

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***R. v. Combes***,
2008 BCSC 1818

Date: 20081217
Docket: 54099-2
Registry: Chilliwack

Regina

v.

Jason Arthur Combes

Before: The Honourable Mr. Justice Joyce

Oral Reasons for Judgment

December 17, 2008

Counsel for the Crown:

J. Lester

Counsel for the Accused:

G.K. Gill

Place of Trial:

Chilliwack, B.C.

[1] **THE COURT:** On October 20, 2007, at just past 4:00 a.m., the accused, Jason Combes, was driving a Ford Fusion car northbound on Tyson Road in Chilliwack, British Columbia, when it struck a Mazda car being driven westbound on South Sumas Road by Mr. Dwayne Vardy. The collision occurred in the north half of the intersection of Tyson Road and South Sumas Road.

[2] Mr. Combes and his female passenger fled the scene. Mr. Vardy died at the scene, almost immediately, as a result of the collision.

[3] Mr. Combes, through his counsel, formally admitted pursuant to s. 655 of the **Criminal Code**, R.S.C. 1985, c. C-46, that he was driving the Ford Fusion when it struck Mr. Vardy's Mazda. He also admitted that the Ford Fusion had been stolen from Mr. James McConnell on October 7, 2007, but denied knowing it was stolen.

[4] Mr. Combes is charged with four offences as a result of this incident:

- Count 1: criminal negligence causing death;
- Count 2: failing to stop and give assistance after having been involved in an accident with another motor vehicle;
- Count 3: impaired driving causing death;
- Count 4: possession of stolen property of a value in excess of \$5,000.

[5] I will first provide a review of the evidence beginning with the events leading up to the collision.

The Day of the Collision

[6] In the early morning hours of October 20, 2007, Constable McKinlay of the Chilliwack RCMP was on duty and operating his marked police car in the Sardis area of Chilliwack.

[7] About 3:45 a.m., Constable McKinlay stopped a vehicle because it did not display a rear license plate. He determined that the driver, Mr. Cody Beck, had consumed some alcohol and he administered a roadside breathalyser test which registered a warning. As a result, Mr. Beck was given a 24-hour suspension and his car was impounded and towed. Mr. Beck requested, and was given, a ride to the home of his girlfriend, which was located on the west side of Tyson Road, a few houses to the north of the intersection with South Sumas Road. It was raining lightly at the time, and, of course, it was dark outside.

[8] Constable McKinlay dropped off Mr. Beck at about 4:00 a.m., then proceeded south on Tyson Road. He then heard a dispatch over his police radio concerning a report of a loud bang and someone lying beside a car in the area of Carter Street and Watson Road. Carter Street lies to the west of Tyson Road.

[9] Constable McKinlay testified that he stopped at the four-way stop intersection of Tyson Road and Watson Road intending to turn right. As he did so, he looked to his right and saw a car go through the stop sign at Carter Street and Watson Road and turn left, heading west on Watson Road, in excess of the speed limit.

[10] Constable McKinlay testified that he turned right, activated his emergency lights, and drove west on Watson Road attempting to catch the car he had seen. He said that before he could catch up, the car turned left off of Watson Road and he lost sight of it.

[11] Constable McKinlay testified that when he lost sight of the car, he turned off his emergency lights and reduced his speed to the speed limit, which is 50 kilometres per hour in that area. He proceeded west on Watson Road until he reached Canterbury Street, which is the next street to the west of Carter. There, he saw tracks made by a vehicle that had turned left onto Canterbury Street heading southbound.

[12] Constable McKinlay said he turned left and followed the tracks. After a short distance, the tracks turned left into Lancaster Drive, which is a cul-de-sac. Constable McKinlay turned into the cul-de-sac and stopped. The other vehicle turned around at the end of the cul-de-sac, came towards him and sped by him on the passenger side. It turned left onto Canterbury Street and sped away. As the car passed him, Constable McKinlay could see a male driver and a female passenger.

[13] Constable McKinlay turned his police car around and followed the car. He said he did not re-activate his emergency lights and did not exceed the speed limit. Constable McKinlay lost sight of the car but saw that the tracks turned left at Cumberland Avenue and he followed, heading east towards Tyson Road.

[14] Constable McKinlay next spotted the car when he was at Cambridge Street, which is about 280 metres before Tyson Road. The car had turned left at Tyson Road and was then travelling towards Watson Road.

[15] Constable McKinlay testified he drove north on Tyson Road and came to a stop at the four-way intersection at Tyson Road and Watson Road. He said that he saw the lights of the car he was following approaching the intersection of Tyson Road and South Sumas Road and then saw the collision.

[16] At that point, he turned on his emergency lights and sped towards the scene of the collision. He stopped his police car, got out, and went over to the Mazda car where he saw a man and a woman attending to the driver. The man was Mr. Beck and the woman was Ms. Patricia Clermont, whose house is located where the Mazda ended up after the collision. Constable McKinlay did not see the driver of the Ford Fusion or his passenger, both of whom fled from the scene.

[17] Mr. Beck testified that he had remained outside on Tyson Road after Constable McKinlay dropped him off. He was standing at the east side of the intersection of Tyson Road and Insley Avenue, which is a short distance to the north of South Sumas Road, using his cellular telephone, when he heard what he described as a screech and the sound of a collision. As he turned, he saw two cars sliding in his direction. As he ran towards the cars, once they had come to a rest, he saw a person run from the scene and vault a fence. He believes that person was a man based on the manner in which the person leapt over the fence. Mr. Beck briefly thought about chasing the man but decided to see if anyone had been hurt. He

found Mr. Vardy in the driver's seat of the Mazda and tried to offer assistance. Mr. Beck said a woman appeared and also tried to offer assistance. A police officer then appeared.

[18] Ms. Clermont testified that she was in her house getting ready for work when she heard the collision. She ran outside and saw a girl standing beside the red car. When she asked what happened, the girl ran. Ms. Clermont's evidence was that a police car had already arrived on the scene when she went outside.

[19] Ms. Clermont, who has first aid training, tried to offer assistance to Mr. Vardy. At first she detected a pulse but it had stopped by the time the ambulance arrived. The paramedics were unable to detect any pulse and did not attempt to resuscitate. Mr. Vardy was pronounced dead at the scene, having died as a result of severe head trauma and a broken neck.

[20] There is some discrepancy in the evidence concerning when Constable McKinlay arrived at the scene and, consequently, how far back of the Ford Fusion his police car was while following the Ford Fusion. Constable McKinlay's evidence is consistent with that of Mr. Beck, but not with that of Ms. Clermont as to the time of arrival.

[21] At one point in his recorded statement to the police, Mr. Combes said the police car was right behind him. Later, he agreed he did not know how far back it was.

[22] The only other person who was present at the time of the incident was Ms. Austin, the young woman who was a passenger in the Ford Fusion. However, her recollection of events was extremely poor, whether as a result of not paying attention at the time, poor memory, unwillingness to testify, or some other reason. At one point, even though she said she recalled seeing the grey car moments before the crash, she said it was travelling eastbound on South Sumas Road. Clearly, that was wrong. In my respectful opinion, her evidence is completely unreliable.

[23] It is my view that the precise manner in which Constable McKinlay pursued the car driven by Mr. Combes is not a matter of any consequence to the decision in this case. What matters is the manner in which Mr. Combes drove and whether the requisite *mens rea* has been proven, not what Constable McKinlay may or may not have done from the time he first observed the Ford Fusion until it crashed into Mr. Vardy's car.

[24] I turn next to the expert evidence adduced by the Crown concerning the charge of criminal negligence causing death.

[25] Sergeant McCowan, an expert in collision analysis and reconstruction, was retained to do the following:

1. determine the speed of the Ford Fusion at the point of impact;
2. determine the speed of the Mazda at the point of impact;
3. download and analyse any data from the Ford Fusion's power control module or PCM; and

4. provide a correlation between the calculated speed of the Ford Fusion and the data obtained from the PCM.

[26] Sergeant McCowan attended at the scene of the collision at 5:20 a.m. on October 20, 2007. He made observations of the scene and the vehicles involved in the collision which he recorded in photographs. He took certain measurements from which he prepared a scale drawing of the scene, including the resting locations of the two vehicles. He also made tests to determine the coefficient of friction of the road surface.

[27] Using a computer program, Sergeant McCowan analysed the data he obtained at the scene to determine the speeds of the vehicles at three different times:

- (a) pre-impact - that is the point at which the two vehicles make contact;
- (b) impact - that is the point at which the two vehicles have achieved maximum impact; and
- (c) post-impact - that is the point at which the two vehicles first ceased to be in contact with one another.

[28] Sergeant McCowan provided a written report in which he set out his observations and his opinions.

[29] With regard to his observations of the scene, Sergeant McCowan noted the following:

- (a) Tyson Road is a two-lane street that runs primarily north and southbound and is located primarily within a residential area.
- (b) South Sumas Road is a two-lane street that runs primarily east and westbound and is located primarily within a residential area.
- (c) The intersection of Tyson Road and South Sumas Road is lit by two streetlamps located on the northeast and west quadrants. There are other streetlights before and after the intersection on the north side of South Sumas Road and on the west side of Tyson Road.
- (d) There are four stop signs at the intersection. There are also warning "stop ahead" signs for all four directions. The sign for northbound traffic on Tyson Road is located 106.6 metres south of the stop line.
- (e) The posted speed limit on Tyson Road is 50 kilometres per hour, with the sign posted on the north side of the intersection at Watson Road.
- (f) South Sumas Road is governed by a 50 kilometre per hour sign that is located west of Vedder Road.
- (g) There is a view obstruction at the intersection consisting of a 2.6 metre high hedge located in the southeast quadrant of the intersection that affects traffic heading northbound on Tyson Road and westbound on South Sumas Road.

- (h) Gouge and scrape marks were found at the intersection that Sergeant McCowan concluded were made by the driver's side of the Mazda. Other scrape marks were found to have been caused by the Mazda, and a trail of dirt was found to have come from the Ford Fusion. This physical evidence permitted Sergeant McCowan to determine the path of travel of the two vehicles after the collision.
- (i) The damage to the two vehicles was consistent with the centre of the Ford Fusion colliding perpendicularly with the driver's side of the Mazda in the area of the pillar between the driver's area and the rear passenger area, something commonly known as a "T-bone" collision.

[30] Sergeant McCowan concluded from the scrape marks and debris found on the roadway and the damage to the vehicles that the Mazda was travelling westbound on South Sumas Road when it was struck by the Ford Fusion that was travelling northbound on Tyson Road. He concluded that "the impact occurred in the intersection at a location consistent with the intersecting paths of the northbound and westbound through lanes".

[31] Taking into account the point of impact, the path of travel of the two vehicles before and after impact, the resting positions of the vehicles, the mass of the vehicles, and the coefficient of friction, Sergeant McCowan employed a computer program called "Vista FX" to calculate the following speeds for the two vehicles. For the Ford Fusion, he calculated the pre-impact speed to be 110 kilometres per hour, the impact speed to be 108 kilometres per hour, and the post-impact speed to be 67

kilometres per hour. For the Mazda, he calculated the pre-impact speed to be 38 kilometres per hour, the impact speed to be 32 kilometres per hour, and the post-impact speed to be 58 kilometres per hour.

[32] Having determined these speeds based on the physical evidence at the scene, Sergeant McCowan then considered the data that he downloaded from the power control model of the Ford Fusion. The PCM continuously receives data from a number of different sources on the vehicle. In the event that one of the vehicle's restraint devices -- an airbag or seatbelt pre-tensioner -- is deployed as a result of a collision, the restraint control module sends a signal that causes the PCM to lock the data. In this event, data, recorded in .2 second intervals for a period of time from 20 seconds before impact until five seconds after impact, is locked into the PCM. This data can then be downloaded from the PCM.

[33] The data that is locked in the PCM includes the speed of the vehicle, the extent to which the accelerator pedal is depressed, the amount of engine throttle and whether or not the brake pedal is depressed.

[34] The data that was received from the PCM on the Ford Fusion showed that at zero seconds, which represents the point of disengagement of the two vehicles, the Ford Fusion had a post-impact speed of 41.9 miles per hour or 67 kilometres per hour, which correlates exactly to the post-impact speed determined by Sergeant McCowan from his own analysis.

[35] The PCM data also showed a speed range of 100 to 109 kilometres per hour for the timeframe between .5 and 1.0 seconds prior to impact which is consistent

with the calculated speeds of 108 to 110 kilometres per hour at impact and pre-impact.

[36] I accept the evidence of Sergeant McCowan with respect to the speeds that he calculated. I also accept that the data downloaded from the PCM is accurate and reliable.

[37] The PCM data provides the following additional information:

- (a) in the 20 seconds prior to the collision, the Ford Fusion was travelling at speeds as high as 82.7 miles per hour or 133 kilometres per hour;
- (b) the average speed of the Ford Fusion during the time from approximately 20 seconds prior to collision until approximately 1.5 seconds prior to impact was 79.2 miles per hour or 127 kilometres per hour;
- (c) for a short period, from approximately 6.2 seconds prior to impact until approximately 4.2 seconds prior to impact, the brake switch was engaged but the vehicle did not slow appreciably. The accelerator pedal was then engaged again and remained engaged until approximately 1.4 seconds prior to impact. At that point, the Ford Fusion was travelling at approximately 76.8 miles per hour or 123 kilometres per hour; and

- (d) at the point where the ABS brake system became active at 1.2 seconds prior to impact, the Ford Fusion was travelling at approximately 72.9 miles per hour or 117 kilometres per hour.

[38] Sergeant McCowan testified that the Mazda travelled a distance of 15.6 metres from the stop line on the east side of the intersection until the point of impact. He also testified that the maximum speed the Mazda could have achieved over that distance with 100 percent acceleration was 27 kilometres per hour. The fact that he calculated the pre-impact speed of the Mazda to be 38 kilometres per hour means that the Mazda could not have stopped at the stop line on the east side of the intersection. It is not possible to determine from the evidence whether Mr. Vardy slowed, but did not come to a full stop, or whether he stopped some distance before the stop line.

[39] The Crown also led evidence from Mr. Vander Bulk, an expert with regard to the inspection of motor vehicles and their roadworthiness. Based on his examination of the Ford Fusion, Mr. Vander Bulk was of the opinion that prior to collision it met the standards of the **Motor Vehicle Act**, R.S.B.C. 1996, c. 318 and the Regulations made thereto and was roadworthy.

[40] Mr. Vander Bulk noted that the right front tire of the Ford Fusion had been cut in a manner consistent with the tire coming into contact with the wheel at a place where the wheel had been bent. He concluded this damage was caused by the collision. He also noted that the three tires that were still inflated were somewhat

over-inflated compared to the manufacturer's recommended tire pressure. The tire pressures were as follows:

- the left front tire was 53 psi compared to a recommended pressure of 32 psi;
- the left rear tire was 42 psi compared to the recommended 32 psi;
- the right rear was at 43 psi compared to the recommended 32 psi.

[41] Mr. Vander Bulk testified that he had no concerns about the roadworthiness of the vehicle because of the over-inflation, and that the vehicle would operate reasonably well under normal circumstances.

[42] In cross-examination, he conceded that over-inflation of the tires could have an impact on performance if they were pushed to their limits such as by sudden swerving or sudden braking.

[43] With regard to braking, he stated that over-inflated tires would have less contact with the road surface than tires that were inflated to the recommended pressure. He did not quantify the extent to which over-inflation might affect stopping distances.

[44] I turn next to the evidence with respect to presence of alcohol as it relates to count 3 on the Indictment.

[45] The only evidence led by the Crown with respect to the presence of alcohol at the time of this incident was the testimony of Ms. Mason, who was a close friend of Mr. Combes' mother and who treated Mr. Combes like a nephew. Ms. Mason

testified that on the morning of October 20, 2007, at about 4:00 a.m., Mr. Combes came to her home and stayed for a brief time. I am satisfied this was prior to the accident. Ms. Mason said she could detect the smell of alcohol on Mr. Combes and that he told her he had had a couple of beers.

[46] In cross-examination, Ms. Mason said that Mr. Combes' speech was louder than normal and his words were a little slurred which she described as meaning "running into each other". She agreed that she smelled "just a little alcohol". She also testified that Mr. Combes was not unsteady on his feet and did not appear impaired or intoxicated; just excited.

[47] Finally, I will review the evidence relating to Mr. Combes' knowledge that the car was stolen.

[48] Mr. McConnell's residence was broken into on October 2, 2007 and the keys to his Ford Fusion were stolen, but there is no direct evidence linking Mr. Combes to the theft. The evidence relied on by the Crown to establish Mr. Combes' knowledge that the Ford Fusion was stolen consists of his statements to the police during the recorded interviews.

[49] I will read parts of those interviews including the exculpatory parts that relate to this issue. I will refer to the police officer conducting the interview as "A.M." and to Mr. Combes as "J.C."

A.M. You were driving a stolen vehicle. You knew the vehicle was stolen.

J.C. The vehicle – the vehicle was boughten (sic) with cocaine.

A.M. Okay.

J.C. Okay. I thought buddy -- buddy is from Manitoba -- selling his car 'cause he had a crack habit, okay?

A.M. Well let me ask you something, if it wasn't stolen, why did you take off like you did?

J.C. Because I am not allowed to be behind a motor -- motor vehicle.

A.M. So you took off.

J.C. I'm not allowed -- I'm not --

A.M. Because you were not allowed to drive?

J.C. I'm not allowed to drive a vehicle.

A.M. It's 'cause the vehicle was stolen.

J.C. I just -- just -- no.

A.M. Yes.

J.C. Because it was a -- a motor vehicle I'm not allowed behind any motor vehicle.

[Transcript, Ex. 12, pp. 61-62]

J.C. And all I want to do is live my life right and I'm -- I'm trying to -- you know, I didn't want to drive a car. I was just driving my stuff that was in the back of the car to where I was going to be staying and I was going to park the car and just told you guys or just let you guys find it.

[Transcript, Ex. 12, p. 65]

A.M. Okay. Let me ask you another thing -- Little John -- you know who Little John is.

J.C. Yeah, why?

A.M. He's the one that gave you the car?

J.C. Yeah, why?

A.M. When did he give it to you?

J.C. He said -- he said it was his father's and he sold it to me just the other day.

[Transcript, Ex. 12, p. 76]

A.M. Who is this? (pointing at a photograph)

J.C. That's not the guy who sold me the car.

[Transcript, Ex. 12, p. 77]

A.M. So Jason, I went and talked with uh, uh, the guys that uh have dealt with this guy here and --

J.C. He's not the guy who gave me the car though -- like --

A.M. Okay, but this is Mikey.

J.C. Yeah, that's -- that's not the guy who gave me the car.

[Transcript, Ex. 12, p. 78]

A.M. A guy named Mike Anderson gave you the car Friday night on the Landing Reserve.

J.C. He lent me the car. I'm supposed to be -- I was supposed to bring it back.

A.M. Okay.

J.C. Like he lent me the car to go --

A.M. But it's a stolen car.

J.C. -- pick up my stuff at Jackie's house.

[Transcript, Ex. 12, p. 80]

A.M. Okay, let me ask you this. You're driving the vehicle and you're not licensed to drive, right?

J.C. Yeah.

A.M. If the police pulled you over and you just came to a stop, what would have happened to you?

- J.C. I probably would have got some fines.
- A.M. Some fines. But yet it's a stolen car so instead -- I don't want to get caught in a stolen car again -- you take off.
- J.C. Scared too.
- A.M. So you took off because it was a stolen car not because you didn't care about some lousy fines.
- J.C. No, because I'd be breached for driving any type of motor vehicle and I -- I just got released on a promise to appear for possession and I wasn't scared that it was stolen, I was scared that I was going to get breached and put in jail.

[Transcript, Ex. 12, p. 81]

[50] With that review of the evidence, I turn then to an analysis of the various counts and I will deal with them in the order in which they appear on the Indictment.

Count 1: Criminal Negligence Causing Death

[51] Under s. 220 of the **Criminal Code**: “[e]very person who by criminal negligence causes death to another person is guilty of an indictable offence.”

[52] Criminal negligence is defined by s. 219 of the **Criminal Code** in these words:

- 219. (1) Every one is criminally negligent who
 - (a) in doing anything, or
 - (b) in omitting to do anything that it is his duty to do,shows wanton or reckless disregard for the lives or safety of other persons.

[53] The *actus reus* or the physical element of the offence of criminal negligence causing death is established if it is proven beyond a reasonable doubt that the accused's acts caused the death of a person, and that those acts constitute a marked and substantial departure from the standards of a reasonable person in all of the circumstances (see **R. v. Bahlru**, 2002 BCSC 1852, 40 M.V.R. (4th) 120, aff'd 2003 BCCA 644, 44 M.V.R. (4th) 13, and **R. v. J.L.** (2006), 206 O.A.C. 205, 204 C.C.C. (3d) 324 (C.A.)).

[54] With regard to causation, the accused's actions need not be the sole or a substantial cause of death. It is sufficient if it was a contributing cause of death provided it was more than an insignificant or trivial contributing cause (see **R. v. Pinske** (1988), 30 B.C.L.R. (2d) 114, 6 M.V.R. (2d) 19 (C.A.), aff'd [1989] 2 S.C.R. 979, 40 B.C.L.R. (2d) 151).

[55] If causation is established, contributory negligence on the part of the victim will not excuse the accused's conduct (see **R. v. Menezes** (2002), 50 C.R. (5th) 343, 23 M.V.R. (4th) 185 (Ont. S.C.J.) and **R. v. J.L.**, *supra*).

[56] The *mens rea* for criminal negligence requires proof that the accused showed wanton or reckless disregard for the lives or safety of other persons. Wanton has been defined as "ungoverned, undisciplined, or recklessly disregarding other persons' rights". Reckless has a similar meaning and has been defined as "heedless of consequences, headlong, irresponsible" (see **R. v. Sharp** (1984), 12 C.C.C. (3d) 428, 26 M.V.R. 270 (Ont. C.A.)).

[57] Much has been written concerning how the *mens rea* for criminal negligence is to be determined, whether by a subjective, objective or so-called modified objective test.

[58] In **R. v. Tutton**, [1989] 1 S.C.R. 1392, 48 C.C.C. (3d) 129 (**Tutton**), in the Supreme Court of Canada, Chief Justice Dickson, writing for himself and Justices Wilson and LaForest, expressed the opinion at para. 14 that:

[14] In short, the phrase "wanton or reckless disregard for the lives or safety of other persons" signifies more than gross negligence in the objective sense. It requires some degree of awareness or advertence to the threat to the lives or safety of others or alternatively a wilful blindness to that threat which is culpable in light of the gravity of the risk that is prohibited.

[59] Justices McIntyre and L'Heureux-Dubé were of the opinion that an objective test was to be employed. At para. 43, Mr. Justice McIntyre said:

[43] ... what is sought to be restrained by punishment under s. 202 of the Code is conduct, and its results. What is punished, in other words, is not the state of mind but the consequence of mindless action.

And further:

In my view then, an objective standard must be applied in determining this question because of the difference between the ordinary criminal offence, which requires proof of a subjective state of mind, and that of criminal negligence. In criminal cases, generally, the act coupled with the mental state or intent is punished. In criminal negligence, the act which exhibits the requisite degree of negligence is punished.

[60] Mr. Justice McIntyre stated, however, that in applying the objective test the surrounding circumstances must be considered.

[61] Mr. Justice Lamer agreed with Mr. Justice McIntyre subject to a qualification.

He stated at para. 49:

[49] I have read the reasons of my colleague, Justice McIntyre, and I am in agreement with them, subject to the following remarks. I am of the view that, when applying the objective norm set out by Parliament in s. 202 of the **Criminal Code** ... must be made (sic) "a generous allowance" for factors which are particular to the accused, such as youth, mental development, education When this is done, as we are considering conduct which is likely to cause death, that is high risk conduct, the adoption of a subjective or of an objective test will, in practice, nearly if not always produce the same result

[62] In **R. v. Waite**, [1989] 1 S.C.R. 1436, 48 C.C.C. (3d) 1, released at the same time as **Tutton**, the court split along the same line.

[63] In **R. v. Anderson**, [1990] 1 S.C.R. 265, 53 C.C.C. (3d) 481 (**Anderson**), the Supreme Court declined to pronounce definitively on the issue. Mr. Justice Sopinka reviewed the two lines of authority, the one suggesting a subjective test and the other an objective test and at para. 13 he said this:

[13] In both the objective and subjective approaches, the court is determining foreseeability of consequences. In a civil negligence case concerned with adjustment of losses, the connection between conduct and consequences is often quite tenuous. The mythical reasonable man has been equipped with a great deal of clairvoyance in order to compensate the innocent victim. Often the defendant will not, in fact, have foreseen the consequences of his negligent acts for which he is held accountable on an objective basis. In a criminal case the connection must be more substantial. To establish recklessness, the consequences must be more obvious. That is the rationale for the requirement of a marked departure from the norm. The greater the risk created, the easier it is to conclude that a reasonably prudent person would have foreseen the consequences. Equally, it is easier to conclude that the accused must have foreseen the consequences. It is apparent, therefore, that as the risk of harm increases, the significance of the distinction between the objective and subjective approaches decreases. The ultimate in this process of reasoning is reached when the risk is so high that the consequences are the natural result of the conduct creating the risk. The conduct in such circumstances can be characterized as intentional.

[64] In **Anderson** it did not matter which test was applied because the trial judge had found as a fact that the conduct of the accused in that case was not a marked departure from the norm and therefore, whichever test was applied, in neither case could guilt be found.

[65] In **R. v. Creighton**, [1993] 3 S.C.R. 3, 83 C.C.C. (3d) 346, more recently, the Supreme Court of Canada dealt with an analogous issue, the *mens rea* for unlawful act manslaughter. Chief Justice Lamer, along with Justices Sopinka, Iacobucci and Major favour the modified objective test in which the court would take into account human frailties that “encompass personal characteristics habitually affecting an accused’s awareness of the circumstances which create risk”.

[66] Madam Justice McLachlin, along with Justices L’Heureux-Dubé, Gonthier and Cory adopted a purely objective test. At page 58, Madam Justice McLachlin said:

I respectfully differ from the Chief Justice on the nature of the objective test used to determine the *mens rea* for crimes of negligence. In my view, the approach advocated by the Chief Justice personalizes the objective test to the point where it devolves into a subjective test, thus eroding the minimum standard of care which Parliament has laid down by the enactment of offences of manslaughter and penal negligence.

[67] At pages 70-71, Madam Justice McLachlin said this:

Mental disabilities short of incapacity generally do not suffice to negative criminal liability for criminal negligence. ... Provided the capacity to appreciate the risk is present, lack of education and psychological predispositions serve as no excuse for criminal conduct, although they may be important factors to consider in sentencing.

[68] Further, at page 71:

This is not to say that the question of guilt is determined in a factual vacuum. While the legal duty of the accused is not particularized by his or her personal characteristics short of incapacity, it is particularized in application by the nature of the activity and the circumstances surrounding the accused's failure to take the requisite care.

[69] Mr. Justice LaForest considered the opinions of Justice McLachlin were more persuasive than those of Chief Justice Lamer, although he would have preferred that a subjective test apply.

[70] I come to our own Court of Appeal in **R. v. Ubhi** (1994), 1 M.V.R. (3d) 161, 40 B.C.A.C. 248, leave to appeal ref'd (1994), 5 M.V.R. (3d) 249 (note), 55 B.C.A.C. 80 (note), in which the court appears to have adopted the purely objective approach. At paras. 2 and 3 of that decision, Madam Justice Rowles, speaking for the court, said:

[2] Shortly before this appeal was to be argued, the judgments of the Supreme Court of Canada in **R. v. Creighton**, [1993] 3 S.C.R. 3, **R. v. Gosset**, [1993] 3 S.C.R. 76, **R. v. Finlay**, [1993] 3 S.C.R. 103, and **R. v. Naglik**, [1993] 3 S.C.R. 122, were handed down. In **Creighton**, the majority expressed the opinion that objective *mens rea* is the fault standard for criminal negligence, and that individual characteristics of an accused, short of incapacity to perceive or assess the risk of danger to the lives or safety of others, are irrelevant to the determination.

[3] As a result of those judgments the ground of appeal asserting error in the charge was not pursued in argument and there is no need to make further reference to it.

[71] Thus, at least in this Province, the applicable test appears to be that set out by the majority in **Creighton**, an objective standard.

[72] I now turn to the application of the law to the facts of this case.

[73] I am satisfied beyond a reasonable doubt that the manner of driving exhibited by Mr. Combes on the morning of October 20, 2007, was a marked and substantial departure from the standards of a reasonable person in the same circumstances.

[74] Mr. Combes drove on wet residential streets at speeds well in excess of the speed limit in an attempt to evade Constable McKinlay who was following. At one point, he passed Constable McKinlay's vehicle at a high rate of speed on the wrong side before speeding off.

[75] For at least 20 seconds prior to colliding with Mr. Vardy's car, Mr. Combes sped along Tyson Road toward South Sumas Road, a residential area with a posted speed limit of 50 kilometres per hour, at an average speed of 127 kilometres per hour and at speeds as high as 133 kilometres per hour. That means that he was travelling on Tyson Road at approximately 127 kilometres per hour for at least 705 metres before the intersection at South Sumas Road.

[76] The distance from South Sumas Road to the prior intersection of Watson Road, which is also a four-way stop, is approximately 670 metres, according to the map entered as Exhibit 7. This means that Mr. Combes also sped through the intersection at Watson Road at a very high speed without stopping. Mr. Combes sped through the stop sign at South Sumas Road at a speed of at least 110 kilometres per hour.

[77] Based on the expert evidence, I am satisfied that Mr. Combes did not swerve, nor did he make any significant effort to brake until approximately 1.4 seconds prior to impact by which time there was no way he could have avoided the collision.

[78] While Ms. Gill did not contest that Mr. Combes' driving constituted a marked departure from that of a reasonable driver in the circumstances, she challenged causation, suggesting that the over-inflated tires of the Ford Fusion may have prevented Mr. Combes from stopping or swerving to avoid the other car.

[79] Considering the speed at which Mr. Combes was travelling and his failure to brake until a second or two before impact, I am satisfied that over-inflation of the tires had no impact on causation.

[80] Likewise, it makes no difference if Mr. Vardy failed to come to a complete stop at the stop line or stop before the stop line. He had entered the intersection and was near the middle of it when the car being driven by Mr. Combes flew through the stop sign and T-boned his vehicle. Even if Mr. Vardy was contributorily negligent, that provides no excuse or defence to Mr. Combes.

[81] I am further satisfied beyond a reasonable doubt that the manner of driving exhibited by Mr. Combes shows wanton and reckless disregard for the lives or safety of other persons.

[82] A reasonable driver in these circumstances would have appreciated that driving through a residential area on wet roads at speeds of 127 kilometres per hour for sustained distances and failing to stop at controlled intersections would create a significant risk of harm to other persons who might be on the streets.

[83] In my view, Mr. Combes' conduct has to be seen as reckless and wanton even though it was 4:00 a.m. and no other vehicles were encountered prior to the accident, other than that driven by Constable McKinlay.

[84] Mr. Combes was not driving on a country road in the middle of the night where one might expect there would be no other traffic. In this day and age, a reasonably prudent driver will appreciate that there may well be motorists on the streets at all hours of the day and night. It can reasonably be expected that persons who work night shift or who start their work day very early may be driving to or from work. Delivery vehicles often operate throughout the night.

[85] There is an additional factor that, in my view, goes to the issue of *mens rea* in this case. Ms. Austin was, as I have noted earlier, a passenger in the vehicle driven by Mr. Combes. As related by Mr. Combes in the course of the police interview, Ms. Austin wanted him to stop the car so she could get out, but Mr. Combes declined to do so. I refer to the following passage from the interview:

J.C. She wanted to walk and she didn't want to be there at all. She was asking me to let her out.

A.M. Okay.

J.C. And I was so scared -- I'm like "We're in a car chase right now. Cops are chasing us and you want me to pull over?"

A.M. Okay.

J.C. And she totally didn't want to be there.

[86] Mr. Combes realized that Ms. Austin was afraid for her own safety and wanted out yet he continued to drive recklessly, disregarding her concerns.

[87] I am satisfied beyond a reasonable doubt the Crown has proven the offence of criminal negligence causing death.

Count 2: Failing to Remain at the Scene

[88] With respect to count 2, failing to remain at the scene, that offence is defined in s. 252(1)(b) of the **Criminal Code**, the relevant provisions of which are as follows:

252. (1) Every person commits an offence who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with ...

(b) a vehicle, vessel or aircraft, ...

and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, if possible, the aircraft, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

[89] There is a presumption of intent provided by s. 252(2) which reads as follows:

(2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle, vessel or, where possible, his aircraft, as the case may be, 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.

[90] The physical element of the offence is established if it is proven that the accused was driving a motor vehicle that was involved in an accident with another motor vehicle and failed to perform any of the duties set out in subsection (1), that is, fails to stop, fails to give his name, or where any person has been injured, fails to offer assistance. If any of those are proven, the law presumes that the accused intended to escape liability unless there is evidence to the contrary.

[91] Mr. Combes admitted he was driving the car; that he was involved in an accident is obvious. It is obvious that he failed to give his name. In my view, it is also obvious that he failed to offer assistance when it was clear from the horrendous nature of the collision that assistance was called for.

[92] With respect to the mental element, Ms. Gill suggests that Mr. Combes has provided evidence to the contrary through his statement when he said he ran because he was scared. I have no doubt he was scared. He was scared of being caught by the police whom he knew were close behind him and that is why he ran: to escape criminal liability.

[93] Mr. Combes' statement was most telling as to his intentions when he spoke of his passenger. He said he was knocked out and when he awoke he asked if she was all right and then he told her to run.

[94] I am satisfied beyond a reasonable doubt that Mr. Combes is guilty on count 2.

Count 3: Impaired Driving Causing Death

[95] With respect to count 3, impaired driving causing death, Mr. Lester for the Crown concedes that the evidence with respect to the presence of alcohol falls well short of proving this offence and invites the court to acquit Mr. Combes of this count which I do.

Count 4: Possession of Stolen Property

[96] Finally, I will deal with possession of stolen property. Mr. Combes admits the car he was driving was stolen but, in order to prove this charge, the Crown must prove beyond a reasonable doubt that Mr. Combes knew, at the time he drove it, that it was stolen. Mr. Lester submits that the statements made by Mr. Combes during the interview established knowledge on his part. Alternatively, he relies on the doctrine of wilful blindness.

[97] During the course of the police interview, Mr. Combes said at various times that he bought, that is, traded the car for cocaine; that a person by the name of “Little John” said it was his father's car and sold it to him; and that a person by the name of “Mike Anderson” lent him the car. Mr. Combes denied on every occasion that he knew the car was stolen.

[98] I am not satisfied what Mr. Combes told the police can be relied upon. With the exception of: (a) his eventual admission that he was driving the car; (b) that Ms. Austin wanted out; (c) that immediately after the collision he told Ms. Austin to run; and (d) that he ran because he was scared. On the other hand, he did not admit knowledge and the fact that he told a variety of stories about how he came into possession of the vehicle is insufficient, in my view, to prove this element of the offence. He probably knew it was stolen, but probability is not enough to convict.

[99] With regard to wilful blindness, the doctrine was summarized in *R. v. Elless*, 2007 BCSC 737 (*Elless*), in these terms:

[130] There was no dispute with respect to the legal principle governing wilful blindness. As was set out in **R. v. Sansregret**, [1985] 1 S.C.R. 570, it is limited in scope and the test is subjective. In particular, as Mr. Justice McIntyre held at para. 22:

Wilful blindness is distinct from recklessness because while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibitive result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant.

[100] Further, at para. 131 of **Elless**:

[131] The test is not whether the Accused “should” have known or should “normally” have known from the suspicious circumstances but whether the circumstances were such that she/he was in fact suspicious but deliberately refrained from making inquiries so that she/he could remain in ignorance of the truth.

[101] In my view, the inconsistent statements by Mr. Combes made to the police are not sufficient to establish wilful blindness. I cannot be satisfied that Mr. Combes had in fact become aware of the need for some inquiry and declined to make the inquiry because he did not wish to know the truth. To put it in a slightly different way, I cannot be satisfied that the circumstances were such that Mr. Combes was in fact suspicious but deliberately refrained from making inquiries so that he could remain in ignorance of the truth. I must therefore acquit Mr. Combes on count 4.

[102] Therefore, I convict Mr. Combes on counts 1 and 2 in the Indictment and acquit him on counts 3 and 4.

B.M. Joyce J.