

COURT OF APPEAL OF YUKON

Citation: *R. v. Andre*,
2024 YKCA 1

Date: 20240118
Docket: 22-YU888

Between:

Rex

Respondent

And

Anthony Andre

Appellant

Corrected Judgment: The text of the judgment was corrected on page 18 on
January 19, 2024.

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Grauer

On appeal from: An order of the Territorial Court of Yukon, dated
March 8, 2022 (conviction) (*R. v. Andre*, 2022 YKTC 9,
Whitehorse Docket 19-00144).

Counsel for the Appellant: V. Larochelle

Counsel for the Respondent: L. Lane

Place and Date of Hearing: Vancouver, British Columbia
October 5, 2023

Place and Date of Judgment: Vancouver, British Columbia
January 18, 2024

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Chief Justice Marchand
The Honourable Mr. Justice Grauer

Summary:

The appellant challenges his conviction for two counts of drinking and driving causing death and one count of drinking and driving causing bodily harm. He argues the trial judge erred in finding as a fact that it was the appellant who caused the vehicle to leave the road and collide with a light standard. Held: Appeal dismissed. There is no reason to interfere with the decision of the trial judge, who properly assessed the evidence before him in convicting the appellant.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] Anthony Andre appeals his convictions for two counts of drinking and driving causing death and one count of drinking and driving causing bodily harm. The grounds of appeal relate to misuse, misunderstanding and misapprehension of the evidence by the Territorial Court trial judge.

[2] I would dismiss the appeal.

Background

[3] The grounds of appeal require an extensive review of the evidence.

[4] An Agreed Statement of Facts was filed at the outset of the trial. On May 13, 2019, Mr. Andre was driving south bound on a divided section of Hamilton Boulevard in Whitehorse, Yukon. Faith Papineau, Stallion Smarch, Jay Charlie and Laurence Patterson-Smith were passengers in the vehicle. At approximately 6:26 a.m., the vehicle went off the road onto a median and collided with a light standard before finally stopping on the far edge of the north bound lane. Tragically, Ms. Papineau and Mr. Smarch died in the accident. Mr. Charlie was seriously injured, requiring surgery in Vancouver, BC.

[5] Mr. Andre provided a breath sample and his blood alcohol at the time of the accident was 160 milligrams of alcohol per 100 litres of blood, or twice the legal limit. Mr. Andre provided a voluntary statement at 11:00 p.m.

[6] The evidence disclosed the following: Mr. Andre and Mr. Charlie had been out in the evening. Although unplanned, they met up with Mr. Patterson-Smith,

Ms. Papineau and Mr. Smarch. They were drinking together. They eventually got into Mr. Andre's vehicle and drove around, stopping periodically, until the accident on Hamilton Boulevard.

[7] The issue at trial was causation. The Crown took the position that the accident was caused (or contributed to) by Mr. Andre. Mr. Andre did not testify, but submitted based on other evidence that the accident was caused by Mr. Patterson-Smith striking him in the head, causing him to lose control of the vehicle.

[8] A witness, Mr. Brady Bonnycastle, was driving behind Mr. Andre when the accident happened. He observed the vehicle ahead of him for a brief period. Nothing in the vehicle's movement appeared to be out of the ordinary and he had no cause for concern. The vehicle was travelling about the speed limit, which was 70 km/h. Suddenly, it made a sharp movement to the left. He described it as a "hard, really hard left turn" and the vehicle drove off of the road, hit the median ditch and then collided with the light standard. The vehicle did not slow down and he did not see any braking. He testified "as far as I know, they [the brake lights] weren't activated. I wasn't paying amazing attention to the vehicle, but it did make a real fast, sudden move and did hit the ditch with quite some speed".

[9] Mr. Bonnycastle testified that he thought the driver was texting or fell asleep because it seemed to be such a fast, sudden movement to the left, "like they must have just really pulled down on the wheel".

[10] Mr. Bonnycastle stopped at the accident scene. He saw people in the vehicle. He saw a person get out of the back seat (Mr. Patterson-Smith), and heard him say, "I don't want to go on anymore... This is too much". The person seemed very upset.

[11] Duncan MacRae was an ambulance driver with 20 years experience. He arrived at the scene, and spoke with Mr. Andre. Mr. Andre was quite upset. He admitted he was driving the vehicle and said he killed two people. He was restless

and agitated and smelled of alcohol. He also appeared completely alert and oriented.

[12] Mr. Patterson-Smith testified that he had gone out in the evening and met up with Mr. Smarch and Ms. Papineau. Later they met with Mr. Andre and Mr. Charlie. Mr. Charlie was drunk, but Mr. Andre did not seem drunk. They got into Mr. Andre's vehicle and drove around, stopping for gas and then stopping in a pull-out area.

[13] At one point, Mr. Patterson-Smith told Mr. Andre to slow down because he thought Mr. Andre was driving too fast. He asked Mr. Andre if he could drive, but Mr. Andre refused. He doesn't recall anything from when they left the pull-out until the accident. He said he did not fall asleep, but when they hit the pole he was knocked out. He agreed that he told the police that he fell asleep, but when he testified, he thought he had blacked out.

[14] Mr. Patterson-Smith denied interfering with Mr. Andre while he was driving. He denied getting angry with Mr. Andre. He denied shoving Mr. Andre's head while he was driving. He testified that he wouldn't do that, especially if someone was driving. He agreed that he sometimes became violent when he was drunk. His criminal record was filed, consisting of three assault convictions, one breaking and entering conviction and two convictions for failing to comply with orders. All the convictions occurred in 2021, after this accident.

[15] Officer Savill testified that he received the call about the accident at 6:27 a.m. When he arrived on the scene, he spoke with Mr. Patterson-Smith, who said he had been asleep. He smelled of alcohol, but was calm and collected. He was not angry or aggressive.

[16] Mr. Andre was sobbing and visibly upset. He was erratic — crying and then angry. He asked the police officer to shoot him because he wanted to die. He got off the gurney and punched the hood of his vehicle. He smelled of alcohol and the officer formed the opinion he was impaired. The officer took him back to the station

after he had been treated at the hospital and Mr. Andre provided breath samples. The blood toxicology was also obtained from the hospital with a warrant.

[17] Mr. Andre's statement was admitted into evidence. He said the following regarding the accident:

I was just driving around then I picked up Stallion, Faith and Laurence and I had Charlie... Jay already with me and we started driving around and then they pulled out a bottle... and they started passing it around and then by the time we got up to the village that bottle was basically gone. And then I said lets go park and sit somewhere, so I can sober up and... so then I picked the rock place, the rock climbing place... up by lobird and started going there and then... when we're going just down that corner... my car swayed like the back end kinda like kicked out, and I was only going like... I was only going the speed limit, probably a little over and then... it just went black, I lost control opened my eyes and my airbag was deployed... and there was Faith and Jayden.

[18] Corporal Louis Allain was qualified as an expert in the field of motor vehicle collision analysis. No issue was taken with his qualifications.

[19] Cpl. Allain arrived on the scene at 7:30 a.m. The vehicle involved in the accident was a 1994 Subaru Impreza. The road was in good repair, and the sun would not have been in the driver's eyes at the time of the accident (also confirmed by Mr. Bonnycastle).

[20] Cpl. Allain examined the road and found no tire tracks on the road until the loose gravel on the south bound shoulder. There was no sign of any skid mark. In his opinion, that showed that there was no aggressive braking on the paved roadway. In his opinion, the vehicle started a very gradual counterclockwise turn and started going off the road left at a shallow angle and then continued to drive off the road left into the ditch separating the two lanes of traffic. The vehicle hit the light standard and spun clockwise. There was a sign of braking south of the light standard after it was struck.

[21] Cpl. Allain was asked, hypothetically, whether the evidence he saw was consistent with either the driver or someone else in the vehicle jerking the steering wheel to the left. He testified that it was not consistent with the physical evidence of

straight tire tracks left at the scene. He said, “it would be more shaped like a J or potentially a U ... It wouldn’t be an almost straight line just going off the road towards the left”. There was no indication of any mechanical failure that would cause the accident.

[22] Cpl. Allain said that travelling at 70 km/h, the vehicle would travel 19.44 metres per second. The first sign of braking was at 28.40 metres from where the vehicle left the road. The vehicle hit the light standard forcefully, ripping the passenger door off. There was no evidence of braking until after the collision with the light standard.

[23] Cpl. Allain opined that whatever caused the accident was internal, inside the vehicle. It could be driver fatigue, impairment, distraction, inexperience and so on.

[24] The toxicology report, prepared by Tanya Ames, was filed as an exhibit. Mr. Andre’s blood alcohol content (BAC), at 7:41 a.m., was between 147 to 168 mg of alcohol per 100 ml of blood (mg%). That analysis is based on the blood taken from Mr. Andre at the hospital. As noted in the Agreed facts, his breathalyser test result was 160 mg%.

[25] Ms. Ames’ report provided general expert evidence of the effects of alcohol on the human body. She stated that alcohol is a central nervous system depressant that negatively affects vision, balance, coordination, movement, memory, attention and judgment. Driving a motor vehicle requires skills in all of these areas, and alcohol impairment negatively affects the operation of a motor vehicle in a number of ways. In Ms. Ames’ opinion, every person’s ability to drive a motor vehicle is impaired by alcohol at 100 mg%, no matter their tolerance to or experience with alcohol. An average drinker is intoxicated at 150 mg%. Accordingly, Mr. Andre’s BAC was within the range causing impairment in his ability to operate a motor vehicle.

[26] Mr. Charlie testified for the defence. Mr. Charlie’s evidence was fraught with difficulty. He did not recall much of what occurred. He recalled driving around, and

that Ms. Papineau was on his lap in the front seat. Mr. Andre was driving and the others were in the back seat. He testified that Mr. Patterson-Smith was sitting behind Mr. Andre. He thought there was an argument and that Mr. Patterson-Smith pushed Mr. Andre's head against the door window, causing the accident. His evidence was contradictory and his memory was poor.

[27] Mr. Andre did not testify.

Reasons for Judgment

[28] The trial judge reviewed the evidence in detail. He identified that the sole issue in the case was whether he was satisfied beyond a reasonable doubt that Mr. Andre caused the accident that led to the deaths of Ms. Papineau and Mr. Smarch and the injuries to Mr. Charlie.

[29] He summarized the case law in relation to causation.

[30] He noted that the Crown agreed that if the evidence of Mr. Charlie was believed or raised a reasonable doubt regarding the cause of the accident, Mr. Andre would be acquitted.

[31] The judge carefully considered the evidence of Mr. Charlie. He identified the many problematic aspects of his evidence. He concluded that his evidence was "wholly unreliable". He also concluded that Mr. Patterson-Smith's evidence was not "especially reliable".

[32] He noted that Mr. Bonnycastle believed the vehicle made a sudden move to the left, but also noted that "he was not paying complete attention to the vehicle".

[33] The judge summarized the defence position, which was that despite the difficulties with Mr. Charlie, his evidence was supported by the evidence of Mr. Patterson-Smith regarding arguing with Mr. Andre, and Mr. Patterson-Smith's criminal record for violence. Considered cumulatively, the evidence should raise a reasonable doubt with respect to causation.

[34] Instead, the judge relied on the opinion of the expert, who testified that the physical evidence at the scene was inconsistent with an abrupt movement of the steering wheel. The vehicle left the roadway in a gradual and uniform fashion.

[35] Finally, the judge noted that Mr. Andre described to the police losing control of his vehicle just before the crash. He made no mention of any interference by a passenger.

[36] The judge concluded that Mr. Andre's elevated BAC negatively affected his driving ability, leading him to make the driving error that caused the accident.

Issues on Appeal

[37] Mr. Andre raises five overlapping issues on appeal:

- i) The trial judge erred by relying on conjectural and speculative reasoning;
- ii) The trial judge failed to consider or engage with material evidence in support of the defence theory;
- iii) The trial judge misapprehended the evidence;
- iv) The trial judge failed to consider evidence relating to an ultimate issue of guilt; and
- v) The trial judge failed to consider whether the totality of the evidence at trial left him with a reasonable doubt.

[38] In my view, all the grounds of appeal relate to one main issue, and that is whether the judge erred in finding as a fact that Mr. Patterson-Smith did not strike Mr. Andre, causing Mr. Andre to leave the road and hit the light standard.

Discussion

Legal Framework

[39] Mr. Andre faced the following charges:

Count #3: On or about the 13th day of May in the year 2019 at the City of Whitehorse in the Yukon Territory, did operate a conveyance and consumed alcohol in such a quantity that the concentration in his blood was equal to or exceeded 80 mg of alcohol in 100 mL of blood within two hours after ceasing to operate the conveyance, and while operating the conveyance caused the death of Stallion SMARCH, contrary to Section 320.14(3) of the Criminal Code.

Count #4: On or about the 13th day of May in the year 2019 at the City of Whitehorse in the Yukon Territory, did operate a conveyance and consumed alcohol in such a quantity that the concentration in his blood was equal to or exceeded 80 mg of alcohol in 100 mL of blood within two hours after ceasing to operate the conveyance, and while operating the conveyance caused the death of Faith Lynn PAPINEAU, contrary to Section 320.14(3) of the Criminal Code.

...

Count #6: On or about the 13th day of May in the year 2019 at the City of Whitehorse in the Yukon Territory, did operate a conveyance and consumed alcohol in such a quantity that the concentration in his blood was equal to or exceeded 80 mg of alcohol in 100 mL of blood within two hours after ceasing to operate the conveyance, and while operating the conveyance caused bodily harm to Jay CHARLIE, contrary to Section 320.14(2) of the Criminal Code.

[40] Mr. Andre admitted that: (1) he operated the vehicle (conveyance) while his blood alcohol was in excess of 80 mg of alcohol per 100 mL of blood; (2) an accident occurred; and (3) as a result of the accident, Ms. Papineau and Mr. Smarch died and Mr. Charlie was seriously injured.

[41] The only issue for the trial judge was the question of causation. That is, did Mr. Andre cause bodily harm to Mr. Charlie and did he cause the death of Ms. Papineau and Mr. Smarch.

Standard of Review

[42] The standard of review for questions of law is correctness; the standard of review for questions of fact and questions of mixed fact and law is palpable and overriding error: see *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36. The standard of review that applies to drawing inferences of fact is also palpable and overriding error (*Housen* at para. 25).

[43] Reasons for judgment are to be read in their entirety, in the context of the evidence, the submissions and the trial as a whole (*R. v. R.E.M.*, 2008 SCC 51 at para. 16, citing *R. v. Morrissey*, 22 O.R. (3d) 514 at p. 525, 1995 CanLII 3498 (C.A.)).

[44] The appellate court must defer to the trial judge's findings of fact with respect to credibility, absent a palpable and overriding error (*R. v. Thomas*, 2006 BCCA 411 at para. 29; *R. v. Gagnon*, 2006 SCC 17 at paras. 10, 19 and 20).

The Law in Relation to Causation

[45] The test for causation remains, "a significant contributing cause" as set out in *Smithers v. The Queen*, [1978] 1 S.C.R. 506, 1977 CanLII 7 and affirmed in *R. v. Nette*, 2001 SCC 78 and *R. v. Maybin*, 2012 SCC 24. No issue is taken with the test for causation applied by the judge. The issue is whether the trial judge erred in his finding that Mr. Andre caused the accident as opposed to Mr. Patterson-Smith.

[46] Causation issues are case-specific and fact-driven (*Maybin* at para. 17; *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25 at para. 122 citing *Housen* at paras. 70, 75).

Ground 1 – Did the Trial Judge Rely on Conjecture and Speculation

[47] Mr. Andre submits that the judge, when analyzing what occurred when the vehicle left the road, said at para. 58, "If he [Mr. Andre] had been assaulted in this fashion, one would expect an abrupt movement of the steering wheel."

[48] Mr. Andre submits that there was no evidence of what a driver would do if assaulted while driving, and the judge thereby decided the case by speculating what would have occurred. He submits that the judge engaged in stereotypical and generalized thinking, rather than relying on the evidence.

[49] The defence submits it is an error in principle for a judge to rely on speculative reasoning in reaching their decision. In other words, it is an error to draw inferences based on "common sense" without a grounding for the inference in the

evidence: see *R. v. Pastro*, 2021 BCCA 149 at paras. 4–6; *R. v. J.C.*, 2021 ONCA 131 at para. 58. On the other hand, judges are entitled and expected to rely on their life experience in drawing inferences from the evidence. The Crown submits that the judge did not speculate but relied on the evidence.

[50] At first blush, when the trial judge said “one would expect ...” it appears that the judge is speculating on how a steering wheel would move under certain conditions, which would amount to an error of law. However, reasons are to be read and interpreted as a whole. The expert evidence of Cpl. Allain, which the judge accepted, supported the conclusion that the direction of the track of the vehicle was a straight gradient off the road, which did not have the appearance of a sudden or abrupt turn of the steering wheel.

[51] Thus, assuming the trial judge correctly accepted and interpreted Cpl. Allain’s evidence, his inference that Mr. Andre did not leave the road because he was assaulted was grounded in the evidence. The issue raised with respect to speculation overlaps with the third ground of appeal raised by Mr. Andre of whether the judge misapprehended the evidence of the expert witness.

Ground 2 – Did the Trial Judge Fail to Engage with the Evidence Supporting the Defence Theory

[52] Mr. Andre submits that the trial judge did not sufficiently engage with the defence evidence. He lists some ten pieces of evidence and says that had the judge properly weighed that evidence, it would have raised a reasonable doubt.

[53] The Crown submits that the judge was well aware of the defence theory and referenced all of the key pieces of evidence in relation to that theory.

[54] A trial judge is not required to cite every piece of evidence or address every argument raised: see *R. v. R.E.M.* at para. 64; *R. v. Dinardo*, 2008 SCC 24 at para. 30. The judge thoroughly reviewed the evidence. He engaged with the issue of whether the accident was caused by Mr. Andre. He was well-aware of the position of the defence and the submissions made in support of their theory, summarizing them

in his reasons. In this ground of appeal, Mr. Andre seeks a re-weighing of the evidence. It is not the role of an appellate court to re-weigh evidence or make their own findings of fact regarding credibility.

[55] I would not give effect to this ground of appeal.

Ground 3 – Did the Trial Judge Misapprehend the Evidence

[56] The Court of Appeal for British Columbia reviewed the law regarding misapprehension of evidence in *R. v. Swales*, 2014 BCCA 350 at paras. 47–49:

[47] A misapprehension of evidence may undermine the validity of the verdict and give rise to a miscarriage of justice under s. 686(1)(a)(iii) of the *Criminal Code*. As Doherty J.A. stated in [*R. v. Morrissey* (1995), 97 C.C.C. (3d) 193], at p. 221:

[w]here a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential role in the reasoning process resulting in a conviction then, in my view, the accused's conviction is not based exclusively on the evidence and is not a 'true verdict'.

[48] The threshold to be met in demonstrating a misapprehension of evidence warranting appellate intervention is stringent. The misapprehension must be a question of substance; must be "material" to the trial judge's reasoning process; and must play an essential role, not just in the narrative of the judgment, but in the reasoning process resulting in conviction: *R. v. Lohrer* at para. 2, 2004 SCC 80, [2004] 3 S.C.R. 732. All three elements of the test must be satisfied to establish a material misapprehension of evidence. The trial judge must be shown to have erred by actually misapprehending the evidence. As LeBel J. explained in *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3 at para. 53, "[t]he plain language or the thrust of the reasons must disclose an actual mistake".

[49] It is not enough for the appellant to merely suggest a different interpretation of the evidence, or merely point to some evidence which arguably weighs against the trial judge's finding. Mere differences in interpretation on factual matters are not misapprehensions but simple disagreement with the judge's differing view of the evidence.

[57] Mr. Andre submits that the judge misapprehended three pieces of evidence "by being mistaken as to the substance of the evidence or by failing to give proper effect to it". The evidence in dispute is:

- i) The evidence concerning Mr. Patterson-Smith's remorse and culpability at the scene of the accident;

- ii) The evidence of the expert concerning the movement of the vehicle; and
- iii) The evidence of Mr. Bonnycastle concerning the unfolding of the accident.

Evidence of Remorse and Regret

[58] Mr. Andre submits that the judge failed to ask why Mr. Patterson-Smith was remorseful at the accident scene. He says that question was key and failing to ask it undermined the defence theory.

[59] The Crown submits that the judge did not err in failing to draw an inference that Mr. Patterson-Smith was expressing remorse or regret.

[60] The judge cited the evidence of Mr. Bonnycastle hearing someone saying, “I don’t want to go on anymore; this is too much”. Mr. Bonnycastle did not say Mr. Patterson-Smith looked remorseful. The evidence is as follows:

- Q You said that – in your statement, you told the police that this person that got out of the rear seat [*agreed to be Mr. Patterson-Smith*] said words to the effect, I don’t want to go on anymore, like, This is too much. Is that what you recall him saying?
- A I do, yeah.
- Q Words to that effect?
- A Yeah.
- Q He seemed – he seemed quite sad and upset at the time you were speaking to him there; right?
- A Yes.
- Q Did he seem remorseful about anything or —
- A Yea, he was really upset. It seemed like the people – the other passengers in the vehicle were injured, and I’m sure he was upset about that.
- Q Okay. Did he explain what he meant or did he say anything else that gave you some understanding as to what he meant when he said, I don’t want to go on anymore?
- A No, not to me.

[61] Mr. Patterson-Smith did not recall saying those words to anyone.

[62] The evidence supports an inference that Mr. Patterson-Smith was upset. The evidence does not support an inference that he was remorseful and regretful because he caused the accident. There was no misapprehension of evidence by the judge.

Evidence of the Expert

[63] Mr. Andre submits that the expert, Cpl. Allain, could not testify to what happened in the vehicle prior to it leaving the road (when tire tracks were first observable). He further submits that Cpl. Allain overstated his opinion when he opined as follows:

Q So Corporal, before we got – before we lost video with you, I was – I put to you a hypothetical, and I'll put it to you again. I'll rephrase it a little bit.

So what I want to put to you is that the vehicle was travelling on the roadway at a normal speed or at the speed limit and then either the driver or someone else in the vehicle jerks the steering wheel to the left. Would that be consistent with the evidence that you saw at the scene and, if not, why not?

A No, that's not consistent with the physical evidence that was left on the scene. There would be a sudden jerk in the motion in the steering wheel. It wouldn't leave almost a straight line if you were to look at diagram 3. We look at T1.

It would more be shaped like a J or potentially a U, how hard it would have been jerked. It wouldn't be such an almost straight line just going off the road towards the left.

[64] Cpl. Allain wrote in his report (and confirmed in evidence):

Vehicle 1 was driving southbound on Hamilton Boulevard and started a very gradual counter-clockwise turn in the road. Vehicle 1 then started going off road left at a shallow angle for some unknown reason and then continued to drive off road left into the ditch separating the lanes of travel (as read)

[65] In cross-examination, he testified:

Q So then whatever caused the accident must have occurred inside the vehicle; correct?

A Yes.

Q And you aren't able to determine from your analysis as to what that internal cause was. Is that my understanding of your report's conclusion?

A Yea, it would have been for some unknown reason. It's — it seems that it would be non-cognitive behaviour, which is a person that would not be able to react to any action that a vehicle's taking in appropriate time given that they could be fatigued, impaired, distracted, inexperienced, a variety of lists. It would just be non-cognitive behaviour.

Q Is it possible that the driver could have been interfered with in some way by someone else in the vehicle or can you — can you say that from your report — or from your analysis?

A Yeah, from the physical evidence there was nothing. I can't speak as to what happened inside the vehicle. I can speak as to what the vehicle did.

Q Okay.

A But if there was anything shocking that happened inside the vehicle, there was no immediate quick, abrupt reaction to prevent it.

[66] Mr. Andre submits that the “overstatement by the expert” is compounded by the judge's failure to give effect to the observation by Mr. Bonnycastle, who testified that:

Q What did you notice next?

A Yea, everything was good, driving fine, and then there's just a sharp, sudden movement from the car. Just a hard, real hard left turn, and they hit the meridian ditch and collided with the street light.

Q Now, what observations, if any, did you make of the driving of that vehicle up to the point where it left the road?

A Up to that point, 'til it left the road, it was fine. There was no cause for concern or anything. It was fine. There was nothing out of the ordinary.

[67] However, Mr. Bonnycastle also said:

Q What went through your mind when you saw the vehicle turn to the left and go off the road?

A I thought maybe they were texting or he fell asleep, because it seemed to be such a fast, sudden movement to the left, like they must have just really pulled down on the wheel. That was my first — my first thought. And then when it did hit the street light, there was this big cloud of dust, and just stopped right away to make sure everyone was okay.

[68] Thus, Mr. Bonnycastle thought that the way the vehicle left the road was consistent with the driver falling asleep or texting — not dissimilar to the opinion of Cpl. Allain.

[69] The evidence of the expert is consistent with the evidence of Mr. Bonnycastle. Contrary to the defence position, Mr. Bonnycastle's evidence, when considered as a whole, does not support the evidence of Mr. Charlie.

[70] The trial judge did not misapprehend the evidence as suggested. He was alive to the issues and his findings are supported by the evidence.

Mr. Bonnycastle

[71] The third issue is also in relation to the evidence of Mr. Bonnycastle. The judge appears to conflate the evidence of Mr. Bonnycastle “not paying complete attention” with his evidence regarding seeing a sharp turn. Mr. Bonnycastle said:

Q And what about brake lights? Did you see the brake lights come on?

A I didn't, no.

Q And sorry, it's a bit of an awkward question, but is that because you didn't notice or you weren't looking at the vehicle or did the — were the brakes as far as you know not activated?

A As far as I know, they weren't activated. I wasn't paying amazing attention to the vehicle, but it did make a real fast, sudden move and did hit the ditch with quite some speed.

[72] Mr. Andre submits that this is a key misapprehension in terms of assessing the evidence of the expert and that the judge overlooked the “sharp turn”.

[73] The Crown submits that the judge is entitled to consider and weigh all the evidence, and that he did not misapprehend the evidence of Mr. Bonnycastle.

[74] The difficulty with the defence argument is that Mr. Bonnycastle, in stating that he saw the vehicle make a sharp turn to the left, thought the move was consistent with driver inattention, which was, as noted already, consistent with the expert's evidence. Thus, while the judge appears to have conflated two aspects of

Mr. Bonnycastle's evidence, it did not impact his conclusion that Mr. Andre caused the accident.

[75] I would not give effect to this ground of appeal.

Ground 4 – Evidence Relating to the Ultimate Issue

[76] This argument repeats the argument made in Ground 2. Accordingly, there is no merit to this ground.

Ground 5 – Burden of Proof

[77] Mr. Andre submits that the judge failed to apply the proper burden of proof — that is, the onus of proof lies with the Crown, beyond a reasonable doubt.

[78] The Crown position is that the judge clearly applied the correct burden of proof. The judge stated the burden correctly in three places in his reasons, at paras. 40, 46 and 62.

[79] It is not clear how Mr. Andre says the judge erred in the application of the burden of proof. His argument appears to be that by focussing on the evidence of Mr. Charlie, the judge failed to appreciate that there was other evidence that supported the defence theory. The difficulty with this argument is that the trial judge addressed that issue directly in his reasons. At para. 57, the judge said:

Despite the unreliability of Mr. Charlie's evidence, the defence, nonetheless, contends that Mr. Charlie's evidence is corroborated to some extent by Mr. Patterson-Smith's agreement that he was arguing with Mr. Andre in the vehicle. The defence contends that Mr. Patterson-Smith's acknowledgement of a verbal argument with Mr. Andre, combined with Mr. Patterson-Smith's state of intoxication and lack of memory, as well as a recent criminal record for violence, should raise a reasonable doubt as to what occurred in the vehicle, and, as a result, the issue of causation.

[80] The judge concluded that the evidence overall was not consistent with Mr. Patterson-Smith striking Mr. Andre. He found the evidence of Mr. Charlie, the only witness who said that the assault occurred, to be wholly unreliable. Mr. Patterson-Smith denied the assault. In Mr. Andre's police statement, he

indicates that the vehicle swayed, the back end “kicked out” and he lost control. Mr. Andre said nothing about being assaulted just prior to leaving the road.

[81] In my view, the trial judge correctly applied the burden of proof and I would not give effect to this ground of appeal.

Conclusion

[82] The trial judge in this case gave lengthy reasons for judgment. He considered the evidence before him. He engaged with the evidence in relation to the issues at trial. His findings of fact, including credibility, absent palpable and overriding error, are deserving of deference. In my view, there is no error in his reasons for judgment. I would dismiss the appeal.

“The Honourable Madam Justice Bennett”

I AGREE:

“The Honourable Chief Justice Marchand”

I AGREE:

“The Honourable Mr. Justice Grauer”