Citation: *R. v. Kuhl*, 2018 YKTC 11

Date: 20180316
Docket: 16-00606
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

MURRAY LLOYD KUHL

Appearances:
Leo Lane — Counsel for the Crown
Amy Steele — Counsel for the Defence

REASONS FOR JUDGMENT

[1] Murray Kuhl has been charged with committing the following offences:

> Count #1: On or about the 29th day of October in the year 2016 at the City of Whitehorse in the Yukon Territory, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, did while operating a motor vehicle cause an accident resulting in bodily harm to June MATHER, contrary to Section 255(2.1) of the Criminal Code.
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> Count #2: On or about the 29th day of October in the year 2016 at the City of Whitehorse in the Yukon Territory, while his ability to operate a motor vehicle was impaired by alcohol, did operate a motor vehicle and thereby cause bodily harm to June MATHER, contrary to Section 255(2) of the Criminal Code.

[2] At the conclusion of the trial I reserved judgment. These are my reasons for judgment.

Findings of Fact

[3] Much in the way of the evidence adduced at trial turned out, in the end, not to be of particular relevance to the issues I am required to decide in this case. There were also some contradictions or inconsistencies between the evidence of some of the witnesses that also have no bearing on the issues that I am required to decide. As such, I will not review all the evidence given or address inconsistencies beyond those that I consider to be necessary for the purposes of rendering my decision.

[4] I find the facts to be as follows. In the early afternoon of October 29, 2016, Ms. Mather was walking back to the Westmark Hotel from Main Street. Her direction of travel took her north on Third Avenue before she cut through the parking lot located between 2nd and 3rd Avenue on Steele Street. The parking lot is located immediately across the street and to the south of the Westmark Hotel.

[5] As Ms. Mather was leaving the parking lot through a vehicle exit pathway, she was struck by a vehicle driven by Mr. Kuhl, who was turning into the same parking lot exit. I note from the photographs filed that there is clearly a vehicle entry pathway and a separate vehicle exit pathway to the parking lot. To the extent that Ms. Mather testified that she had been struck in a different location, being in the vehicle entry pathway and further back into the parking lot, I find that she was mistaken. It is clear from the testimony of all the other witnesses and from the photograph taken while Ms. Mather was lying on the ground, that she was struck in the vehicle exit pathway.

[6] I note from the photograph, filed as Exhibit #5 in the trial, that Ms. Mather is lying in a predominantly north/south direction, with her head facing north and partly on the

roadway, while her feet are on the sidewalk facing towards the parking lot. She is clearly on the east side of the vehicle parking exit.

[7] As a result of being struck by Mr. Kuhl's vehicle, Ms. Mather was momentarily at least partially on the hood of the vehicle before falling off and landing on the ground in front of the vehicle. I am satisfied that she was not struck with enough force to cause her to travel any significant distance from where she was struck, and that she landed very close to where the initial contact between her and the vehicle occurred.

[8] The road conditions at the time were relatively bare and somewhat moist. The road and the parking lot surfaces were not slippery or snow covered. From the photograph that was taken at the time of the incident, I note that the little snow that was present was in areas not connected with the location where Ms. Mather was struck, or where Mr. Kuhl's vehicle was travelling.

[9] Mr. Kuhl had been travelling west on Steele St. and was waiting for an eastbound vehicle to pass before he turned left in order to enter the parking lot. There is a clearly visible "**DO NOT ENTER**" sign at the parking lot exit where Mr. Kuhl was attempting to enter. There is no evidence to indicate that Mr. Kuhl was travelling at anything but a normal rate of speed as he attempted to enter the parking lot.

[10] Ms. Mather was struck by the front left bumper and headlight of Mr. Kuhl's vehicle. I accept the photographic evidence and the testimony of Cst. Reid that the absence of dirt on these areas of the vehicle is consistent with them being the areas that struck Ms. Mather. I also find that this is consistent with Ms. Mather's direction of travel and the location at the sidewalk/roadway where she was struck by the vehicle.

[11] As a result of being struck by the vehicle, Ms. Mather incurred a significant injury to her left knee, in addition to other, less serious, injuries. Counsel for Mr. Kuhl does not take issue with the injuries Ms. Mather suffered meeting the threshold for bodily harm.

[12] Cst. Faulkner, who arrived after Cst. Reid in order to assist him, noted indicia of the consumption of alcohol by Mr. Kuhl that caused him to make a breath demand for the purpose of providing a breath sample into an approved screening device ("ASD"). As Cst. Faulkner did not have an ASD with him, he directed Cst. Miller, who had an ASD in his vehicle, to take the breath sample from Mr. Kuhl.

[13] A "Fail" reading resulted from the breath sample and Mr. Kuhl was arrested for an impaired driving offence. He was transported to the RCMP Detachment for the purpose of providing breath samples into an approved instrument. Mr. Kuhl provided an initial breath sample at 4:29 p.m. which resulted in a reading of a blood alcohol concentration of 230 mg%, followed by two breath samples which both resulted in readings of 190 mg%. The latter two samples were obtained at 4:50 p.m. and 5:10 p.m. respectively.

[14] I find that the accident occurred at approximately 2:15 p.m. I accept the evidence of Mr. Newans that he stepped out the south-facing doors of the Westmark Hotel to take his work break and saw Ms. Mather lying in front of Mr. Kuhl's vehicle, hearing her say words to the effect of: "I think you broke my leg". The exact words are not of significance; it is the timing that matters. Mr. Newans testified that he almost invariably took his afternoon work break at 2:15 p.m. I find it only logical, given the

public area in which the accident occurred and the time of day, that the accident occurred just moments before or as Mr. Newans stepped outside.

[15] In further support of the timing of the accident, Cst. Reid testified that he was dispatched to the scene of the accident at 2:27 p.m., with the call having come into the RCMP Detachment earlier, within seconds or minutes. It is also logical that the call to report the accident occurred shortly after the accident occurred, and that the accident had not occurred a significant period of time before the call was made.

Issues

[16] There has been no *Charter* application filed in these proceedings, therefore there is no issue with respect to there having been sufficient grounds for the initial breath demand for the ASD, or the subsequent arrest of Mr. Kuhl and the breath demand for the approved instrument.

[17] There is also no issue with respect to Mr. Kuhl being provided his right to counsel. In fact, there was a delay of almost one hour between the time Legal Aid was contacted by the RCMP and the time they returned the call and spoke with Mr. Kuhl. As a result of this delay, and a problem with the first breath sample, the breath samples of 190 mg% that the Crown are relying on were not obtained within the requisite two hours for the Crown to rely on the Certificate of Analyst as proof of the evidence of the readings for trial (s. 258(1)(c)). Therefore the Crown called Dr. Tracy Cherlet to provide expert evidence in regard to the breath samples and Mr. Kuhl's blood alcohol concentration at the time of driving, as well as expert evidence on the issue of

impairment. Dr. Cherlet is employed as an RCMP Forensic Specialist in the Toxicology Services Section.

[18] Counsel for Mr. Kuhl challenges the expert evidence of Dr. Cherlet and, in particular, states that the assumptions Dr. Cherlet relied upon to form her opinion were not proven in evidence. Therefore her testimony and the expert opinion she provided cannot be relied upon.

[19] Counsel also submits that the Crown is unable to prove beyond a reasonable doubt that Mr. Kuhl's ability to drive was impaired by alcohol and that, as a result of impairment by alcohol, he caused the accident that resulted in the bodily harm.

Analysis

[20] Dr. Cherlet was qualified to provide expert evidence with respect to:

- Physiology of alcohol, with respect to the absorption, distribution and elimination of alcohol from the body;
- Pharmacology of alcohol as it relates to the effects of alcohol on the human body and the ability to safely operate a motor vehicle;
- Retrograde and antegrade estimates of blood alcohol concentrations; and
- Theory of operation of breath test equipment.

[21] The Forensic Science and Identification Services Laboratory Report (the "Report") was prepared by RCMP Forensic Specialist, Toxicology Services Section, Ms. Anita Osagiede. As she was unable to attend court on the day of trial, Dr. Cherlet reviewed Ms. Osagiede's opinion report. She stated that she concurred with the estimates and comments provided in the Report and that her evidence at trial would be

similar to that which would have been provided by Ms. Osagiede. No concerns were raised by counsel for Mr. Kuhl in this regard.

Driving Over 80 mg%

[22] Dr. Cherlet testified that the first blood alcohol reading of 230 mg% could not be relied upon as there was too much discrepancy between it and the second reading of 190 mg%. A difference between readings of 20 mg% is the maximum allowed. Therefore a third sample was required. As the reading from the third sample was consistent with the second sample, these two samples could be considered reliable.

[23] Dr. Cherlet relied upon information provided to her by the RCMP in order to provide her opinion. Using an estimated time of driving of 2:27 p.m., and the scientifically accepted elimination rate of alcohol from the body of between 10 and 20 mg% per hour, she estimated that Mr. Kuhl's blood alcohol concentration at 2:27 p.m. would be between 214 and 237 mg%. In addition to the time of driving, the breath reading of 190 mg% at 4:29 p.m., and application of the 10 – 20 mg% elimination rate, Dr. Cherlet's estimate is based upon:

- Peak alcohol absorption attained at, or prior to, the time of driving; and
- No alcohol having been consumed between the time of testing and the time of the incident.

[24] Dr. Cherlet testified that the weight and gender of Mr. Kuhl was not a factor that would have any impact upon the estimated blood alcohol concentration of between 214 and 237 mg%, insofar as she relied upon the scientifically accepted elimination rate of alcohol from the body.

[25] Defense counsel does not challenge the accuracy of the reading of 190 mg% taken at 4:29 p.m., nor the application of the 10 to 20 mg% elimination rate to Mr. Kuhl.

Time Of the Incident

[26] It is clear that the incident happened prior to the time of 2:27 p.m. relied upon by Dr. Cherlet in providing her opinion. However, Dr. Cherlet's evidence was that small changes in time would not significantly affect the estimate. A change in time of five minutes would result in a difference of only 2 mg%, using a rounding principle. Further, if the driving was earlier than 2:27 p.m., any change in the blood alcohol concentration calculation would result in a higher blood alcohol reading, as more alcohol would have been eliminated from the body at the time of the reading being obtained.

[27] Dr. Cherlet testified that, assuming the driving had occurred 15 minutes earlier than 2:27 p.m., Mr. Kuhl's blood alcohol level would have differed by 5 mg%, thus resulting in a blood alcohol concentration of between 219 and 242 mg%.

[28] Therefore, I find that the small variance in time, from the time estimate utilized by Dr. Cherlet and the actual time of driving, does not negatively impact upon her opinion evidence.

Peak Alcohol Absorption

[29] Dr. Cherlet provided evidence that, assuming a normal drinking pattern, the highest blood alcohol concentration is reached at approximately 30 minutes after the last alcohol has been consumed.

[30] She addressed the issue of “bolus drinking”, which occurs when a large amount of alcohol is consumed in a short period of time. In instances of bolus drinking there may be unabsorbed alcohol in the gastrointestinal tract at the time of driving, which would result in a higher estimated blood alcohol concentration at the time of driving than what was actually correct. The estimated blood alcohol concentration would be higher by the amount of alcohol that was absorbed after the time of driving, but prior to the breath samples being taken.

[31] The gender and weight of an individual are factors that can impact upon the rate of absorption. Dr. Cherlet was provided information that Mr. Kuhl’s weight was approximately 100 kg (220 lbs). She provided evidence that for Mr. Kuhl, based upon his blood alcohol reading of 190 mg% at 4:29 p.m., to have had a blood alcohol concentration of 80 mg% at 2:27 p.m., he would have had to have consumed a minimum of 6.3 355 ml cans of 5% beer either within minutes immediately prior to the time of the incident or afterwards.

[32] Counsel for Mr. Kuhl argues that the inconsistent estimates of Mr. Kuhl’s weight by other witnesses undermines the assumption of weight Dr. Cherlet relied upon, thus casting doubt upon her opinion evidence.

[33] I agree there were inconsistent estimates. Mr. Newans provided an estimate of 165-170 lbs for Mr. Kuhl, stating that Mr. Kuhl was lighter than his own 300 lbs, as he was then, and that Mr. Kuhl seemed heavier in court than at the time of the incident. Cst. Faulkner estimated Mr. Kuhl’s weight at 230 lbs. Cst. Reid based his estimate of Mr. Kuhl’s weight of 220 lbs on several factors. Cst. Reid is 6’2” and 275 lbs. He

considered Mr. Kuhl to be approximately 6'1" and, by comparison, arrived at the figure of 220 lbs. He also considered Mr. Kuhl's driver's license which gave a weight for Mr. Kuhl of 240 lbs. Cst. Reid believed Mr. Kuhl to be lighter than this at the time of the incident.

[34] I am satisfied that Mr. Kuhl would have been approximately 220 lbs at the time of the incident. He did not, when providing his testimony, give any evidence that he was a different weight.

[35] This said, despite the amount of trial time devoted to this issue, I find that the weight of Mr. Kuhl is irrelevant. Weight only matters if there is evidence of bolus drinking. Mr. Kuhl testified that he may have had one beer before noon and two further cans of beer before he left his residence. This was in addition to his admission that he had been consuming alcohol the night before. This falls far short of the kind of evidence that would be required to raise a defence of bolus drinking.

[36] Further, there was no evidence that Mr. Kuhl had consumed any alcohol between the time of driving and the time that the breath samples were taken. He certainly did not testify to having done so and there were no observations made that would support this proposition.

[37] As stated in ***R.*** v. ***Saul,*** 2015 BCCA 149:

> 42 In short, [Blair J.A. in *Paszczenko*] summarized the burden on the Crown as: "[a]bsent something to put bolus drinking in play -- an inference may (but not must) be drawn [of no bolus drinking]" (para. 37).
>
> 43 The potential difficulty for the Crown to prove the absence of bolus drinking was recognized in *R. v. St-Onge Lamoureux*,

> the Court stated that in the absence of any evidence on the issue, a court is entitled to apply a common sense inference that most individuals do not bolus drink:
>
> > [95] ... To do this, the expert must make certain factual assumptions, for example, that the accused did not consume a large quantity of alcohol within approximately one half hour before the alleged offence (in other words, that a portion of the alcohol consumed had already been absorbed when he or she was pulled over), or between the time when he or she was pulled over and that of the test. If nothing in the evidence makes it possible to cast doubt on the expert's assumption, the court may make a deduction, based on common sense, that a person will not generally ingest large quantities of alcohol immediately before driving or while driving, or after being pulled over by the police (*R. v. Paszczenko*, 2010 ONCA 615, 103 O.R. (3d) 424; *R. v. Grosse* (1996), 29 O.R. (3d) 785 (C.A.); *R. v. Hall*, 2007 ONCA 8, 83 O.R. (3d) 641; *R. v. Bulman*, 2007 ONCA 169, 221 O.A.C. 210).
> >
> > [96] In sum, even without the presumption of identity, the accused might be required to raise a doubt about his or her unusual alcohol consumption if nothing in the evidence indicates that the expert's assumptions are erroneous. It therefore seems artificial to say that requiring the accused under s. 258(1)(d.1) to testify about his or her alcohol consumption imposes an evidentiary burden on the accused. The choice by the accused to testify in this regard flows from a decision that must be made whenever the Crown's evidence is sufficient to support a conviction. Thus, s. 11 (c) of the *Charter* is not infringed.
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> 44 In summary, the application of the common sense inference does not place an onus on the accused to prove that he or she had engaged in bolus drinking but rather gives rise to a "practical evidentiary burden" on an accused to point to some evidence in the totality of the evidence that at least puts the possibility that the accused had engaged in bolus drinking into play. [Emphasis in Saul]

[38] As such, I find the Crown has established the factual assumptions that Dr. Cherlet relied upon in providing her opinion evidence that Mr. Kuhl was operating his motor vehicle with a blood alcohol concentration of between 214 and 237 mg%. I have

no concerns with respect to the validity of her opinion in this regard. I accept that, given the earlier time of driving by several minutes than what was considered by Ms. Osagiede's in her calculations, there may be a slight variation in these readings, but any variation would serve to increase the estimated range of Mr. Kuhl's blood alcohol reading. For the purpose of this decision, I will consider the range to be between 214 and 237 mg%.

[39] As such, I find that Mr. Kuhl was operating his motor vehicle with a blood alcohol concentration in excess of 80 mg% and has, at a minimum, committed an offence contrary to s. 253(1)(b).

Impaired Driving

[40] With respect to the question of whether Mr. Kuhl's ability to operate a motor vehicle was impaired by his consumption of alcohol, in ***R.*** v. ***Schmidt***, 2012 YKCA 12, the Court noted the test for impaired driving to be as follows:

> 15 In *R. v. Stellato*, [1993] O.J. No. 18, aff'd [1994] 2 S.C.R. 478, the Ontario Court of Appeal held that the offence of impaired driving is proved if the trial judge is satisfied that an accused's ability to operate a motor vehicle was impaired by alcohol or drugs to any degree ranging from slight to great. In order to make out the offence, it must be proven not simply that the accused has consumed alcohol, but also that such consumption impaired the accused's ability to operate a motor vehicle (*R. v. Andrews*, 1996 ABCA 23).

[41] I accept Dr. Cherlet's evidence that Mr. Kuhl's ability to operate a motor vehicle would have been impaired by alcohol as a result of having a blood alcohol concentration of between 214 and 237 mg%. As stated in the Report with respect to the effect of alcohol on the human body and driving ability:

> Driving is a complex, divided attention task that requires integration of faculties such as vision, information processing, and motor coordination. A driver needs to be able to visualize and perceive objects (for example, a stop sign), process the information quickly in order to determine what action needs to be performed (recognize the need to start slowing down) and quickly execute that action (movement of foot to the brake to start decelerating). Additionally, a driver must be attentive and stay focused on the task of driving and notice changes in the driving environment with other distractions present inside and outside the vehicle. Other mental functions involved in the operation of a motor vehicle include judgment and comprehension, which allow a driver to assess, understand and react quickly to random, unexpected situations that can arise while driving. Alcohol has a detrimental effect on these mental faculties, causing a driver to concentrate more on one task and neglect other tasks; respond slowly to traffic signs and signals due to more time required to process information; and loss of inhibitions and increased self-confidence resulting in increased risk-taking behaviour.
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> …
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> With respect to driving, impairment is a deterioration of sensory, mental and motor functions, to such an extent as to make operation of a motor vehicle unsafe. Impairment is characterized by decreased judgment and comprehension, lessened attentiveness, deterioration of vision and motor skills, and increased reaction time.
>
> …
>
> The majority of the population is impaired in their ability to operate a motor vehicle at a BAC of 50 mg%. As the BAC increases, more and more of the population becomes impaired. In my opinion, at a BAC of 100 mg% and greater, all individuals are impaired in the operation of a motor vehicle, regardless of their tolerance to, or experience with alcohol.
>
> For an average drinker, one that has some tolerance to, and experience with alcohol, intoxication begins at a BAC of 150 mg%. Intoxication is an advanced stage of impairment, characterized by outward signs of the deteriorating effects of alcohol, such as slurred speech, unsteadiness (loss of balance or staggered gait) and emotional disturbances. Severe intoxication is associated with a BAC of 250 mg% and greater…

[42] Having accepted the evidence that Mr. Kuhl's blood alcohol concentration at the time of driving would have been between 214 and 237 mg%, I am satisfied on the basis

of Dr. Cherlets' evidence that Mr. Kuhl's ability to drive a motor vehicle was impaired. It is not necessary for me to comment on Dr. Cherlet's opinion that every individual with a blood alcohol concentration of 100 mg% or greater is impaired in his or her ability to operate a motor vehicle.

[43] Besides my reliance on Mr. Kuhl's blood alcohol readings, I note in addition that his driving into the marked DO NOT ENTER exit of the parking lot, and failing to observe Ms. Mather and avoid striking her, are consistent with the type of deteriorations in the ability to operate a motor vehicle testified to by Dr. Cherlet.

[44] In this regard, I find that Ms. Mather's direction of travel, location on the ground after being struck, and the marks, or absence thereof, on the front left bumper area of Mr. Kuhl's vehicle establish that Ms. Mather had crossed almost entirely across the front of Mr. Kuhl's vehicle as he was entering the parking lot. As such, even accepting as a possibility that Ms. Mather may have been obscured from Mr. Kuhl's line of sight by vehicles while walking in the parking lot, and momentarily further obscured by the dividing structures between the entry and exit lanes of the parking lot[1], Mr. Kuhl, traveling at a normal rate of speed into the parking lot, would have in the ordinary course of driving been able to see her and react in time to avoid striking her.

[45] As noted in ***R.*** v. ***Maxwell-Smith***, 2012 YKTC 76:

> 132 In *R. v. Andrews*, 1996 ABCA 23 (leave to appeal to the Supreme Court of Canada dismissed without reasons, [1996] S.C.C.A. No. 115), Conrad, J.A. for the majority stated at para. 23:

[1]Certain photographs (Exhibits 1, 4, 11) depicting the dividing structures in the parking lot were taken approximately one year after the date of the incident, but I am prepared to accept that these dividing structures were also present at the time of the incident.

> 23. Impairment is a question of fact which can be proven in different ways. On occasion, proof may consist of expert evidence, coupled with proof of the amount consumed. The driving pattern, or the deviation in conduct, may be unnecessary to prove impairment. More frequently, as suggested by Sissons C.J.D.C. in McKenzie, [1955] A.J. No. 38, proof consists of observations of conduct. Where the evidence indicates that an accused's ability to walk, talk, and perform basic tests of manual dexterity was impaired by alcohol, the logical inference may be drawn that the accused's ability to drive was also impaired. In most cases, if the conduct of the accused was a slight departure from normal conduct, it would be unsafe to conclude, beyond a reasonable doubt, that his or her ability to drive was impaired by alcohol. Put another way, as was done in Stellato, the conduct observed must satisfy the trier of fact beyond a reasonable doubt that the ability to drive was impaired to some degree by alcohol. McKenzie does not state a rule of law. It suggests a reasonable, common sense approach to the assessment of evidence necessary for proof. This was pointed out long ago by Kerans A.C.D.C.J. (as he then was) in R. v. Conlon (1978), 12 A.R. 267 at pp. 268-9:
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> > 'It was never the intention of McKenzie to say that impairment means marked impairment but rather to say that there must be a doubt when you are relying on physical signs alone and those signs are ambiguous.'"

[46] As such, I find that Mr. Kuhl was operating his motor vehicle while his ability to do so was impaired by the consumption of alcohol and that he has, at a minimum, committed an offence contrary to s. 253(1)(a).

Offences Contrary to s. 255(2.1) and 255(2)

[47] Section 255(2) requires not only that the operator of a motor vehicle be impaired by the consumption of alcohol, but that this impairment is a contributing factor to the accident that in turn results in the bodily harm. Establishing causation, i.e. that the

impairment of the operator was a factor that contributed to the resultant accident and bodily harm, is necessary in order to secure a conviction. Section 255(2) reads:

> Everyone who commits an offence under paragraph 253(1)(a) and causes bodily harm to another person as a result is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years.

[48] Section 255(2.1) however, requires only that the operator of the motor vehicle have a blood alcohol concentration in excess of 80 mg% and causes an accident that results in bodily harm. While causation remains a factor, in order to secure a conviction it is only necessary to show that the operator of the motor vehicle caused the accident that resulted in the bodily harm. It is not necessary to show that the fact that the driver had a blood alcohol concentration in excess of 80 mg% was a contributing factor to the accident. Causation in this regard is not required. Section 255(2.1) reads:

> Everyone who, while committing an offence under paragraph 253(1)(b), causes an accident resulting in bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

Section 255(2.1)

[49] Counsel for Mr. Kuhl submits that in order to secure a conviction under s. 255(2.1) the Crown must prove that Mr. Kuhl's blood alcohol readings in excess of 80 mg% were a contributing factor to the accident. In this regard counsel submits that the same causal link exists for a s. 255(2.1) conviction as exists for a conviction under s. 255(2).

[50] Counsel cites the case of ***R.*** v. ***Gentles***, 2016 BCCA 68 as support for her submission.

[51] I disagree.

[52] In ***Gentles***, Mr. Gentles was involved in an accident that killed one pedestrian and seriously injured another. He was convicted after trial of the offences of impaired driving and driving with a blood alcohol concentration in excess of 80 mg%. He was, however, acquitted of the offences in regard to causing death and bodily harm.

[53] In acquitting Mr. Gentles of the more serious offences of causing death and bodily harm, the trial judge found that the accident was unavoidable. The Court of Appeal, based upon the trial judge's finding, upheld the acquittals.

[54] In the appellate decision it is noted that the trial judge stated the following in para. 44 of the trial decision:

> Those charges require a finding in law that it was the effect of his impairment on his driving that caused the death and bodily harm and not merely his driving while impaired that caused the death and bodily harm.

[55] In the trial decision, it is clear from paras. 41-46 that it was only the charges of impaired driving causing death and impaired driving causing bodily harm that Truscott J. was referring to. He deals with the s. 255(2.1) charges in paras. 47 and 48 and acquits Mr. Gentles of those as well, on the basis that Mr. Gentles did not cause the accident that resulted in death and bodily harm.

[56] I am in agreement with the reasoning in ***R.*** v. ***Koma***, 2015 SKCA 92 in paras. 25-32.

[57] As stated in paras. 31 and 32:

> The absence from s. 255(2.1) of a causal connection similar to that found in s. 255(2) reflects the difficulty of requiring the Crown to prove an individual has caused an accident *because* he or she was over .08, without the Crown leading some form of expert evidence as to the effect of blood alcohol concentrations in excess of .08 on *that* individual's ability to operate a motor vehicle that is causally tied to the accident in question. However, this kind of evidentiary difficulty does not arise in cases of impaired driving or dangerous driving where objective indicia of an individual's impairment or recklessness provide an evidentiary basis for a court to conclude the causes of an accident might include an inability to operate a motor vehicle brought on by impairment, negligence or recklessness. For this reason, the causation element of the offence of impaired driving causing bodily harm (s. 255(2)) is different. There, the Crown has to prove a causal link between an individual's impaired operation of a motor vehicle and bodily harm to another person.
>
> Thus, for a conviction to lie under s. 255(2.1) of the *Criminal Code*, I conclude the Crown must prove beyond a reasonable doubt that an individual, while operating a motor vehicle or in care or control of a motor vehicle, had a blood alcohol concentration exceeding 80 mg of alcohol in 100 mL of blood and the individual caused an accident that resulted in bodily harm to another; but, s. 255(2.1) does not require the Crown to prove the individual's over .08 blood alcohol concentration caused the accident. The judge made no error when she concluded similarly.

[58] The question before me in this case, therefore, given my finding that Mr. Kuhl was operating a motor vehicle with a blood alcohol concentration of between 214 and 237 mg%, is whether Mr. Kuhl caused the accident, and whether the accident resulted in Ms. Mather suffering bodily harm.

[59] I have no difficulty finding that Mr. Kuhl caused the accident. He turned left into a marked DO NOT ENTER laneway into the parking lot. He failed to see Ms. Mather as she was walking through this laneway. There is nothing in the evidence that would support a finding that the accident was unavoidable and/or caused by Ms. Mather. Notwithstanding any moments of possible obstruction of Mr. Kuhl’s view of Ms. Mather as she was walking through the parking lot and across this laneway, Mr. Kuhl should

have been able to observe Ms. Mather and avoid striking her with his vehicle. He did not and, in nor doing so, caused the accident, and this accident resulted in bodily harm to Ms. Mather. In so finding, I am not saying that Mr. Kuhl's manner of driving was particularly reckless or dangerous. To some degree, there was an element of inadvertence or inattention to the circumstances that existed. However, all that is required to sustain a conviction under s. 255(2.1) is causation of the accident and therefore I find Mr. Kuhl guilty of the offence.

Section 255(2)

[60] In ***R.*** v. ***Best***, 2016 NLTD(G) 150, Handrigan J. stated in para. 5:

> 5 In **R. v. Larocque** (1988), 5 M.V.R. (2d) 221, 1988 CarswellOnt 22 (C.A.), the Ontario Court of Appeal considered how the Crown could prove that the accused's impairment by alcohol caused the bodily harm to the victim. Rick Libman wrote an annotation to the case shortly after it was reported. He commented on the impact he thought that **Larocque** would have on proving causation:
>
> > The issue for determination requires scrutiny only of whether the accused's driving conduct has been proven to be a substantial, though not necessarily the only cause of the injury to the victim. So long as it is a contributing cause and something more than de minimis, the requisite causal element has been established. (Larocque, Annotation to Reported Decision)

[61] The actions of Mr. Kuhl are consistent with the evidence of Dr. Cherlet as to the effects of impairment by alcohol on an individual's ability to operate a motor vehicle. In particular, and in addition to those aspects of the Report I referenced earlier, I note from the Report:

> Vision is the most important sensory function used while driving. A driver needs to scan the driving environment to ensure the vehicle stays within

> the lane and maintains an appropriate speed. The adverse effects of alcohol on vision include decreased visual acuity, diminished peripheral vision and depth perception, and increased glare recovery time. Deteriorated aspects of vision result in a driver spending more time trying to identify traffic signs due to reduced clarity of vision; or miss objects in the periphery as a result of vision becoming more centrally focused.

[62] Mr. Kuhl's failure to note that he was turning into the marked DO NOT ENTER laneway of the parking lot and his failure to either see Ms. Mather as she was walking, or to adjust his driving in time to brake and avoid striking her, are consistent with the indicia of impairment by alcohol noted in Ms. Osagiede's Report and in the testimony of Dr. Cherlet.

[63] I also find, noting it is not disputed, that the bodily harm suffered by Ms. Mather resulted from being struck by the vehicle driven by Mr. Kuhl.

[64] As such, I also find Mr. Kuhl guilty of the offence under s. 255(2).

[65] As per the principle in ***R.*** v. ***Kienapple***, [1975] 1 S.C.R. 129, `this charge is conditionally stayed.

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COZENS T.C.J.