offence. Subsequent attempts for a sample are made, none being suitable for analysis. I find that Mr. Holbein failed to comply with the breath demand.

[63] The Court in *Arudselvam* addressed reasonable excuse at para. 95:

> As explained by Campbell J. in *R. v. Pletas*, [2014] O.J. No. 1136 (S.C.J.), a "reasonable excuse" is not a denial of either the physical or mental elements of the offence but refers to matters that stand outside the requirements that the Crown is obliged to prove. The court goes on state at paragraph 67, "It is an assertion that some additional factual circumstances, beyond proof of the *actus reus* and *mens rea* of the offence preclude the imposition of criminal liability. Evidence of explanations or excuses for failed attempts to provide breath samples is relevant to the defence of "reasonable excuse."

[64] The Court continued at paras. 99 and 100:

> 99 In *R. v. Malicia*, [2004] O.J. No. 6016 (SCJ) Epstein J.A., as she then was, stated the following in the context of a medical excuse:

> 32 I adopt the statement of law enunciated by Richard J. of the Yukon Territory Supreme Court in *R. v. Pederson*, [1993] Y.J. No. 72, dated March 25, 1993, where he states at paragraphs 5 and 6:
>
> > "In my respectful view, the trial judge, in his oral reasons, correctly stated the law as to when a medical condition constitutes a "reasonable excuse" in the context of s. 254(5):
> >
> > > "The law is clear that if a person cannot provide a sample of this kind by reason of a medical condition that is a reasonable excuse. Now, when say he cannot provide a sample, this does not mean that it is absolutely and utterly impossible for him to provide a sample. It means that the medical condition must make it either extremely difficult or extremely painful and/or uncomfortable or involve some risk to the accused's health. So it is not an absolute, but it must be a condition which, as I say, makes compliance extremely difficult. It is simply not the case that any respiratory difficulty which makes it more difficult for the accused than for the average person involves a reasonable excuse."
>
> 100 Justice Epstein went on to state, "The question therefore comes down to whether Mr. Malicia has satisfied me that proper compliance with the breath demand would have been *extremely difficult or painful and/or uncomfortable*."

[65] A review of the Watchguard audio and video exchange between Cpl. Dunmall and Mr. Holbein shows Mr. Holbein repeatedly holding his head in his hands while complaining about his head hurting, holding his chest while complaining that his chest hurts, stating that he was unable to provide a sample, and asking the officers what

happened. It also shows him, over the period of the attempted breath samples, breathing deeply and exhaling and talking to the officers. Despite his apparent discomfort, Cpl. Dunmall formed the opinion that he could provide a suitable sample and that he was intentionally withholding breath or disrupting the flow of the sample.

[66] Cpl. Dunmall testified that Mr. Holbein was fine until the ASD demand was made, at which time he started to complain about having a sore head and chest. Mr. Holbein had advised Cpl. Anderson that he did not feel well prior to the arrival of Cpl. Dunmall, which she was not aware of. She was unwavering in cross-examination that she did not believe that he was in medical distress and, based on her interactions with him, he could provide a suitable sample required for the ASD. There is an exchange captured on the Watchguard video where she explained to Mr. Holbein that he used more breath than is required to provide a suitable sample when he was asking for a cigarette while outside the vehicle. Her observations and conclusions are consistent with the quick discharge of Mr. Holbein at the hospital once he was able to see a doctor. There is no evidence before the Court from Mr. Holbein or otherwise that any medical concerns were noted by the doctor.

[67] Defence counsel relied on the *Arudselvam* decision as authority that corroboratory medical evidence is not necessarily required where there has been a serious motor vehicle accident. I find *Arudselvam* distinguishable as the Judge found serious concerns with: the reliability of the police officer attempting to take the ASD samples; the lack of knowledge the police officer had about Mr. Arudselvam's difficulty understanding and speaking English; the serious nature of Mr. Arudselvam's injuries requiring him to remain in the hospital for hours after the investigation concluded; and

finding Mr. Arudselvam to be a credible witness. Additionally, the accident that Mr. Holbein was involved in was not as serious as the one in *Arudselvam* which involved a “serious front-end accident” leaving the vehicle totalled.

[68] While he was in the police vehicle during the time that the ASD samples were attempted, Mr. Holbein denied that he was driving the truck and advised Cpl. Anderson that the truck was insured. These statements made were contradicted by his testimony at trial wherein he described the issues that he had driving the truck and that the truck was not insured.

[69] I am not satisfied on the evidence before me that Mr. Holbein was suffering from a medical condition at the time the eight samples were attempted that made “compliance extremely difficult”. He has not established a reasonable excuse on the balance of probabilities.

[70] I find Mr. Holbein guilty on Count 4 of the *Criminal Code* Information for the offence contrary to s. 320.15(1) of the *Criminal Code*.

[71] Given defense counsel’s concessions previously noted, and the evidence presented at trial, I find Mr. Holbein guilty of Counts 1, 2, and 6 on the *MVA* Information for the offences contrary to ss. 39(1)(b), 87(2) and 59(b) of the *MVA*.

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PHELPS T.C.J.