Citation: *R.* v. *Marshall*, 2018 YKTC 25

Date: 20180406
Docket: 16-00681A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

MACKENZIE RAE MARSHALL

Appearances:
Leo Lane — Counsel for the Crown
Joni Ellerton — Counsel for the Defence

REASONS FOR JUDGMENT

[1] MacKenzie Marshall has been charged with having committed offences contrary to ss. 255(2) and 255(2.1) of the *Criminal Code*.

[2] Counsel for Ms. Marshall has filed a *Charter* application and, at trial, seeks exclusion of the evidence of the breath test results on the basis that Ms. Marshall's s. 10(b) *Charter* right to counsel was violated.

[3] In particular, counsel challenges the admissibility of the test results of the breath samples provided by Ms. Marshall on the basis that she had not been provided and had not waived her right to speak to legal counsel prior to the breath samples being obtained.

[4] Counsel also advances a s. 10(b) *Charter* argument against the use of any of the evidence obtained in the course of Ms. Marshall's responses to police questioning, insofar as there would be any attempt to rely on the evidence obtained for a purpose beyond obtaining the requisite reasonable and probable grounds to make a breath demand pursuant to s. 254(3). Counsel submits that Ms. Marshall was not provided access to legal counsel before responding to police questioning.

Evidence at trial

[5] It is not disputed that on January 8, 2017, at approximately 6:00 p.m., the vehicle being driven by Ms. Marshall rear-ended the vehicle being driven by Ms. Annette Taylor. The accident occurred at the intersection of 4th Ave and 2nd Ave at the bottom of Two Mile Hill. Both Ms. Marshall's and Ms. Taylor's vehicles were heading up Two Mile Hill. There was a vehicle stopped at the lights at the T-intersection, waiting to turn left to head south on 4th Avenue.

[6] The driver of this vehicle, Sydney Dawson, observed the accident as it occurred. Her passenger, Quinn Wilkinson, however, did not observe the moment the accident occurred but made observations afterwards.

[7] I find that Ms. Taylor was stopping at the lights as they turned from yellow to red. Ms. Taylor testified that she had completely stopped her vehicle before being struck, while Ms. Dawson said that Ms. Taylor's vehicle had not completely stopped. I find that this distinction does not matter. It is clear that Ms. Taylor was responding properly to a change in the traffic lights and, if not fully stopped, was at least well along the way to being so.

[8] I accept the evidence of Ms. Dawson that there was nothing unusual in the stopping of the vehicle by Ms. Taylor as the light was changing from green to red. This was a normal vehicle stop at a traffic light turning from green to red.

[9] Despite Ms. Taylor's vehicle stopping at the lights, Ms. Marshall's vehicle made no attempt to stop, and thus her vehicle ran into the rear of Ms. Taylor's vehicle.

[10] I accept the evidence that there was nothing in the road conditions that existed at the time that would have contributed to Ms. Marshall being unable to stop her vehicle in time in order to avoid striking Ms. Taylor's vehicle.

[11] As Ms. Marshall did not testify at trial, I do not have any evidence from her as to why she did not stop her vehicle behind Ms. Taylor's vehicle. There are several possible explanations, including but not limited to, momentary inadvertence, thinking that both Ms. Taylor's vehicle and her vehicle were going to be able to proceed through the light, or possibly impairment by the consumption of alcohol or other substance.

[12] I will not engage in speculation, however, noting that part of what I am required to decide on the evidence is whether Ms. Marshall's ability to operate her vehicle was impacted by her consumption of alcohol.

[13] Following the accident, both Ms. Taylor and Ms. Marshall turned their vehicles to the right and parked on 2nd Avenue, with Ms. Marshall's vehicle pulling up in front of Ms. Taylor's. The vehicle being driven by Ms. Dawson also pulled over and she and Mr. Wilkinson got out and approached the other vehicles.

Amanda Taylor

[14] Ms. Taylor testified that after she got out of her vehicle, Ms. Marshall approached her and said “I totally got you”. Ms. Marshall also offered to transfer her money by an e-transfer the following day.

[15] Ms. Taylor formed the impression Ms. Marshall was drunk by the look in Ms. Marshall’s eyes. She noted Ms. Marshall’s eyes to be “half-shut”. She testified, however, that she did not smell an odour of liquor. Ms. Taylor did not note Ms. Marshall to have any difficulty when speaking with her, or in walking.

[16] Ms. Taylor refused the offer made by Ms. Marshall to sit in her vehicle to get warm while she was waiting.

[17] After approximately 10 minutes an ambulance arrived and Ms. Taylor was taken to Whitehorse General Hospital (“WGH”).

[18] Ms. Taylor testified that she had general soreness for a couple of weeks in her left arm, her legs, wrist and occasionally her neck. She took four days off work. She did not receive a medical diagnosis and was not prescribed any medications. She attended physiotherapy once per week for approximately 10 weeks, primarily for her arm and neck, before being told by the physiotherapist that she no longer needed to attend. Her normal physical activities and employment were not affected, other than some pain in her arm at work when lifting. She stated that she was placed on “light duty” at her work at Superstore for approximately four weeks. Her sleep was interfered

with “a little bit”. She testified that she still experiences some soreness in her arm at times.

Sydney Dawson

[19] Ms. Dawson formed the opinion that Ms. Marshall seemed to be intoxicated. She testified that Ms. Marshall was not speaking clearly, slurring her words, and had difficulty standing up straight. She noted Ms. Marshall’s eyes to be only partially open and that Ms. Marshall was unable to keep them open.

[20] She did not observe an odour of liquor coming from Ms. Marshall. In cross-examination Ms. Dawson agreed with the suggestion that she assumed Ms. Marshall was intoxicated because of the accident.

Quinn Wilkinson

[21] While he did not actually see the accident, Mr. Wilkinson made observations of Ms. Marshall afterwards. He testified that he believed she was intoxicated. He believed this because of the way that she was acting, including what she was saying and that her words were sluggish. He noted that her eyes were half-shut. He was three to five feet away from Ms. Marshall when he made these observations. He did not smell any liquor coming from Ms. Marshall, stating that he believed this was because it was too cold and windy.

Cpl. Stelter

[22] Cpl. Stelter testified in a *voir dire* format. He stated that in his 15 years of experience as an RCMP member he has regularly dealt with impaired individuals. He also has experience as a former qualified breath technician.

[23] He received information from one of the ambulance personnel that the driver of the truck, Ms. Marshall, may possibly be impaired.

[24] He approached the truck and Ms. Marshall rolled the window down. Cpl. Stelter was on alert for any indicia of impairment on the part of Ms. Marshall. When requested to do so, Ms. Marshall was unable to produce her driver's license. When asked whether she had been drinking, Ms. Marshall admitted to having had two drinks earlier. Cpl. Stelter assumed that Ms. Marshall was specifying alcoholic drinks.

[25] Cpl. Stelter considered Ms. Marshall's speech to be slow, as though she was being careful in how she spoke. This was an observation that he was specifically looking for. In his experience, this was sometimes consistent with an individual who was trying not to slur words and to avoid the detection of the odour of liquor.

[26] He did not initially smell an odour of liquor. It was only when Ms. Marshall was in the police cruiser for the purpose of providing a breath sample into the Approved Screening Device ("ASD") that he noted an odour of liquor coming from her breath.

[27] Cpl. Stelter had no prior dealings with Ms. Marshall. He noted her to be polite and cooperative.

[28] Cpl. Stelter formed the opinion that Ms. Marshall had alcohol in her body based upon the collision that had occurred, the slow speech on her part that he observed, the statement made to him by the ambulance personnel, and the admission by Ms. Marshall that she had consumed two drinks earlier. He testified that he did not believe that all alcohol that had been consumed by Ms. Marshall would have been eliminated from her body at that time.

[29] Based upon his suspicion, Cpl. Stelter made a s. 254(2) breath demand to Ms. Marshall. He testified that, at that point, he did not have sufficient grounds to arrest Ms. Marshall for impaired driving.

[30] Cst. McRorie had also attended at the scene with the ASD. He administered the ASD test to Ms. Marshall, who ultimately provided a suitable breath sample which recorded a "Fail" reading.

[31] Based upon the "Fail" reading, Cpl. Stelter arrested Ms. Marshall for impaired driving. He read the *Charter* right to counsel to Ms. Marshall from the card he carried as follows:

> You have the right to retain and instruct a lawyer without delay
>
> You may call any lawyer you choose to seek immediate legal advice
>
> A legal aid lawyer is also available at any time to provide you with free legal advice
>
> The police will provide you with a telephone and telephone numbers to assist you to contact a lawyer of your choice
>
> You may speak to a lawyer of your choice in private at the Detachment
>
> In addition to free legal advice at this time, if you are later charged with an offense you may apply to Legal Aid to seek free legal assistance.

[32] When asked, Ms. Marshall replied that she understood what he had read to her and that she would cooperate. When she was asked whether she wanted to use a phone to call a legal aid lawyer or any other lawyer of her choice, Ms. Marshall replied "No. I'm not from here so none of those". Cpl. Stelter testified that he understood that Ms. Marshall did not wish to speak to either a legal aid lawyer or private counsel.

[33] Cpl. Stelter testified that he asked Ms. Marshall one more time, in plain language, after they had arrived at the RCMP Detachment, whether she wished to speak to a lawyer, to which she replied "No, no". Cpl. Stelter testified that he asked Ms. Marshall again because he wanted to make sure that Ms. Marshall had not changed her mind about not wanting to speak to a lawyer.

[34] Ms. Marshall subsequently provided two breath samples of 250 and 230 mg%.

Cst. McRorie

[35] Cst. McRorie testified that on January 8, 2017 he was qualified to operate the ASD and was also qualified as a Breath Technician on the Intox EC/IR II. Prior to administering the ASD test to Ms. Marshall, he had not formed an independent suspicion that Ms. Marshall had been operating a motor vehicle while she had alcohol in her body. He relied on the direction from Cpl. Stelter in order to obtain a breath sample from Ms. Marshall through the approved screening device.

[36] Cst. McRorie was the breath technician that obtained the samples from Ms. Marshall through the Intox EC/IR II. He noted the instrument to be operating properly

and signed the Subject Test Sample printout that was filed as an Exhibit at trial. The test results were 250 and 230 mg%.

[37] I note that Cst. McRorie did not sign the Certificate of Qualified Technician that was also filed at the trial. He did, however, fill it out contemporaneous to the time that he took the breath samples.

[38] Crown is relying on the evidence of Cst. McRorie at trial as to the breath sample test results.

Issues

Voir Dire Section 10(b)

[39] Counsel for Ms. Marshall concedes that if there is no s. 10(b) *Charter* breach, Ms. Marshall's breath sample results would allow for at least a conviction under s. 253(1)(b).

[40] Counsel submits, however, that Ms. Marshall did not unequivocally waive her right to counsel. In order to rely on waiver, Cpl. Stelter should have taken further steps in order to ensure that Ms. Marshall was unequivocally waiving her right to consult with legal counsel. Counsel points to Ms. Marshall's comment that she was "not from here" as an indication of uncertainty on her part with respect to consulting counsel. She also notes that in Cpl. Stelter's testimony, he stated that he would have asked Ms. Marshall back at the RCMP Detachment whether she wished to speak to a lawyer, however, he has no independent recollection of having done so. At most, he simply asked her

whether she wanted to talk to a lawyer, without providing any further information to her as to how to do so.

[41] Crown counsel submits that Cpl. Stelter complied with both the informational and implementational components of the *Charter* right to counsel and that it was clear Ms. Marshall had waived her right to speak to a lawyer.

Bodily Harm

[42] Counsel for Ms. Marshall questions whether the injuries suffered by Ms. Taylor constitute bodily harm. There were no visible injuries and no medical reports or diagnosis provided.

[43] Crown counsel submits that the threshold for bodily harm simply requires that the injuries are not transitory or trifling. While acknowledging that the injuries suffered by Ms. Taylor are at the low end of what is required to constitute bodily harm, there is nonetheless evidence that Ms. Taylor, due to the discomfort she was experiencing, took time off work, attended at physiotherapy and still suffers from some soreness in her arms.

Impairment Causing Bodily Harm

[44] Counsel for Ms. Marshall submits that there is insufficient indicia of impairment on the part of Ms. Marshall to sustain a conviction for impaired driving. There was little beyond the witnesses' testimony that Ms. Marshall's eyes seemed half-shut, and an assumption by the witnesses that she was impaired based upon the occurrence of the accident, in the fact that Ms. Marshall's vehicle had rear-ended Ms. Taylor's vehicle.

[45] Crown counsel submits that in addition to the above, there was also Cpl. Stelter's observation in regard to slow or sluggish speech, and that Ms. Marshall also seemed to be intoxicated to the witnesses because she was not standing straight. Counsel also points to the high breath readings as indicia of some degree of impairment.

Analysis

Section 10(b)

[46] The law is clear that Cpl. Stelter had a duty, upon arresting Ms. Marshall, to not only advise her of her right to contact a lawyer, but then to provide her a reasonable opportunity to do so.

[47] In ***R.*** v. ***DiGiulio***, 2006 BCPC 294, the accused was arrested for impaired driving and read his *Charter* right to counsel from the card the police officer used for such purposes. The accused stated that he did not know the implications of this, and when it was further explained to him that he could call either a lawyer of his choice or a legal aid lawyer, the accused stated that he should call a lawyer. At the Detachment, without any further discussion in regard to facilitating the contact with counsel, the police officer contacted legal aid and Mr. DiGiulio, spoke to counsel for approximately 18 minutes.

[48] The Court agreed that the pre-emptive actions of the police officer in contacting a legal aid lawyer, without inquiring properly into whether there was other counsel Mr. DiGuilo wished to contact, constituted a breach of his s. 10(b) *Charter* rights.

[49] In ***R.*** v. ***Liddell***, 2008 BCPC 143, a s. 10(b) *Charter* breach was found to have occurred on the basis that the response by Mr. Liddell, after being arrested for impaired

driving, as to whether he wished to speak to a lawyer or not, of “Not at this time”, was not an unequivocal waiver by Mr. Liddell of his right to speak with legal counsel. The Court stated in para. 8 that there was a failure by the police officer to ensure that the s. 10(b) *Charter* requirement had been met. More needed to be have been done by the police officer to ensure that Mr. Liddell did not want to speak to a lawyer before obtaining the breath samples.

[50] In ***R.*** v. ***Turcotte***, 2008 ABPC 16, a similar conclusion was reached by the Court on the s. 10(b) *Charter* issue after Mr. Turcotte was arrested on an impaired driving charge. Mr. Turcotte indicated that he understood the *Charter* rights to counsel that were read to him by the police officer, and responded, when asked whether he wanted to speak to a lawyer, “No, not right now”. Mr. Turcotte subsequently brought up the issue of speaking to counsel after being read the breath demand. There was an exchange between Mr. Turcotte and the police officer and, in the end, Mr. Turcotte stated that he did not want to call a lawyer. The police officer, in cross-examination, agreed with the following:

> 7 …So, that would seem to indicate that, as you clearly state there, that he seemed to pause, confused it, pause, and then contemplate his situation or the situation about a lawyer and then made that statement to you about don’t think it would – there is any point in calling one. …

[51] The Court stated in paras. 11 and 12:

> I conclude from the initial equivocal statement from the accused, followed by the question about a lawyer and then the pause, that Mr. Turcotte did not fully appreciate his right to legal advice at that time. …
>
> …

> I find that Mr. Turcotte did not appreciate the purpose of immediate legal advice. The exchange between Mr. Turcotte and Constable Campbell should have alerted Mr. Campbell that he must go further to ensure that Mr. Turcotte understood his right to counsel. …

[52] In ***R.*** v. ***Fisher***, (1992) 7 B.C.A.C. 64, after referring to a line of authorities, the Court held in para. 5, that:

> …the principle to be derived from those cases is that when there is evidence that the *Charter* advice has been given, the *Charter* duty will have been discharged "absent proof of circumstances indicating that the accused did not understand [her] right to retain counsel when [she] was informed of it. …

[53] In ***Fisher*** the accused did not testify and, notwithstanding the evidence of the witnesses that the accused was "…distraught and upset and agitated and generally in an emotional state", there was no evidence that she did not understand what was said to her or in responding rationally to questions that were put to her.

[54] Ms. Marshall did not testify and, as such, we have no evidence from her that she was confused and/or that she did not understand the extent of her right to speak to legal counsel. There is nothing in the evidence of the civilian witnesses who came into contact with Ms. Marshall that would seem to support a finding that she was incapable of understanding and responding to her environment, including in the context of a conversation.

[55] The testimony of Cpl. Stelter also provides evidence of Ms. Marshall's responsiveness to questions, and there is nothing to indicate that she was having trouble understanding what she was being asked or in responding to the questions she was asked.

[56] This case is distinguishable from those where there appeared to be a deferment in time with respect to speaking to a lawyer. Ms. Marshall did not indicate that she may wish to speak to a lawyer later or at a different time. She did not express any doubt as to whether she should or should not contact a lawyer or whether it would be helpful or not for her to do so. At most, we have the comment that she was "not from here" in the context of declining to speak to a lawyer after her *Charter* right to counsel was read to her.

[57] This said, it is, to me, illogical for Cpl. Stelter to have concluded that when Ms. Marshall stated to him, "… I'm not from here …", that she was saying no more than that, as he testified to. Clearly, Ms. Marshall stated this in the context of being asked whether she wanted to contact a lawyer. This response was connected to the issue of her wanting, or not wanting, to contact legal counsel, and the logical inference to be drawn was that, in saying "No…" she was also saying that she was not from here. This would logically allow for an inference to be made that she was not sure about calling a lawyer in Whitehorse when she was not from Whitehorse.

[58] In my opinion, there is an equivocal aspect to Ms. Marshall's answer that should have caused Cpl. Stelter to perhaps consider providing an additional explanation to Ms. Marshall about what would be available to her here, in Whitehorse, with respect to lawyers she could speak to, notwithstanding that this information had been technically provided to her when Cpl. Stelter read the *Charter* right to counsel from his card.

[59] Simply asking her again at the Detachment whether she wanted to contact a lawyer, without more, does not in any way address the issue raised by Ms. Marshall's comment that she was not from here.

[60] It would have been relatively simple for Cpl. Stelter to have reiterated to Ms. Marshall, particularly when at the Detachment, that legal counsel was readily available and that he could enable her to make a call right away to any private counsel that she may choose to contact from a list available or, at least to legal aid for her to speak with duty counsel. Any uncertainty that may have existed with respect to whether Ms. Marshall was unequivocally waiving her right to counsel could have been eliminated. He did not, however, choose to do so.

[61] Does this failure to do more constitute a breach of Ms. Marshall's s. 10(b) *Charter* right to counsel?

[62] In my opinion it does not. Cpl. Stelter, through reading the *Charter* right to counsel to Ms. Marshall from the card he carried for that purpose, provided the necessary information to Ms. Marshall to comply with the informational requirement of the s. 10(b) right to counsel. While her response, that she was not from here, raises a question as to whether she fully understood what her options with respect to contacting counsel were, there is an absence of any other evidence that would support a finding that she was unsure or equivocal when she said "No" with respect to speaking to a lawyer. Standing alone, and in consideration of what is stated in ***Fisher***, I am not satisfied that there is any other evidence, that would constitute the necessary proof required to indicate that Ms. Marshall did not sufficiently understand her right to counsel

and the opportunity that would be provided to her to exercise it. As such I find that there has been no s. 10(b) *Charter* breach.

[63] As such the evidence of Cpl. Stelter and Cst. McRorie is admitted into the trial proper.

Bodily Harm

[64] "Bodily harm" is defined in s. 2 of the *Code* as "…any hurt or injury to a person that interferes with the health or comfort of the person and is more than merely transient or trifling in nature".

[65] In ***R.*** v. ***Stonechild***, 2016 SKQB 130, the issue of what constitutes bodily harm was considered in the context of an assault causing bodily harm charge.

[66] The Court cited the Yukon Court of Appeal decision of ***R*** v. ***Dixon***, 1988 CarswellYukon 38 (WL) (YTCA):

> 27 In *Dixon*, Esson J.A. gave some meaningful definition to the term "bodily harm" in a passage, at paras. 44 - 46, that was later recited in *Moquin*. That passage reads as follows:
>
> > 44 ...I leave aside the question whether there was interference with health because, if there was interference with comfort, that is enough. Transient, trifling and comfort are all words in common usage. The Shorter Oxford English Dictionary, 3rd ed., vol. II, defines transient at p. 2346 as:
> >
> > > Transient 1. Passing by or away with time; not durable or permanent; temporary, transitory; esp. passing away quickly or soon, brief, momentary, fleeting.

> At p. 2362, it defines "trifling" as:
>
> > Trifling 3. Of little moment or value; trumpery; insignificant, petty.
>
> At pp. 373-74 (vol. I), it defines "comfort" as:
>
> > Comfort 4. The condition or quality of being COMFORTABLE.
>
> 45 Clearly, as employed in s. 245.1(2), those words import a very short period of time and an injury of very minor degree which results in a very minor degree of distress.
>
> 46 The findings that "there is no evidence of any interference with the victim's health or comfort" and that "an injury that lasts no longer than a month would fall within the definition of being transient and trifling" demonstrate, in my view, an absence of any reasonable regard for the ordinary meaning of the words. From the time of the assault at least until the medical treatment was completed, it is clear that the victim must have been deprived of any sense of comfort which she might have had before being assaulted. The element of interference with comfort, which is all that the definition requires, must have continued for some time after that. The interference with comfort resulted from a significant injury -- one which cannot be described as trifling. There is no necessary connection at all between the duration of the injury and the question whether it is trifling -- a life-threatening injury is often resolved in a short time. Transient does relate to time but, in this context, it is simply insupportable to describe as transient an injury that "lasts no longer than a month". [Emphasis added]

[67] The Court further discussed the treatment of the ***Dixon*** case in the cases of ***R.*** v. ***Moquin***, 2010 MBCA 22 and ***R.*** v. ***Poitras***, 2015 SKQB 341 as follows:

> **28** From the Manitoba Court of Appeal's consideration of *Dixon*, Layh J., in *Poitras*, drew a conclusion about the nature of "bodily harm" which he concisely described at para. 65:
>
> > 65 From *R. v. Dixon* ..., as accepted by the Manitoba Court in *Moquin*, one can conclude that either the complainant's comfort or health must be subject to interference by the injury, with comfort often being the lower threshold. And,

> while "transient" relates to time, "trifling" relates to seriousness but not to duration of the injury. As well, in *Moquin*, the court rejected the trial judge's functional test -- whether the injury to the complainant's arm prevented her from using her arm, or whether the injury to her throat made swallowing difficult. The court stated, at para. 31, that although "...a functional impairment may accompany bodily harm, it is not a necessary component of bodily harm as it is defined in s. 2 of the *Code*..."

29 It is noteworthy that the Manitoba Court of Appeal, in *Moquin*, provided a concise synopsis of various appellate decisions since *Dixon.* This synopsis, which was also recited in *Poitras*, it appears at para. 25:

> 25 Examples of injuries that have been found by courts of appeal to constitute bodily harm within s. 2 of the *Code* are as follows:
>
> * scrapes, lacerations and bruises, especially around the eye and a large amount of hair which had been pulled out by the roots - the court observed that significant bruising will obviously cause discomfort and inconvenience for more than a brief and transitory period - *R. v. Dorscheid*, [1994] A.J. No. 56 (Alta. C.A.);
>
> * superficial injuries, consisting primarily of bruising and abrasions, were found at trial to have interfered with the complainant's health and comfort, which decision was upheld on appeal - *R. v. Rabieifar*, [2003] O.J. No. 3833 (Ont. C.A.);
>
> * a number of bruises to the neck and arms, a number of lacerations to the face, chest, shoulder and wrist which cleared up within a week, difficulty speaking for three or four days as a result of choking and a scar on her forearm from a laceration - the court noted (1) that it was incorrect to find that an injury that would heal within a week could not constitute bodily harm, as life-threatening injuries can be of short duration, and, (2) one must look at the overall effect of a number of injuries, each of which may be trifling, but taken together may be more than trifling and transient - *Garrett*; and

> * a sore neck that lasted for approximately one month - the court also noted that medical evidence is not required before making a finding of bodily harm - *R. v. Giroux*, [1995] A.J. No. 900 (Alta. C.A.).

[68] In para. 31 of ***Moquin***, the Court states:

> 31 Although a functional impairment may accompany bodily harm, it is not a necessary component of bodily harm as it is defined in s. 2 of the *Code*, and it is not a requirement in any of the cases that have interpreted and applied that section. Interference with comfort -- that is, discomfort -- is sufficient to constitute bodily harm, if it is more than trifling and transient. Pain causing discomfort, if it is more than trifling and transient, is sufficient, even if it does not impair a person's ability to function.

[69] Crown has conceded that the injuries suffered by Ms. Taylor are at the lower end of the spectrum of what constitutes "bodily harm". I agree. They are not, however, injuries that are merely transitory or trifling in nature. I accept Ms. Taylor's evidence as to the discomfort she has experienced and that there is a component to this discomfort that continues to this day. This, based on the relatively low threshold established by the Code and case law, supports a finding that Ms. Taylor has suffered bodily harm.

Impairment Causing Bodily Harm

[70] ***R.*** v. ***Visser***, 2013 BCCA 393, addresses the application of the "limited-use" doctrine in respect of the use a police officer may make from evidence emanating from an accused prior to the accused being provided his or her *Charter* right to counsel. In para. 64, the Court holds that if a factual analysis of the circumstances show that the police officer's only purpose in giving directions to a motorist is to investigate the extent of the driver's insobriety:

> …the principles derived from *Milne* and *Orbanski* would dictate that such evidence may only be used at trial for the limited purpose of establishing reasonable grounds for a breathalyzer demand. To admit the evidence obtained in this manner to prove guilt on a criminal charge would, in my view, amount to an unjustifiable infringement of the motorist's s. 10(b) right to counsel.

[71] In paras. 65-69, the Court specifically rejected the submission of Crown counsel that passive observations made by a police officer, such as those made following a direction to exit the driver's vehicle, to accompany the police officer back to the police vehicle, and to answer questions posed by the police officer, are not evidence compelled to be produced by the police officer and thus are not caught within the "limited use" doctrine, stating in para. 69:

> 69 A helpful way to apply the rationale of these decisions might be for a court first to determine the investigating officer's focus or purpose at the roadside stop. If the evidence establishes that the officer formed the opinion from his or her initial interaction with the motorist, that it was necessary to remove the driver immediately from the road for safety reasons, then the investigator's observations of the driver made thereafter would be available at trial to prove guilt on a subsequent criminal charge: *Chand*. However, if the evidence establishes that the purpose of the investigator's direction to a motorist to exit his vehicle was to determine whether grounds existed to make a breathalyzer demand, then the observational evidence obtained thereafter would not be available to prove the guilt for a criminal offence: *Milne*. This might be a fine distinction but I would suggest an intelligible one.

[72] It is clear on the evidence that from the moment Cpl. Stelter approached Ms. Marshall, his intent was to conduct an investigation in order to determine whether she was impaired. As such, I agree that the admission of having consumed two drinks, the odour of liquor noted in the police vehicle and the glossy eyes also noted while Ms. Marshall was in the police vehicle, are not admissible for the purpose of proving impaired driving.

[73] As per my decision in ***R.*** v. ***Kuhl***, 2018 YKTC 11, evidence of readings in the 230 and 250 mg% range can, in and of itself, constitute evidence of impaired driving. Unlike in the ***Kuhl*** case, however, I do not have before me expert evidence to that effect. In the absence of such evidence in the case before me, I am not prepared to make a finding of impairment on the basis of the breath readings alone.

[74] I further find that there is otherwise insufficient indicia of impairment to conclude that Ms. Marshall's ability to operate a motor vehicle was impaired by the consumption of alcohol. The admissible indicia of impairment is minimal, and the fact that an accident occurred is not, even with this indicia, sufficient to satisfy me beyond a reasonable doubt of this. In this regard I note that Cpl. Stelter testified that, absent the "Fail" reading obtained pursuant to the ASD demand, he did not have grounds to arrest Ms. Marshall for impaired driving. Therefore, Ms. Marshall is acquitted of the s. 255(2) offence.

Over .08 Causing Bodily Harm

[75] In my recent decision in ***Kuhl***, I held that the causation requirement in s. 255(2.1) is only a required element in that the accused must have caused the accident. Causation is not a required element such that the Crown must prove a causative link between the operator of the motor vehicle having a blood alcohol level in excess of 80 mg% and the reason for the accident occurring. In this regard there is a difference from the s. 255(2) offence, where the Crown must prove that the impairment of the driver was a contributing factor to the accident that caused the bodily harm.

[76] As I stated in paras. 56 and 57 in ***Kuhl***:

> 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.

[77] This was the same conclusion reached in ***R. v. Gaulin***, 2017 QCCA 705 in paras. 36-38.

[78] Counsel has provided the case of ***R.*** v. ***Phan***, 2015 ONSC 2088, in which Trotter J. acquits the accused of charges under ss. 255(3) and (3.1), (the only difference from ss. 255(2) and (2.1) being that death resulted instead of bodily harm). Trotter J. states in para. 85:

> Despite the language of s. 255(3.1), the basic principles of causation, as discussed in *Nette* and *Maybin*, are still applicable. The Crown cannot escape the burden of formally proving beyond a reasonable doubt that, being "over 80" (as I have already found), Mr. Phan was a significant contributing (*i.e.*, blameworthy) cause of the accident from which death ensued. For the reasons already stated above in relation to s. 255(3), I reach the same conclusion under s. 255(3.1). In short, the collision occurred *while* Mr. Phan was "over 80", not *because* he was "over 80."

[79] In my opinion, the critical finding was that Mr. Phan did not cause the accident that resulted in death. I do not read the decision as standing for the proposition that a causal link is required between the effect of the over 80 readings and the reason for the accident. In this regard I do not consider ***Phan*** as being in contradiction to ***Koma***.

[80] In this case, Ms. Marshall drove her vehicle into the rear of Ms. Taylor's vehicle while Ms. Taylor was stopping her vehicle at a light that was changing from green to red. I do not find that Ms. Taylor's actions were in any way a contributory cause to the accident. There were also no other factors, such as road conditions, that made the accident unavoidable. Ms. Marshall, for whatever reason and without legal excuse, failed to stop her vehicle and caused the accident in which Ms. Taylor was injured and

suffered bodily harm. As Ms. Marshall's blood alcohol readings were in excess of 80 mg%, she is therefore guilty of the s. 255(2.1) offence as charged.

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COZENS T.C.J.