SUPREME COURT OF YUKON

Citation: *R v Kloepfer,* 2016 YKSC 55

Date: 20161014
S.C. No.: 15-01505
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

PAUL MARIA MAXIMILLIAN KLOEPFER

Publication of any information that could identify a victim under the age of 18 years is prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Before Mr. Justice L.F. Gower

Appearances:
Jennifer Grandy — Counsel for the Crown
André W.L. Roothman — Counsel for the defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] GOWER J. (Oral) Paul Kloepfer is charged with six *Criminal Code*, R.S.C. 1985, c. C-46, ("the *Code*") offences for using a motor vehicle in an aggressive and unlawful manner towards a teenager, TS, and Herbert Arnold, TS's adult neighbour, on Mosquito Road, south of Whitehorse, on August 20, 2014. Specifically, as against each complainant, the accused is charged with: (1) committing an assault by using his motor vehicle as a weapon [s. 267(a)]; (2) failing to stop his vehicle with intent to escape civil

or criminal liability [s. 252]; and (3) dangerous operation of a motor vehicle causing bodily harm [s. 249(3)].

[2] Because one of the victims was under the age of majority at the time of the offence, I feel it is appropriate to impose a ban under s. 486.4 of the *Code* for the purpose of protecting his identity, and I so order. For the sake of convenience and clarity of communication, as I read these reasons, I will refer to the witnesses variously by their actual names. However, the published version of these reasons will initialize the underage victim, as well as the names of his family members.

[3] The theory of the Crown is that Mr. Arnold, TS, who was 17 years old at the time of trial[1], TS's brother, SS, who was 18 at the time of trial, and TS's mother, RS, had walked easterly down Mosquito Road from their respective residences towards the South Klondike Highway during the later afternoon of August 20, 2014. When they returned westerly towards their homes, and were in an area of the road commonly described as the S-turn, the accused quickly came up behind them in his diesel 4-wheel drive pickup truck. It is alleged that the accused failed to slow down, nearly struck SS and RS, and did strike TS and Mr. Arnold, in a glancing fashion, with the pickup truck. It is further alleged that he failed to stop the truck after these collisions, and continued on down the road towards his residence. RS then called 911 to report the incident.

[4] The theory of the defence (and by this I mean defence counsel acting on the instructions of the accused) is that TS, SS, RS and Mr. Arnold are all neighbours of the accused, that they did not like him, and that they had a motive to get rid of him by bringing these false charges. In particular, the accused is of the view that the bad blood

[1] The evidence was heard May 9 – 13, 2016. Final submissions from counsel were heard on June 20, 2016.

between him and his neighbours has to do with the common use of Mosquito Road as an access road to the respective properties of the various parties. The accused also says that TS and SS have been trespassing on his property with their dirt bikes and all-terrain vehicles, and that his efforts to restrict this have contributed to the bad blood. The accused admits to encountering the group of the four neighbours on Mosquito Road on August 20, 2014. However, he alleges that someone in the group placed boulders across the road, which obstructed his path of travel and forced him to go off the road in his pickup truck to get around them. The accused admits that a few minutes later he saw the group walking down the road. However, he testified that they effectively were blocking his passage by spreading out across the road and walking towards him. He said that he brought his truck to a complete stop, and then slowly inched forward. The accused said that as he passed by Mr. Arnold, the latter struck the side of his truck with the metal end of his walking stick, which left a dent. Accordingly, when he got home, he called the RCMP at 4:11 PM to report the mischief.

[5] It is uncontested that RS made her call to 911 at 4:06 PM. RCMP Constable Lacasse did not return the call until 5:45 PM. He advised RS that the victims should attend hospital to get checked. Constable Lacasse spoke again with RS at 7:41 PM, at which time she said that some photos had been taken of the scene. Constable Lacasse never attended at the scene to investigate the complaint. On August 21, 2014, he took statements from RS, TS and Mr. Arnold.

[6] The issues in this trial turn mainly on the credibility and reliability of the various witnesses, including the accused, who testified on his own behalf.

[7] For the reasons which follow, I find the accused guilty of: the two counts of failing to stop his vehicle with intent to escape civil or criminal liability; one count of dangerous operation of a motor vehicle causing bodily harm to TS; and one count of the lesser included offence of dangerous driving with respect to Mr. Arnold. I find him not guilty of the two counts of using his vehicle as a weapon.

EVIDENCE

Crown's Case

1. Herbert Arnold

[8] Mr. Arnold testified with the assistance of an interpreter. The interpreter translated the English questions into High German, which Mr. Arnold understands. Mr. Arnold then answered in Swiss German, which the interpreter understands and interpreted back into English.

[9] Mr. Arnold described the incident generally as follows. He was walking down Mosquito Road in an easterly direction towards the South Klondike Highway in the afternoon, when by coincidence he met TS, SS and RS all walking in the same direction with their family's two dogs. He said that the group walked towards the Highway and at some point they turned around and walked back towards their respective homes.

[10] Mr. Arnold testified that the incident occurred at a location on the road referred to as the "S-curve". As stated, it is common ground that the encounter between the accused and the four neighbours took place at about 4 PM. Mr. Arnold also took five photographs of the S-curve area at about 7:50 PM on the evening of August 20, 2014. The photographs show that there is a red stake (about four feet high) on the south side of the road. The stake is to mark the location of a stump on the edge of the road (which

appears to be about six-to-eight inches high and about 12 inches in diameter), as it a hazard in the winter for snowplows.

[11] In a rough sketch of the S-curve, Mr. Arnold indicated that RS would have been the first individual to have been encountered by the accused in his pickup. He said she was on the north side of the road, which would have been on the right-hand side facing westward towards the parties' homes. Mr. Arnold then placed SS a little further down the road from RS on the south side, or the left-hand side in the direction the group was walking. Mr. Arnold placed TS almost immediately beside the red stake. Finally, Mr. Arnold placed himself on the north side of the road, or right-hand side given the group's westerly direction of travel, a little further down the road to the west. It is clear that the four pedestrians were spread out across the road, or at least on both sides of the road, when they were encountered by the accused.

[12] As for the collision, Mr. Arnold said that he heard the engine of the pickup truck coming along the road and that it all happened very quickly. He said that he saw the truck "very briefly" before the collision and identified the accused as the driver.
Mr. Arnold testified that he tried to get over further to the right hand side of the road to avoid the truck, when he "felt sort of a hit" on his back, and then felt a hit on his right elbow from his walking stick, which has a metal tip on the bottom, and which had been thrown into the air from the collision. Mr. Arnold did not recall exactly what direction he was facing when he was struck by the truck. He said that he did not fall and was able to maintain his balance. Mr. Arnold denied intentionally striking the accused's truck with his walking stick, although he did not see if his stick accidentally hit the truck. He testified that the truck sped up and then disappeared down the road. Although

Mr. Arnold could not say how fast the truck was going, he did say that it was not travelling at a safe speed when it went through the S-curve. After he was struck, he observed one of the dogs with SS and the other with RS. As I will come to shortly, TS, SS and RS also corroborate this.

[13] The photographs depict a couple of parallel tire tracks in the loose gravel on the road in the S-curve. Mr. Arnold marked with a yellow highlighter pen the parallel tracks which he said were left by the accused's truck. These appear to indicate that the accused's direction of travel was originally on the north side of the road, in the proper lane of travel, but then veered towards the red stake on the south side of the road. The tire track on the driver's side, as the accused was heading westerly, appears to be about 12 inches away from the red stake.

[14] In general support of Mr. Arnold's evidence, Dr. Alexander Labelle testified that he treated Mr. Arnold at the Whitehorse General Hospital on August 21, 2014. He noted that Mr. Arnold complained of some pain on the side of his right elbow and he observed a small abrasion on the skin at the same location. He recommended treatment with rest, ice and over-the-counter pain medication. He expected Mr. Arnold to recover in one to two weeks.

[15] The defence vigorously challenged Mr. Arnold's credibility, and I agree that there were a number of problems with Mr. Arnold's testimony going both to his credibility and his reliability. Although I find that the requirement for translation affected the overall coherence of the evidence provided in his original statement to the police (August 21, 2014), at the preliminary inquiry (August 18, 2015), and at trial, I also found him to be non-responsive, argumentative and defensive at times while testifying. He was internally

and externally inconsistent on a number of points. Had the Crown depended on Mr. Arnold's evidence alone, I would have been unable to find the accused guilty beyond a reasonable doubt of any of the offences. However, as will be discussed, Mr. Arnold's evidence as to what happened at the scene of the two collisions with TS and himself was largely corroborated by TS, SS and RS.

[16] The defence raised numerous internal inconsistencies in Mr. Arnold's evidence. While many examples were minor and can be explained by the language barrier, some of the more significant internal inconsistencies within Mr. Arnold's testimony are:

1) In cross-examination, Mr. Arnold initially denied having any memory problems, but later acknowledged that he suffered a head injury in January 2016, which required surgery and hospitalization for one month. Mr. Arnold testified that he has had to learn to walk and talk again and that since then, he has a problem remembering certain things.

2) Mr. Arnold testified that he gave his statement to the police on the same day as the incident, i.e. August 20, 2014. He later agreed that he gave the statement the following day, August 21, 2014, which was the same day that he attended at the Whitehorse General Hospital for treatment of his injuries. I find that this raises a concern about his overall recollection of the incident.

3) Mr. Arnold said that his doctor wrote him a note indicating that, as a result of his injury, he was not to work for 2½ weeks. In fact, the note, which is dated August 21, 2014, did not say that. Rather, it states as follows:

> Mr. Arnold suffered a soft tissue injury to his right elbow after being hit by his walking stick yesterday. Expected recovery 1-2 weeks.

4) In his statement to the police, Mr. Arnold said that the accused's truck struck him on the shoulder. At the trial, Mr. Arnold said that something hit him in the middle of his back area and that the truck did not strike him in the shoulder.

5) Initially in cross-examination, Mr. Arnold denied that in recent years his relationship with the accused had turned sour. Later in cross-examination, he admitted that he did have a problem with the accused and that it had been going on for a while by the time of the incident.

6) Mr. Arnold initially said that he saw RS calling the police after the incident on the road, but later testified that he did not see her using her cell phone at the scene. Again, I find that this lack of consistency of recollection gives rise to a concern about the overall reliability of his evidence.

7) Mr. Arnold testified that RS left the scene with him, but acknowledged that at the preliminary inquiry, he had testified that he left the scene all by himself.

[9] Some of the external inconsistencies that raise concerns about Mr. Arnold's reliability are as follows:

1) He testified that after the incident he returned to his home to collect his camera for the purpose of taking some photographs of the scene. He said that he drove back to the scene with his truck, alone, and that when he

arrived, TS and SS were already at the scene. However, TS and SS said they both returned to the scene with Mr. Arnold.

2) When Mr. Arnold described the group of four neighbours walking towards the South Klondike Highway, he did not recall anybody riding a horse alongside them. However, TS, SS and RS said a girl (named F) was riding a horse alongside the group as far as, or just before, the creek, which flows across Mosquito Road close to where it reaches the South Klondike Highway.

[10] On the other hand, Mr. Arnold's testimony about where the parties were placed at the scene when the accused collided with TS and himself is substantially corroborated by TS, SS and RS.

2. RS

[15] Like Mr. Arnold, RS testified with the assistance of an interpreter using a combination of High German questions and Swiss German answers. There were a few occasions when RS indicated that she had some problems with language during her statement to the police, her testimony at the preliminary inquiry and with certain answers in this trial. Nevertheless, I generally found RS to be a soft spoken, somewhat shy, but credible witness. While she admitted to being frustrated with certain aspects of the accused's behaviour, such as his driving on Mosquito Road, I do not have the impression that she has such animosity towards the accused that she would have been a party to the grand fabrication theorized by the defence. That said, RS's evidence also was not without its problems.

[16] RS was 48 at the time of trial. She and her husband, US, and the couple's two sons, TS and SS, live on a property at the west end of Mosquito Road. The gravel/dirt road is partly on private and partly on public land, however the Yukon Government does not maintain it. Therefore, RS and her husband work to maintain the road by putting down gravel and flattening it with a Bobcat. She also mentioned that another neighbour at the west end of the road, Ernst Bjarsch, also contributes financially to the cost of the gravel. RS estimated that a safe speed for driving the road in the summer would be 15 to 20 km/h on average.

[17] RS testified that on August 20, 2014, she, her two sons, and the family's two dogs, all went for a walk down Mosquito Road towards the South Klondike Highway, sometime after 3 PM. She said that they met Mr. Arnold "by accident" at the end of the driveway coming out of their property. Then the group continued down the road towards the Highway. In this respect, RS's evidence and that of Mr. Arnold are mutually corroborative. On the way down to the creek just before the Highway, they were also accompanied by a girl named F, who was riding a horse.

[18] On the way back, the group of four were walking through the S-curve area in a westerly direction, when she heard a loud noise and noticed the accused's pickup truck quickly approaching. The dog that RS had on a leash started pulling towards the truck. RS said she pulled the dog back, and then bent down to grab the dog. When she stood up again, RS testified that the accused had driven right past her head and was close enough that she could have reached out and touched the truck. RS then said she saw Mr. Arnold being hit in the back with the passenger side of the truck, in between the wheel wells, and "sort of" being "dragged" on by it. She heard a "hard bang" sound

when the truck struck Mr. Arnold. RS could not say how fast the accused was driving but she did not think it was a safe speed for such a gravel road. After the collision with Mr. Arnold, she also saw the accused speed away in the truck and could hear him accelerating. RS then noticed TS and SS on the south side of the road, with the other dog. She then called 911 on her cell phone and the group waited in that location for a "rather long" period of time, which RS estimated to be at least an hour. However, the police did not attend. Eventually, everyone left the scene of the S-curve. She did not initially mention whether US had been present at the scene.

[19] RS said she was "certain" she was not present when Mr. Arnold returned to take his five photographs. However, at the preliminary inquiry she said that she "did not remember" whether she was present. RS explained the difference in her answers as being due to language issues. I accept that explanation.

[20] Initially, like each of the other Crown witnesses involved in the incident, RS made a rough sketch of the S-curve area and indicated the relative location of each of the four individuals immediately after the accused drove through. She placed herself and Mr. Arnold on the north side of the road, with Mr. Arnold ahead of her to the west. RS then placed TS and SS on the south side, with TS slightly ahead and to the west of SS. This corroborates Mr. Arnold's evidence.

[21] When RS was shown Mr. Arnold's five photographs, she again indicated the relative positions of the individuals after the truck had driven through. Defence counsel submitted that the positions were slightly different between the photographs and the sketch. I find that any such differences were not significant, and that RS indicated everyone in roughly the same relative positions to one another. Further, it is noteworthy

that she again placed TS immediately next to the red stake marking the stump on the south side of the road. Finally, although she did not have her glasses with her at the time, like Mr. Arnold she made an effort on one of the photos to highlight the tire tracks which she observed after the accused's truck had driven through. I find these to be generally similar to the tracks indicated by Mr. Arnold and thus the evidence of the two witnesses is again mutually corroborative.

[22] The defence criticized RS for not checking to see whether anyone was injured after the two collisions before calling 911. I assume this criticism was for the purpose of trying to establish that her evidence is implausible. In my view, this criticism is unwarranted. When RS was asked on cross-examination whether she checked on the others before making the call she replied "Yes, well okay, it was something different, we were all shocked, we were not so okay", and later, "I saw that they were standing, so then I called".

[23] The defence pointed to an internal inconsistency about whether RS had described blood at the scene. She initially testified that she told the 911 operator "there was no blood around", because nobody was bleeding after the collisions. However, RS also acknowledged that she gave the following answers at the preliminary inquiry:

> Q Did you see any injuries on [TS]?
> A He was bleeding.
> Q Did you take a look at – at [TS's] shoulder to see whether it was swollen or perhaps broken?
> A It was red. It was red, like it looked as if he was - yeah. It was hurting him.
> Q Now, was it red on the - which shoulder was it?
> A The left side.

At the trial, RS testified: "He was red, he was hit, that's what I meant". When asked if she agreed that there was a difference between being red from a bump and bleeding,

RS initially said she did not understand, but then subsequently agreed there is a difference. When asked whether her answer that TS was “bleeding” was wrong, RS agreed and apologized. It seems to me that there may have initially been a language issue here as well. Nevertheless, when pressed about her incorrect answer, RS candidly acknowledged she was wrong and apologized to the court in what appeared to be a genuine acknowledgement that she had made a mistake. Indeed, RS made a similar apology on two other occasions when she corrected evidence she had given earlier. I find that the evidence she gave at trial was generally credible, and especially given what appear to be some issues arising out of the need for translation, I do not consider much to turn on these inconsistencies.

[24] The defence also submitted that RS was internally inconsistent when she failed to testify in direct examination that her husband, US, later came down to the scene of the S-curve after the incident, which she did indicate in cross-examination. I do not find this to be a significant inconsistency. RS conceded that she was nervous in her testimony and she was not specifically asked in direct examination about her husband.

[25] The defence also submitted that RS was internally inconsistent in her description of how the accused’s truck struck Mr. Arnold. She testified that he did not fall onto the ground. However, in her statement to the police, RS said “I saw [Mr. Arnold] falling right away on his (INAUDIBLE) side and it was a huge noise…”. RS attributed this error to a language problem, and I accept that explanation. Further, her trial evidence here is again mutually corroborative with Mr. Arnold's. Defence counsel also pursued questions about RS’s evidence that Mr. Arnold “was dragged on by the car with his back”. When asked how far the truck dragged Mr. Arnold, RS testified:

> I only saw him with his back towards the truck… With his back at the truck on the side… The back was on the truck on the side of the truck.

I conclude that there were again some translation or communication issues here, as this is virtually incomprehensible, and she was not asked to clarify what she meant. It is not at all clear though that she is saying Mr. Arnold was on the ground and dragged in a manner that is inconsistent with his and the other witness' evidence that he did not fall.

[26] RS also testified that when she saw Mr. Arnold with his back to the side of the truck, his arms were outstretched. Mr. Arnold would have been facing into the bush on the north side of the road at the time. Mr. Arnold had also been holding his walking stick, with the metal end on the bottom, in his right hand. Further, Mr. Arnold himself did not actually see the truck strike him from behind. From all of this, I find that, after colliding with TS on the south side of the road at the location of the red stake, the accused must have swerved his truck back over to the north side of the road, where Mr. Arnold was faced away from him and attempting to get out of the way. I conclude that the collision was a glancing type or sideswiping type of action. In particular, when the passenger side of the truck struck Mr. Arnold, I find that it must have caused him to spin around from left to right with both arms outstretched. I believe this is what RS was trying to describe when she said Mr. Arnold was "dragged on" by the truck. I further conclude that this is when he lost his grip on his walking stick and that it struck Mr. Arnold in the right elbow while flying through the air. Finally, it seems likely that the noise heard by RS at that time may well have been the metal end of the stick striking the side of the truck. Obviously, if the walking stick did strike the truck in this fashion, it would not have been because of any intention on the part of Mr. Arnold.

[27] The defence also submitted that RS was internally inconsistent when, at different times, she placed herself and the other individuals at differing locations either “next to the road” or “at the edge of the road” or "just off the edge of the road”. I find these to be minor and unimportant differences.

[28] The defence also attempted to challenge RS’s credibility because of her testimony regarding her use of Facebook. The exchange began with RS referring to the fact that she tried to take photographs of the S-curve after the incident with her old cell phone, but that the pictures did not work out because they did not clearly show the tire tracks. Counsel then asked whether RS sometimes posts pictures that she takes on her iPhone on Facebook. RS answered negatively, but acknowledged that she did so at the beginning, for her profile picture only. She also indicated that she used to post pictures of her sons on their dirt bikes on Facebook, but that she had not done so for two-to-three years. Then, when confronted with a photograph of one of her sons posted on Facebook in August 2014, just a few days before the incident, RS testified that it was probably one of her sons who took the photograph. She said she did not remember posting such photos to Facebook in 2014 at around the time of the incident, but later said: “Probably yes, I really don’t know anymore”. Frankly, I am not sure that there is a genuine inconsistency here, despite the apparent importance placed on the point by the defence.

[29] More significantly, RS acknowledged that she had previously complained to the police about the accused’s driving on Mosquito Road. In particular, she acknowledged that the accused sometimes made holes on certain parts of the road when driving his big sewage truck. However, when she spoke to RCMP Constable Brown on one

occasion, RS acknowledged that she was told that the RCMP could do nothing because "nobody got hurt" and that this frustrated her. Based on this, the defence suggested that RS expected that the RCMP might respond to her complaints about the accused's driving if he actually hit someone. Accordingly, it was argued that RS had a motive to fabricate the entire incident, along with the other three Crown witnesses. Given the mutual corroboration between all four Crown witnesses and the injuries that were detailed by the two doctors, and for reasons that will be detailed further below, I reject this argument.

3. SS

[30] Like RS, I found SS to be an impressive witness. He appeared to be a soft-spoken, responsible young man, who seemed to consider his answers carefully in an attempt to be as responsive as possible. SS did not appear to have any significant animosity towards the accused. Also like RS, when he was challenged about an inconsistent answer that he gave at the preliminary inquiry, he conceded the inconsistency and apologized.

[31] The defence pointed to numerous inconsistencies, both internal and external, in SS's evidence. These are set out in significant detail in the written submissions of the defence and I have considered them all carefully. For the most part, I do not find these inconsistencies to be significant and, indeed, some are not really inconsistencies at all. Given this, I will only deal with some of the more significant challenges to his trial evidence.

[32] SS was 18 at the time of trial. He graduated from high school in June 2015 and currently works as a small engine technician.

[33] He testified that he, TS, RS, his father, US, Mr. Arnold, Ernst Bjarsch, and sometimes Mr. Arnold's spouse, Evie Zhender, all help to maintain Mosquito Road in the summer and plow it of snow in the winter. He has never seen the accused help with this maintenance.

[34] SS said that 20 km/h is a safe speed to drive the road in the summer.

[35] On August 20, 2014, SS testified that he was walking on Mosquito Road with TS, RS and Herbert Arnold. He said the group went almost to the creek at the end of the road before turning around. SS testified that the girl, F, accompanied the group on horseback for "the first part" of the walk. On their way back towards their respective homes, SS said he heard the noise of a truck's diesel motor revving up. He turned around and saw the truck coming towards the group at "full speed". He grabbed one of the two little dogs, which was off-leash, and jumped to the side of the road for safety. SS said that he recognized the truck as belonging to the accused because he had seen it before. He said that he clearly saw the accused driving the truck, and that he appeared to have a "bland" expression on his face. Although he could not specifically estimate the speed, he testified that the truck was not travelling at a safe speed for that stretch of the road. SS said that he believed that he would have been hit or run over by the truck if he had not jumped out of the way.

[36] SS drew two sketches indicating the relative positions of each of the four individuals just prior to and just after the collisions. He also referred to the five photographs taken by Mr. Arnold and again marked the relative positions of the parties. In general, these positions were: (1) SS on the south side of the road closest to the South Klondike Highway; (2) RS on the north side of the road slightly ahead (i.e. to the

west) of SS; (3) TS on the south side on the roadway immediately beside the red stake; and (4) Mr. Arnold on the north side of the road a little past TS's location (i.e. further to the west). SS also highlighted one of the photographs to indicate the tire tracks left by the accused's truck as it approached and passed by the red stake. I find this evidence to be mutually corroborative of the evidence of both Mr. Arnold and RS.

[37] Interestingly, defence counsel submitted that SS was inconsistent in his evidence at the preliminary inquiry when he testified that Mr. Arnold was on "the right side behind" SS's mother (facing west towards home). Here, the suggestion seems to be that SS was reversing the relative positions of Mr. Arnold and RS on the north side of the road. However, in my view, SS's testimony at the preliminary inquiry was ambiguous. If one was facing westward in the direction of their homes, then Mr. Arnold would indeed have been "behind" RS.

[38] SS testified that it all "happened so quick". He heard a clattering noise as the truck went by, which he described as "metal on metal". SS said the truck did not stop. He testified that the next thing he noticed was TS holding his shoulder. He could not remember whether TS was standing or was on the ground at that point. SS testified that his mother looked at TS's shoulder, which he described as "red, as in bruising red", and which was visible because TS was wearing a sleeveless tank top style shirt at the time. He testified that the cause of the bruise was the mirror of the truck hitting TS's shoulder as it went past. SS saw his mother call 911, and then he texted his father, US, who later arrived at the scene. However, the police did not come, notwithstanding that the group waited for a long time, which he described as "for sure three hours". SS said that everyone at the scene all left at the same time to return to their respective homes, but

that later he and TS returned to the scene with Mr. Arnold, who took photographs of the tire tracks.

[39] SS testified that he went to the police station that same evening, but the attending police officer told him directly that the police did not want his statement. SS is obviously mistaken about the date of the attendance at the police station, as the witness statements were taken on August 21, 2014.

[40] On cross-examination, SS indicated that the distance between himself and the truck when he first noticed it coming towards the group was five or six metres "give or take", but later acknowledged that he is "quite horrible" at estimating distances and time.

[41] SS also agreed on cross-examination that meeting up with Mr. Arnold that day was pursuant to some type of an "arrangement", rather than being purely by coincidence, as Mr. Arnold testified. Defence counsel submits that this is one of several inconsistencies in the evidence between the four Crown witnesses involved in the incident. While I agree that this is somewhat inconsistent, it is not significant in my mind. Firstly, the word "arrangement" was defence counsel's word. Secondly, SS testified that during the summer break from school, he, his brother and his mother would regularly take walks with Mr. Arnold at various times of the day. When asked further whether every time someone would "arrange" with Mr. Arnold for times to go for these walks, SS responded: "Yeah, or sometimes you would meet him on a trail or whatever". I interpret this answer as indicating that the so-called arrangements were relatively haphazard and not in the form of a specific appointment, as defence counsel would suggest was the case on this occasion.

[42] SS admitted that both he and TS each own cell phones. When asked by defence counsel whether he had his cell phone with him that day, SS responded: “I believe so, I believe so”. Although defence counsel suggested that SS testified that both he and TS had their cell phones with them that day, this is not how I interpret SS’s evidence. The point is significant, says defence counsel, because it is puzzling why neither of the young men used to their cell phones to take photos of the scene or of the injuries of TS and/or Mr. Arnold. The implication here is that this somehow goes to the implausibility of the testimony of the Crown witnesses. I disagree. First, the manner in which SS responded to the question of whether he had his phone with him that day indicated to me that he was far less than certain. Second, there is no evidence that TS had his cell phone with him that day.

[43] The defence also submitted that it was significant that SS estimated that the group turned around about 500 metres, or “maybe less”, before the creek when they decided to return home. Here the defence points to the evidence of TS, who said the group went all the way down to the creek before returning home. Once again, I do not view this difference as significant. SS clearly stated more than once that he is not good at estimating distances. I would apply this same reasoning to the inconsistency between SS’s trial testimony as to how far the S-curve was from the South Klondike Highway, as compared to his testimony at the preliminary inquiry. Similarly, I would take the same approach with the inconsistencies in SS’s evidence as to how far one could see down Mosquito Road in each direction from the S-curve.

[44] The defence also suggests that it is significant that SS was inconsistent in testifying at the preliminary inquiry that both of the dogs were off-leash at the time of the

incident, whereas at the trial he testified that only his dog was off-leash. When confronted with this, SS responded, quite clearly and emphatically: "Yes, but I was wrong [at the preliminary inquiry], because I remember the one [dog] was on [leash]…". I do not consider this to be a significant inconsistency.

4. TS

[45] As with RS and SS, I found TS to be a credible witness. Like his brother, he struck me as a responsible and confident young man. He answered the questions put to him in a clear, responsive and concise manner. He acknowledged doing things that arguably did not reflect well on his character. When he was in error, he promptly admitted it. Although he was candid about having had problems with the accused in the past, he did not exhibit any excessive animosity towards him. Lastly, TS's evidence was mutually corroborative of much of what I heard from Mr. Arnold, RS and SS.

[46] Like SS, TS graduated from high school in 2015. He lives with his parents and his brother at their residence near the west end Mosquito Road. He is an accomplished sportsman and athlete in the areas of snowboarding, volley-ball and dirt bike racing.

[47] TS said that the four members of his family, together with Mr. Arnold and his spouse, are principally responsible for maintaining Mosquito Road in the summer and snow plowing the road in the winter. The maintenance in the summer consists of applying gravel to the road and flattening it out with a loader. TS said that the accused does not assist with this maintenance. He testified that the road is uneven and that a safe speed to drive it in the summer would be about 20 km/h. It is uncontested that TS, his father and Mr. Arnold put fresh gravel on various patches of Mosquito Road about a week prior to August 20, 2014, including the location of the S-curve.

[48] TS testified that on August 20, 2014, he went for a walk with his mother, brother and the two family dogs in the later afternoon. The group met Mr. Arnold where their driveway converged with that of Mr. Arnold. TS made no reference to whether the meeting was by chance or by arrangement. He testified that the group of four walked all the way to the creek near the South Klondike Highway, accompanied briefly by a girl on a horse. They then looked at the scenery and turned around. TS said that when the group got to the S-curve, they heard a diesel engine coming from the direction of the Highway and he realized a vehicle was approaching. He said he and SS moved to his left (facing west) and Mr. Arnold and RS moved to their right (also facing west). TS testified that, as the purple truck came around the corner into the S-curve, he recognized it as belonging to the accused. He also saw the accused in the driver's seat, with a small grin on his face. TS observed that the truck was starting to accelerate towards him and his brother. He said that his reaction was to move further "off the roadway" to give the accused more space, and that while he was doing that, walking backwards, he stumbled on a tree stump that was behind him. He testified that he successfully put his hand down to regain his balance. Then, as he was standing up facing the truck, the "tow mirror" of the truck hit his left shoulder and knocked him to the ground. TS said that by the time he got back up, the truck had veered to the right of the roadway towards Mr. Arnold and RS. He lost sight of both of those individuals and did not hear any unusual noise. The truck then continued on down the road without stopping. TS could not estimate the speed of the accused's vehicle, but he did say that it was not travelling at a safe speed for that road. He said that it all happened to "really fast". It did not appear to TS as though the accused had lost control of his truck. TS

testified that the truck left deep tire ruts veering towards where he and his brother were and then to the right hand side of the road.

[49] Like the other Crown witnesses, TS was asked to indicate the relative positions of the four individuals at the time of the incident. On a sketch and on one of Mr. Arnold's photographs, he placed himself immediately to the right of the red stake, on the roadway. He placed himself and the other three individuals in roughly the same relative positions as the other witnesses. I also find that the highlighted tire tracks that TS said were left by the accused's truck were indicated in the same relative position as those indicated by the other three Crown witnesses.

[50] TS testified that after the accused left the S-curve, the group gathered themselves together because they were pretty "shocked" at what had happened. His mother called 911 and the group waited for the police to arrive. He was unable to say whether he had his iPhone with him that day or not. TS said that they called the father, US, who came down to the scene to check up on them. After waiting for about two hours, he said that everyone left the scene and returned to their respective homes. TS and his brother returned later with Mr. Arnold, who took photographs of the scene.

[51] He said that initially he did not feel any injury to his left shoulder because he had "a pretty good adrenaline rush". TS also acknowledged that he dislocated his thumb when he fell to the ground, but was able to pop it back into place because he had suffered that injury before. When he began to feel the pain in his shoulder, he rated it at about 7 out of 10 in terms of severity. TS said he went to the hospital the next day for treatment, and was informed that he had no broken bones and he was not given any medication. TS testified that the pain lasted for about the following year and a half and

impacted his regular activities to the extent that he could not lift things like he normally could and did not have a full range of mobility. However, he did not return for any further medical treatment.

[52] TS gave his statement to the police on August 21, 2014, after attending at the hospital.

[53] As with RS and SS, the accused challenged TS's credibility on the basis of internal and external inconsistencies, the specifics of which are detailed in the defence closing written submissions. In general, I find that most of these discrepancies are not significant and therefore I do not intend to address them all.

[54] The defence submitted that since TS testified that he was "off the roadway" just before the collision, he could not have been in a position close enough to the truck to be struck by the mirror. However, what this submission ignores is that TS actually said that he was attempting to get out of the way of the truck, and at one point was off the roadway. However, as TS was backing up he tripped on the stump beside the red stake and lost his balance. He did not say that he was off the roadway at the time that he was struck. His evidence was clearly that when he was struck he was on the roadway immediately beside the red stake.

[55] The defence also submitted that there is no evidence the accused's truck had "tow mirrors" extending more than usual from the side of the truck. Rather, the defence referred to the photographs of the mirrors on the truck in evidence, which indicate that they are protruding approximately 10 or 11 inches from the side of the truck. It is also uncontested that the mirrors are designed with a hinge which allows them to be collapsed inward towards the driver's and passenger's windows. The upshot of the

defence submission is that TS could not have been standing close enough to the truck to have been struck by the driver's side mirror, and that all of this reflects poorly on TS's credibility. I disagree.

[56] Firstly, it must be remembered that when TS was cross-examined about the tow mirror hitting him, he replied: "I believe so, yes, I didn't see what hit me, it happened so fast". He conceded that he really did not know the exact length of the mirrors, but he said he believed it was the tow mirror because that was the only thing from the truck close enough to hit him.

[57] Secondly, I conclude that, as TS was standing on the road facing the truck immediately beside the red stake, that the truck could have come close enough to him for the mirror to have caught him on his left shoulder. TS testified that he is six feet tall and the photographs of the accused's truck relative to the position of the red stake are entirely consistent with the mirror striking that particular area of his body. In addition, the southernmost tire track left by the accused's truck appears to be approximately one foot away from the red stake, which indicates the truck would have passed by TS close enough to strike him with the mirror.

[58] The defence also argued that TS's relative success in his sporting activities after the incident is inconsistent with his complaint that his shoulder injury restricted his normal activities for 1½ years after the incident. In particular, the defence pointed to the evidence that TS: was the top adult in a dirt bike race on September 22, 2014, only one month after the incident; participated in two snowboard competitions in February 2015; and came first and second in two separate snowboard competitions in April 2015. However, it is apparent from TS's answers in re-examination that he continued to

compete in such events notwithstanding a severe right shoulder injury in 2011, plus multiple dislocations afterwards. That is consistent with his continuing to compete after the injury to his left shoulder, which had not been injured prior to the incident.

[59] In general, the defence submitted that the entire S family had a significant animosity towards the accused and that this is the motivation for having fabricated the story about the incident with the accused's truck in the S-curve. In this regard, defence counsel asked TS whether he thought the accused is crazy, to which TS responded: "Me personally, I do, but I'm not a psychiatrist to say that". TS further acknowledged that he thinks the accused is crazy because of the way he acts. TS also agreed that the accused has been aggressive towards him in the past. In re-examination, Crown counsel asked TS what behavior of the accused made him think that the accused was crazy. TS responded:

> Every time we drive past him on the road, because we share an access road with each other, and any time we pass him, every time he speeds up, gives us this weird glare and just drives off. And we have multiple accounts he had spat on our car or our truck, spat on our pickup truck…

[60] Lastly, the defence seemed to suggest that TS's injury was not objectively confirmed during the examination of Dr. Alison Madlung at the Whitehorse General Hospital on the morning of August 21, 2014. Dr. Madlung testified that she observed significant swelling to TS's left upper arm and shoulder. She also said that she did a full examination of TS and that he reported quite a bit of discomfort in moving his left arm, as well as tingling in his left hand. Dr. Madlung testified that she arranged for a series of x-rays to be taken of TS's left limb as well as his neck area, which she discussed with the radiologist. She concluded the x-rays were "unremarkable". Defence counsel

suggested that the x-rays showed “no injuries”. I disagree. Based on Dr. Madlung’s evidence, it is more likely that the assessment that the x-rays were “unremarkable” indicated that there were no fractures or broken bones. However, they did not rule out soft tissue injury, which was in fact the doctor’s ultimate diagnosis. Defence counsel also suggested that one would have expected bruising to TS’s left shoulder, and that the absence of same in Dr. Madlung’s testimony suggests that the injury may have been fabricated by TS. I disagree. Firstly, the physical manifestation of the injury was the “significant” observable swelling to the left upper arm and shoulder. Secondly, when the doctor was asked whether she saw any red marks or bruises to the shoulder, she responded: “I do not recall”, not that she did not see any such marks or bruises. Thirdly, when asked if she would have noted such an observation, she responded: “Not necessarily… I write things I think are clinically relevant… In this case, bruising would not have affected the clinical management of this patient.”

Defence Case

[61] In direct examination, the accused testified that on August 20, 2014, there was fresh loose gravel on the S-curve. He said that a safe speed on Mosquito Road in the summer would be from under 20 km/h to up to 35 km/h, depending on the road surface. The accused said that he was heading home about 4 PM travelling westward down Mosquito Road. He testified that he approached the spot where “boulders” were put across the road, such that he was not able to proceed because the boulders were too big. The accused said he had to drive his truck almost completely off the road to the right hand side, where there was a clear spot in the bush. Once he got past the boulders, he continued westward down the road. The accused testified that he next

noticed Mr. Arnold, RS, TS and SS walking towards him in an easterly direction. Eventually, he came to a point where it was not possible for him to drive further because the four individuals were spread out across the road. Accordingly, the accused said that he brought his truck to a complete stop. At that point RS and TS moved over to the right hand (i.e. north) side of the road and SS and Mr. Arnold moved over to the left (i.e. south) side. The accused testified that Mr. Arnold then decided to change from the left to the right side of the road (a fact he failed to mention to the police when he provided his statement on September 7, 2014). Once everyone was off the road, he slowly drove his truck forward and started to accelerate. When he checked his rearview mirrors, he saw Mr. Arnold strike the truck with his walking cane approximately in the middle of the box above the rear right wheel well. The accused said that he continued driving directly home, at which point he called the RCMP to report the incident of the blockage of the road, which he assumed the group was responsible for, and the striking of his truck. It is uncontested that this call was made at 4:11 PM.

[62] The accused also testified that he moved onto his property in 2011. He shared the property with Ernst Bjarsch. Mr. Bjarsch had previously given permission to SS and TS to cross over his property with their dirt bikes and ATVs. That practice soon came to bother the accused, because of the noise and the perceived damage to the environment. Eventually the accused began erecting barriers across certain trails, using strands of barbed wire and, in one location, a steel cable. It is undisputed that TS and SS later cut the steel cable, because they felt it was a safety hazard and they did not agree with the accused on where the property line at issue was located.

[63] On September 13, 2015, the accused also made a video of his truck travelling down Mosquito Road from the South Klondike Highway, through the location where he said the boulders had been placed to block the road, as well as the location of the S-curve. In reviewing the video, the accused testified in direct examination that the location of the boulders blocking the road was at 3:29 minutes on the recording, immediately adjacent to an orange stake marking a tree stump on the south side of the road, much like the one in the S-curve, which was some distance further down the road to the west.

[64] In cross-examination, the accused initially seemed determined not to admit that he was "upset" with Mr. Arnold or the S boys for using the trails on his property, or at least property which he perceived he had rights to. Although he acknowledged being "annoyed" following his complaint to RS about the boys in 2013, he denied being upset with either Mr. Arnold and/or the S boys in 2014. This evidence was belied by the fact that the accused admitted to making five separate complaints to the police about the S family and the use of dirt bikes on his property in the four months prior to the incident on August 20, 2014. Nevertheless, he would still not admit that he was "upset" with the behavior of the S boys, but only "sad", annoyed" and "frustrated". I found his answers in this regard to be evasive.

[65] The accused also testified in cross-examination that his wife had driven westward down Mosquito Road on August 20, 2014, after the accused had driven around the area blocked by the boulders. Interestingly, the accused said nothing about his wife having any problems driving down the road as a result of the boulders. He said that he and his wife discussed the issue that evening and determined that the accused's

wife would take photographs of the area of the boulders the following morning when she went to work. These photographs were taken by the accused's wife on August 21, 2014, although the accused was not present at that time. The boulders had been moved by the time the photographs were taken. The three photographs were collectively entered as Exhibit 33 at the trial and became the subject of considerable cross-examination by the Crown. The first of the three photographs (Photo #1) shows the orange stake which the accused had earlier indicated in the video (at 3:29 minutes) to be the location of the blocking boulders. However, that evidence was soon to change significantly.

[66] Photo #1 depicts three rocks, two next to one another towards the bottom of the picture and one rock a few feet from the orange stake. A distance of several metres separates the single rock by the stake from the other two. Although it is difficult to gauge the actual size of the rocks because of the perspective in Photo #1, they appear to be of comparable size, with the largest ranging from about 8-to-10 inches in diameter. Photo #2 depicts the same general view as Photo #1, but with the photographer standing further away from the orange stake to the east. As a result, the larger of the two rocks seen towards the bottom of Photo #1 appears to have blocked the view of the smaller rock immediately beside it. Photo #3 depicts another irregular, somewhat pear-shaped rock. I assume this was the single rock immediately adjacent to the orange stake, because there were no other rocks of that size in either Photos #1 or #2, however there was no clear evidence on the point.

[67] The accused agreed in cross-examination that the stones should more appropriately be referred to as "rocks", rather than "boulders", given their relatively small size. Nevertheless, the accused maintained that the three rocks in Photo #1 were

placed across the road, about three feet apart, in such a way that he could not drive over them with his truck. This is inconsistent with the several photographs and the video of the accused's truck which depict a four-wheel-drive Dodge Ram 2500 with slightly higher than normal clearance between the tops of the tires and the wheel wells. With this type of truck, it is conceivable that the clearance under the truck would have been sufficient to have allowed the accused to carefully negotiate over the rocks without damaging his undercarriage or his differentials The accused testified as follows on this point:

> … But the bigger one was right in the middle, so I could not drive over with my truck… I was kind of concerned about my undercarriage, so I just went all the way to the right…

[68] The accused then changed his testimony and said that the probable location of the three rocks across the road was further to the east, where the two rocks closest to the photographer are seen in Photo #1. However, Crown counsel then suggested that there did not appear to be any open area in the bush on the right-hand side in that location in order to have allowed him to have driven off of the road to get around the rocks. The accused then changed his evidence a second time and said that the line of the three rocks had to have been further to the east and out of the view of the area depicted in Photo #2. After further cross-examination, the accused ultimately conceded that he was "not sure" of the location of the three rocks. Also, in answer to a question I posed whether there were a total of three rocks (earlier he had said there were "at least three"), the accused responded: "I would say yes, but I can't remember".

[69] When asked by the Crown why the accused did not simply get out of his truck to move the rocks, especially knowing that his wife would be soon following him in her own vehicle coming from work, the accused responded along the following lines:

> I didn't leave my truck or my vehicle anymore because there was stuff going on and Mr. [S] tried to jump on my skidsteer and stuff and I wouldn't do the least anymore on the road and in a situation like that you think you better go home and stay in and don't open the door and don't open the window because there might be something happening…. If you see anything on the road, I automatically connected it with my neighbours…

The "skidsteer" incident with US happened in the spring of 2013.

[70] The accused acknowledged that he didn't see anybody in the area of the three rocks, and at that time he had no way of knowing that he was about to encounter Mr. Arnold and the three members of the S family a few minutes further down the road.

ANALYSIS

[71] As I said at the outset, this case involves an assessment of the credibility and reliability of each of the witnesses, including the accused. With respect to credibility, I must have regard to the principles in *R v W (D)*, [1991] 1 S.C.R. 742, which are:

1) if I believe the evidence of the accused, I must acquit him;

2) if I do not believe the accused, but I am left in a reasonable doubt by his evidence, then I must acquit him; and

3) even if I do not believe the accused and I am not left in a reasonable doubt by his evidence, I must go on to consider whether, on the basis of the evidence I do accept, I am convinced beyond a reasonable doubt of the accused's guilt.

[72] It has also been said that if I do not know whom to believe, then I must acquit the accused. Further, I must clearly have regard to the whole of the evidence in coming to any determination about the guilt or innocence of the accused.

[73] With respect to the first two branches of *W (D)*, I do not believe the evidence of the accused. Nor am I left with a reasonable doubt as a result of his evidence. I say this principally for two reasons.

[74] First, I find the theory of the defence implausible. This theory suggests that after the accused encountered the four Crown witnesses, as he described, all four must have immediately conspired to create the illusion of a hit-and-run accident scene, and not at the location where the accused said the encounter occurred, but some distance further to the west along the road in the S-curve. Based on the video and the driving time between the two locations, this would have required some time to move from the location suggested by the accused to the S-curve. Further, there is no suggestion that any of the four witnesses had access to a vehicle on or near Mosquito Road at that time. Therefore, one of them would have had to have returned to one of their respective homes to collect a vehicle, drive it to the S-curve, and then drive through the loose gravel in order to create the tire tracks which were subsequently photographed by Mr. Arnold. All that would have taken a significant amount of time. This of course raises the question why RS would have phoned for police assistance at 4:06 PM, which was likely very close to the time the accused claimed to have encountered the four witnesses, since his call was made at 4:11 PM.

[75] While there is no evidence about precisely how long it might have taken for the police to travel from Whitehorse to the S-curve, there is evidence that the entrance to

Mosquito Road is approximately 6 km south of the Carcross Cut-off on the Alaska Highway. Thus, I believe I can take judicial notice of the approximate distance between the two locations. This, together with the video evidence, allows me to conclude that it would not be unreasonable to expect the police to have arrived at the S-curve in response to RS's 911 call within approximately half an hour of the call been placed. This would have left the group of four with precious little time to construct the crime scene, take the photographs and get their stories straight.

[76] Further, the defence theory also requires that TS and Mr. Arnold either injured themselves or faked their injuries to a degree that fooled the respective physicians who treated them. While the defence conceded that Mr. Arnold's injury may have been genuine, this was only pursuant to a further theory that after Mr. Arnold intentionally struck the side of the accused's truck with his walking stick, somehow the stick rebounded to strike his right elbow. That in itself seems implausible. Further, I am satisfied that the injury TS's left shoulder was also genuine and that the "significant swelling" observed by Dr. Madlung validates her diagnosis of a soft tissue injury. Again, it seems implausible in the extreme that TS would have gone to such lengths in order to coordinate with the global fabrication of the incident

[77] Lastly on this point, the defence theory is premised on the notion that the degree of animosity held by Mr. Arnold and the S family towards the accused was so strong that they felt they had to fake or self-inflict injuries in order to get the attention of the police with a view to "getting rid of" the accused. There is no question that Mr. Arnold, RS, SS and TS each had their own views of the problems they had encountered with the accused. It would be fair to say that each witness was variously unhappy about

certain aspects of the accused's conduct. Having said that, and having observed the witnesses carefully and heard their testimony, I am unable to conclude that whatever level of animosity they may have held, either individually or as a group, was sufficient to give rise to such an elaborate and spontaneous plot to get rid of the accused.

[78] The second reason why I do not believe the accused, and why his evidence does not raise a reasonable doubt for me, is that his evidence that his truck was blocked by three rocks placed across Mosquito Road strains credibility. First, given the size of the rocks, I do not accept the accused's evidence that he could not have carefully negotiated over the rocks without damaging his truck. Second, even if the accused had a reasonable concern in that regard, he could easily have gotten out of his truck and moved one or more of the rocks to create a path through. Indeed, knowing that his wife was following him later in her own vehicle down the same road, this would have been a very reasonable course of action. To the extent that he was reluctant to step out of his vehicle for fear of the S. family, on his evidence they were nowhere in sight. Further on this point, the accused was significantly internally inconsistent about both the number of rocks that were used and their location on the road. Finally, I also note that his wife apparently had no issue passing the rocks in her vehicle and making it back to their house.

[79] As for the Crown's evidence, there are indeed several inconsistencies between the witnesses to the incident as well as inconsistencies within each individual's own evidence. However, this is to be expected when there are multiple witnesses to a single event. It is normal that there will be variations in the recounting of the event, depending on the experience of each of the witnesses and their respective ability to recall

particulars. Many of the inconsistencies emphasized by the defence are with respect to tangential details. Further, taking all of the evidence as a whole, I am impressed by the mutual corroboration between all four witnesses regarding the placement of the four individuals within the S-curve at the time of the incident, as well as the location of the tire tracks left by the accused's truck. Therefore, I accept the evidence of the four Crown witnesses involved in the incident as to the central points leading to the guilt of the accused. I will have more to say shortly about the specific offences I find the accused guilty of.

FINDINGS OF FACT

[80] On August 20, 2014, at approximately 4 PM, Mr. Arnold, RS and her two sons were walking westerly down Mosquito Road in the vicinity of the S-curve. The accused drove his four-wheel-drive diesel pickup truck into the S-curve. I am satisfied that he would not have seen the four individuals walking on the road until he turned the corner into the S-curve. His reaction was to accelerate his truck towards the group. This reaction would be consistent with previous encounters between members of the S family and the accused coming and going on Mosquito Road, as testified to by TS. This was unsafe conduct, especially given the relatively fresh and loose gravel in the S-curve, which the accused knew about. In any event, I find that the accused initially drove very close to RS, who was reaching down to pick up her small dog. She was on the north side of the road at that time, as a result, the accused reacted by weaving to the left or southerly side of the road which meant that he passed very close by SS and ultimately collided with TS, who was standing on the road immediately adjacent to the red stake facing the accused's oncoming truck. The result was that the driver's side

mirror struck TS in the left shoulder. The accused then reacted to this collision by veering to the right or northerly side of the road where Mr. Arnold was walking towards the edge of the road with his back to the accused's oncoming truck. I find that the passenger side of the truck sideswiped Mr. Arnold in his central back area causing him to pivot from left to the right with his arms outstretched, at which point he lost his grip on his walking stick, which flew into the air, rebounded off the side of the truck, and struck him on his right elbow. After colliding with Mr. Arnold, the accused reacted a third time by veering back towards the centre of the road. He continued to accelerate and left the area of the S-curve without stopping to render assistance or check for injuries. Rather, he continued down the road to his home where he made yet another complaint to the police about mischief caused by the S family, this time in conjunction with Mr. Arnold.

OFFENCES

[81] The two counts of using a motor vehicle as a weapon contrary to s. 267(a) of the *Criminal Code,* as framed, require the Crown to prove beyond a reasonable doubt that the accused intended to collide with each of Mr. Arnold and TS. I am not satisfied beyond a reasonable doubt that the accused had such intent. Rather, I find that he reacted to the presence of the four individuals by accelerating his truck in a manner which caused him to lose control and nearly collide with RS. It would appear that he reacted further by correcting the trajectory of the truck excessively to the left or southerly side of the road, where he collided with TS. I find he further reacted by veering to the right or northerly side of the road, where he collided with Mr. Arnold. I do not find that either collision was intentional. Accordingly, I find the accused not guilty of these two counts.

[82] The two counts of dangerous driving causing bodily harm arise under s. 249(3) of the *Code.* Section 249(1)(a) contains the definition of dangerous driving:

> Everyone commits an offence who operates… a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place…

[83] One of the leading cases interpreting this section is *R v Hundal*, [1993] 1 S.C.R. 867, which held that there is a modified objective test for determining the mental element of the offence. The accused may be convicted if the Crown proves that, viewed objectively, he was driving in a manner that was dangerous to the public, having regard to all of the circumstances. In particular, the Court held:

> 43 It follows then that a trier of fact may convict if satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place". In making the assessment, the trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation.

[84] I am satisfied that the Crown has proven beyond a reasonable doubt that the accused was driving too fast through the S-curve given the presence of the pedestrian complainants and the loose gravel. Although he didn’t anticipate the former, he clearly had time to slow down and even stop his vehicle once he came into the S-curve. Further, the accused clearly knew about the uneven surface of the road and the loose gravel in the S-curve. These circumstances necessitated a slower speed overall, and perhaps even a stop before proceeding. However, the accused was heard to accelerate

his diesel truck both before and after the two collisions. I have also found that he swerved from side to side on the road.

[85] Crown counsel submitted that it is open to this court to convict the accused on the lesser charge of dangerous driving with respect to Mr. Arnold, contrary to section 249(2) of the *Criminal Code* given the extent to which his injury may not have amounted bodily harm, i.e. something that was more than transient or trifling. Those words appear in section 2 of the *Code*, which defines "bodily harm" as meaning "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". The Yukon Court of Appeal in *R* v *Dixon*, (1988), 42, C.C.C. (3d) 318, discussed this definition and held that the words import a very short period of time and an injury of a very minor degree which results in a very minor degree of distress. In this case, Mr. Arnold experienced some pain on the side of his elbow and a small abrasion. The recommended treatment was rest, ice and over-the-counter pain medication. The prognosis is that he would recover in one to two weeks. I am not satisfied beyond a reasonable doubt that this constitutes bodily harm.

[86] Accordingly, I find the accused guilty as charged of dangerous driving causing bodily harm with respect to TS. However, I find him not guilty of dangerous driving causing bodily harm with respect to Mr. Arnold, but guilty of the lesser included offence of dangerous driving contrary to section 249(2) of the *Criminal Code*.

[87] The two counts of failing to stop with intent to escape civil or criminal liability arise under s. 252 of the *Code*. Section 252(1)(a) provides:

> Every person commits an offence who has the care, charge or control of the vehicle… that is involved in an accident with… another person… and with intent to escape civil or criminal liability fails to stop the vehicle… give his or her name and address and,

> where any person has been injured or appears to require assistance, offer assistance.

Section 252(2) provides:

> In proceedings under subsection (1), evidence that an accused failed to stop his vehicle… offer assistance where any person has been injured or appears to require assistance and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.

[88] The Crown has proven beyond a reasonable doubt that the accused had an 'accident' involving his truck with each of Mr. Arnold and TS. He failed to stop his vehicle in each case. There is no evidence to the contrary that his intent was other than to escape liability. Accordingly, I find him guilty of both counts as charged.

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GOWER J.