**IN THE PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** R. v. Brogan, 2008 NSPC 42

**Date:** July 21, 2008
**Docket:** 1703209 and 1703210
**Registry:** Sydney

Her Majesty the Queen

v.

Patrick Brogan

# DECISION

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| **Judge:** | The Honourable Judge Anne S. Derrick |
| **Heard:** | June 2, 3, 4 and 5, 2008 |
| **Decision:** | July 21, 2008 |
| **Charges:** | *Criminal Code* sections 255(3) and 220(b) |
| **Counsel:** | Darcy MacPherson and Shane Russell for the Crown<br>Derrick Kimball and Nash Brogan for the Defence |

**By the Court**:

## Introduction

[1] On September 27, 2006 Joshua Penny was hit by a car driven by Patrick Brogan, and critically injured. He died of his injuries nine days later on October 6. He was six years old. Mr. Brogan has conceded that Joshua's death was caused by the collision with his car.

[2] There is no way to describe Joshua's death other than as a heart-breaking tragedy. Such a loss must seem almost unbearable to the Penny family. No matter what happens in these criminal proceedings, Joshua Penny's family will never be the same again. Joshua's death will have affected, not just his family, but the entire community.

[3] The role of the criminal justice process is to determine if criminal fault should be assigned to Mr. Brogan for Joshua's death. When Joshua died, Mr. Brogan was charged with criminal negligence causing death and impaired driving causing death. Mr. Brogan was also charged with having had, at the time of the collision with Joshua on September 27, 2006, a blood alcohol concentration (BAC) over the legal limit of .08. At the start of his trial on June 2, 2008, Mr. Brogan pleaded guilty to that charge.

[4] In addition to the offence of driving with a BAC over the legal limit, the Crown has submitted that Mr. Brogan should be convicted of: criminal negligence causing

death, or the included offence of dangerous driving causing death, impaired driving causing death or impaired driving.

[5] It must be remembered that Mr. Brogan is presumed innocent until proven guilty beyond a reasonable doubt. The burden of proof lies on the Crown and never shifts to Mr. Brogan. The fact that Mr. Brogan drove into Joshua and killed him, a fact which is not in dispute, does not settle the question of whether Mr. Brogan is criminally responsible for the accident. A great deal has to be considered before that question can be answered. I have to determine first what facts I accept as having been proven beyond a reasonable doubt and then I must apply the law to those facts. If I am not satisfied that the Crown has proven Mr. Brogan's guilt beyond a reasonable doubt, I must acquit him of any of the charges for which proof has not been made out. If a reasonable doubt is raised by the evidence at trial, then Mr. Brogan is entitled, as a matter of law, to that doubt, and an acquittal.

[6] For Mr. Brogan to be convicted, I have to be satisfied beyond a reasonable doubt that his driving qualified as criminally negligent or dangerous as these offences are defined in law. In arriving at my decision, one of the issues I have had to consider is whether Mr. Brogan was impaired by alcohol at the time of the accident. However, even a finding of impairment does not determine that an accused driver who is involved in a fatal accident is guilty of criminal negligence, dangerous driving or even impaired driving causing death. It is necessary to also determine if the impairment caused the accident. A failure by the Crown to prove beyond a reasonable doubt that the accident would not have occurred but for the driver's impairment entitles the accused driver to an acquittal. *(R. v. Ferguson, [1965] 1 C.C.C. 123 (Sask.C.A.))*

**Applicable Legal Principles**

*Criminal Negligence*

[7] Criminal negligence amounts to a wanton or reckless disregard for the lives and safety of others. *(section 219(1), Criminal Code)* This is a higher degree of moral blameworthiness than dangerous driving. *(Anderson v. The Queen (1990), 53 C.C.C. (3d) 481 (S.C.C.))* It is a marked and substantial departure in all the circumstances from the standard of care of a reasonable person. *(R. v. Waite, [1989] S.C.J. No. 61)* The mental element (*mens rea*) for criminal negligence is objective foreseeability of the risk of bodily harm that is neither trivial nor transitory. (*R. v. Creighton, [1993] S.C.J. No. 91; Waite, supra*) Although a trial judge must take alcohol consumption into account as one of the circumstances from which wanton or reckless driving can be inferred, there is no presumption of law that impaired driving coupled with the creation of risk always constitutes criminal negligence. (*Anderson, supra, at paragraph 8*)

*Dangerous Driving*

[8] Dangerous driving is an included offence under criminal negligence. It involves the operation of a motor vehicle dangerous to the public having regard to all the circumstances, including the nature, condition and use of the place where the driving occurred and the amount of traffic present at the time or that might reasonably be expected to be there. Dangerous driving is established by proof beyond a reasonable

doubt of a marked departure from the standard of conduct of a reasonably prudent driver in all the circumstances. *(R. v. Hundal (1993), 79 C.C.C. (3d) 97 (S.C.C.); R. v. Beatty, [2008] S.C.J. No. 5 at paragraph 5)* There must be danger to the public actually present or which might reasonably be expected in the vicinity when the driving occurred. *(Regina v. Mueller, [1975] O.J. No. 1190 (Ont. C.A.))* The issue is whether, viewed objectively, the accused exercised the appropriate standard of care. *(R. v. Hundal, supra)* It is open to the accused to raise a reasonable doubt that a reasonable person would have been aware of the risks associated with the accused's conduct. *(Hundal, supra, at page 8 (Q.L.))* To secure a conviction for dangerous driving, the Crown must establish beyond a reasonable doubt that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused. *(Beatty, supra, at paragraph 43)* This application of the objective test in the context of the events surrounding the incident creates a modified objective test for dangerous driving.

[9] Driving while impaired does not automatically constitute dangerous driving. It must still be proven beyond a reasonable doubt that the manner of driving was a marked departure from the norm. *(Cabral, supra, at paragraph 14)*

*Impaired Driving*

[10] To prove impaired driving causing death, the Crown has to show, beyond a reasonable doubt, that Mr. Brogan's ability to operate his car was impaired by alcohol and that his impairment caused the accident that killed Joshua. An impaired driver who is involved in a fatal accident is not automatically guilty of impaired driving

causing death. The Crown must prove that the impairment was a significant, contributing cause of the accident. "Some fault on the part of the driver must be found, aside from the fact of impairment alone." *(Cabral, supra, at paragraph 13)*

*Causation*

[11] Subject to what I have just said, while courts have held that impairment alone could ground a conviction for criminal negligence, dangerous driving or impaired driving causing death, *(see, for example, R. v. Colby, [1989] A.J. No. 1041 (Alta. C.A.); R. v. Anderson, [1990] S.C.J. No. 14 at paragraph 18)*, criminal responsibility is not established unless it is proven beyond a reasonable doubt that the impairment was a significant, contributing cause of the death. *(R. v. Nette, [2001] S.C.J. No. 75; R. v. Fisher, [1992] B.C.J. No. 721 (B.C.C.A.))* Absent other explanations for an accident, causation can be established from evidence that includes the circumstances of the accident itself. *(R. v. Rhyason, [2006] A.J. No. 1498 at paragraphs 39 - 40 (Alta. C.A.))*

[12] Where a reasonable doubt is raised that a driver's impairment was the significant, contributing cause of the fatal accident, the result will be an acquittal. *(see, for example: R. v. Cabral, [2001] M.J. No. 38 (Man. C.A.); R. v. Anderson, [1990] S.C.J. No. 14; R. v. Ewart, [1989] A.J. No. 1036 (Alta.C.A.); R. v. Isaak, [1988] Y.J. 113 (Y.T.C.); R. v. Petznick, [1987] O.J. 2474 (Ont. Dist. Ct.))*

*Reasonable Doubt*

[13] To secure a conviction in a criminal case, the Crown bears the burden of proving the charge against the accused beyond a reasonable doubt. This burden of proof never shifts to the accused. The standard of proof beyond a reasonable doubt is tightly bound to the presumption of innocence. It is based on reason and common sense, not on sympathy or prejudice. It is logically connected to the evidence or the absence of evidence. It requires more than proof that the accused is probably guilty, although it is not proof beyond any doubt nor is it an imaginary or frivolous doubt. Reasonable doubt falls much closer to absolute certainty, although absolute certainty is not required, than it does to proof on a balance of probabilities. *(R. v. Lifchus, [1997] S.C.J. No. 77; R. v. Starr, [2000] S.C.J. No. 40: see also, R. v. Vanmerrebach, [2008] N.S.J. No. 4 at paragraphs 10 - 13 (N.S.S.C.))*

**General Summary of Trial Evidence**

[14] There were eighteen witnesses called at Mr. Brogan's trial. Twelve of the witnesses were civilian witnesses, including two paramedics. Four police officers testified and two experts, a forensic toxicologist and a pharmacologist. The only witness called by Defence was the pharmacologist. Mr. Brogan did not testify. He is not required to. Mr. Brogan did make statements at the scene and to police and I will discuss those further in my more detailed review of the evidence.

[15] No one actually saw Mr. Brogan's car hit Joshua. There is no dispute that Mr. Brogan did hit Joshua with his car and that the injuries inflicted were the cause of Joshua's death. The following description of the incident appears to be accepted by both the Crown and Defence.

[16] On September 27, 2006, at approximately 7:30 p.m., Mr. Brogan was driving his 1993 Lincoln north on Main Street in Florence, (also known as Little Pond Road) having just come from buying lottery tickets in Sydney Mines. Dusk was gathering. It was a dry, clear evening and people were outside, including children who were gathered at the intersection of School Street and Main. Joshua, his brother, Mikey, and a friend, Tristan Luker, were riding bicycles south on Main Street, in the direction of the approaching Brogan vehicle. Joshua was riding Mikey's bicycle, a black BMX with no rear brakes. He was on the road, between the sidewalk and the white line at the edge of the road. Mikey and Tristan were on the sidewalk, Mikey slightly ahead, Tristan with his back wheel parallel to Joshua's front wheel.

[17] A number of witnesses heard a scream. Joshua was seen to be lying in the road. Mr. Brogan got out of his car and picked Joshua up, carrying him over to the grass by the sidewalk. Joshua was critically injured. Mr. Brogan was upset and tried to administer CPR to Joshua. Some witnesses at the scene smelled alcohol on Mr. Brogan's breath. When the police came he was cooperative. He spoke to two police officers at the scene, Csts. Shane Baker and David Melski. Cst. Melski formed the belief that Mr. Brogan was impaired based on the smell of alcohol on his breath and his unsteadiness when walking. He charged him with impaired driving and made a breathalyzer demand. Mr. Brogan was Chartered and cautioned.

[18] An ambulance removed Joshua from the scene. Mr. Brogan was taken to Central Division to have the breathalyzer testing done. He produced two breath samples each showing a blood alcohol concentration (BAC) of 130 mgs.%. Mr. Brogan told police on two separate occasions that he had been drinking prior to the

collision with Joshua. Cst. Baker asked him at North Division if he had been drinking and Mr. Brogan said he had 2 - 3 beers. He subsequently told Cst. Melski that he had 4 - 5 beers, 5 at the most.

[19] The Crown commissioned a report from an expert engineer, Allison D. Tupper, (Exhibit #2). Mr. Tupper came to the conclusion that the collision between Mr. Brogan's car and Joshua Penny was "an unavoidable accident." Mr. Tupper concluded that Joshua's bicycle had suddenly veered westerly, away from the sidewalk, into the northbound lane on Main Street and then corrected easterly, back toward the sidewalk, in front of Mr. Brogan' s car. It was Mr. Tupper's opinion that the movements of the bicycle occurred in as little as one second before impact and that, "Under such circumstances, an average alert driver would not have had enough time even to start an avoidance measure." (Tupper Report, page 28)

**Detailed Review of Trial Evidence**

*Describing Main Street*

[20] I am now going to lay out the trial evidence in more detail, starting with a description of Main Street and the location of various relevant addresses and other landmarks. These can be seen in various Exhibits, including Exhibit #4, the Booklet of Photographs; Exhibit #2, the Tupper Report containing Fig. 2, a diagram of the street; and Exhibit #20, a large map of the accident scene and Main Street.

[21] Main Street in Florence has a double yellow centre line. The speed limit is 50 kilometers per hour. A driver coming from Sydney Mines and travelling north on Main Street toward Little Pond would first cross School Street and pass by the home of April Johnson at 537 Main Street. Ms. Johnson ’s home was on the west side of Main Street, the driver’s left. There is a street light just to the north of School Street. It is on the west side of Main Street, which is the northbound driver’s right hand side. On September 27, 2006 a group of children were gathered at the juncture of School Street and Main, on the other side of School Street from the street light.

[22] All the remaining houses that are relevant in some way to this trial are located on the east side of Main Street, going north, away from School Street. Darren LeBlanc’s house was at 558 Main Street. Patricia MacLeod lived at 566 Main Street. There was a street light on the same side of Main Street as her home, just below it. Next to Ms. MacLeod’s residence is the MacKeigan property at 574 Main Street, which has a paved, horseshoe-shaped driveway. Another street light stands just north of the second leg of the MacKeigan driveway. I am going to call this the MacKeigan street light. A very short distance from the MacKeigan street light, on the MacKeigan property, is a brown wooden garbage box located just by the northern-most leg of the MacKeigan’s driveway. The residence next to the MacKeigan property, going north, and on the same side of Main Street, was home to Shannon Meehan and her daughter, Alyssa Carter. The Meehan residence, at 584 Main Street, had a crushed rock driveway. Continuing north on Main Street are three more light standards on the east side of the street before the Parks residence at 610 Main Street, also on the east side of the street. The photographs in Appendix "A" of the Tupper Report show that there

are a number of utility poles along Main Street, but only what I am referring to as street lights have lighting on them.

[23] Further north on Main Street, beyond the Parks residence, was where Mr. Brogan lived on September 27, 2006. Mr. Brogan was familiar to a number of the witnesses, who knew him to speak to him, or as a friend of the family or by sight in the community.

[24] As I will describe further, in relation to the accident, the significant area of Main Street was the MacKeigan property at 574 Main and the Meehan property at 584 Main. All the accident debris, including the parts of Joshua Penny's broken bicycle, was found in the area, proceeding in a northerly direction, from just before the most northerly leg of the MacKeigan driveway to just short of the driveway to a property at 592 Main Street. When paramedics and the lead investigator, Cst. Sheldon O'Donnell, arrived at the scene, Joshua was lying on the grass by the Meehan driveway.

*Joshua, Mikey and Tristan*

[25] On September 27, 2006, Tristan Luker, who was 8 years old at the time, was riding his bike with Joshua and Mikey Penny. Each of the boys had a bike: Mikey was riding Joshua's small yellow bicycle and Joshua was riding Mikey's black "stunt" BMX. None of the boys was wearing a helmet. After a visit to the skatepark, they went over to the Parks' home at 610 Main Street for Zachary Parks. Zachary was in bed already, so they left. Going down the Parks' driveway, the boys turned south on

Main Street toward School Street. Mikey was ahead. Tristan and Joshua were almost side by side with Joshua slightly behind. Tristan described this as his back tire being parallel to Joshua's front tire. Tristan and Mikey were on the sidewalk: Joshua was on the edge of the roadway, between the sidewalk and the white line on the road. Tristan testified it was dark at the time.

[26] It appears from photographs of Joshua's clothing (photographs 1, 2 and 3 at the back of Exhibit #4), that Joshua was wearing a mixture of darker and lighter clothing, consisting of denim pants and a light blue long sleeved jersey-type shirt.

[27] Tristan saw Mr. Brogan's car coming down the street. He testified that it was travelling fast. He heard a scream, looked back and saw Joshua on the road. Tristan testified that he was located by the MacKeigan street light when Joshua was hit.

[28] Tristan testified that he saw Joshua being picked up from the road and carried by Mr. Brogan and Mikey over to the grass and put down. However this was contradicted by other witnesses, Scott Baker and Josh Munroe, who saw only Mr. Brogan carrying Joshua. Pieces of Joshua's bicycle were all over the road. Tristan left at this point. He did not hear Mr. Brogan say anything at the scene.

[29] On cross-examination, Tristan acknowledged that the events of September 27, 2006 had been pretty upsetting. He gave a statement to police on August 31, 2007. He did not tell the police about seeing Mr. Brogan's car or that he thought it had been going fast. He agreed these details would be important and that his memory would have been better in August 2007 than it is now.

*The School Street Group of Children and What They Witnessed*

[30] Robin Woods was not quite 14 on September 27, 2006. She and a group of her friends were all outside sitting on the sidewalk by School Street opposite her house on September 27, 2006 in the early evening, around 7 - 7:30 p.m. Robin recalls that it was dark, although she could not remember how dark. She heard a human sound like a "squeal" or a "yelp". She also heard "brakes slam."

[31] Robin and her friends ran down in the direction of the sounds. She heard Scott Baker, her mother's boyfriend, tell Mr. Brogan, who had Joshua in his arms, that he had to put him down and should not be carrying him because of the risk of paralyzing him. Robin did not see Mr. Brogan pick Joshua up or put him down. She saw Mr. Brogan trying to give Joshua CPR. Once Joshua was laid on a patch of grass by the sidewalk, Robin saw Scott Baker try to give him CPR. This was right by the MacKeigan's brown garbage box.

[32] Another one of the kids hanging out with Robin Woods on September 27, 2006 was Jordie Pero. He was 13 at the time. Jordie recalls that it was just starting to get dark and was not pitch black. About 10 - 20 seconds before the accident, he saw Mr. Brogan drive by in a black car, he believed it to be "a Lincoln or something." He thought it was going "a normal speed." He saw Joshua going down Main Street on a black bicycle with his brother, Mikey. Tristan Luker was also with them. When Jordie saw these boys they were on the sidewalk, headed north down the road. He thought Joshua was in the rear with Mikey and Tristan ahead of him. I have concluded that this sighting of Joshua by Jordie was when Joshua was going to Zachary Parks' home and

had to have been somewhat before Jordie saw Mr. Brogan drive by. By the time Mr. Brogan passed School Street going north, Joshua, Mikey and Tristan were already headed south on Main Street, back toward School Street.

[33] Jordie testified that he and the other children heard "a big bang." Everybody ran down Main Street to look. Jordie saw Joshua in the grass and turned his head away so as not to see. He observed Mr. Brogan leaning against a garbage box, about 6 - 7 feet away from Joshua, saying: "O shit, o shit." That was all Jordie heard Mr. Brogan say. Jordie saw Joshua's bicycle which was "split in half" with the pieces scattered and Mr. Brogan's car parked a little farther down the road.

[34] On September 27, 2006, Josh Munroe, about 14 years of age at the time, was with the group of children at School Street that included Robin Woods and Jordie Pero. They were all hanging out and talking. He recalled that it was about 8 p.m., "maybe", and dark. He testified that the street lights were on.

[35] Josh heard a loud bang and a scream. He ran down toward Little Pond, going north on Main Street. As he ran, he saw Mr. Brogan getting out of his car, hollering: "Where is he? Where is he? Why weren't youse on the sidewalk?" He then saw Mr. Brogan giving CPR to Joshua. Josh did not see how Joshua ended up in the spot where he saw him lying and therefore, it can be concluded that he did not see or does not remember seeing Mr. Brogan carrying Joshua to the side of the road.

*Other Witnesses in the Area Who Responded to the Sounds of the Accident*

[36] On September 27, 2006, Shannon Meehan was in her kitchen at 584 Main Street when her daughter, Alyssa, came running up the driveway saying that a little boy had been hit. Ms. Meehan went to the bottom of her driveway where she saw Joshua, whom she did not know, lying on the grass by the sidewalk. She saw a man come across the street. Lying around were parts of a black bike. Past her hedge she saw a car on the road facing in the direction of Little Pond. The back part of the broken bike was behind this car.

[37] Ms. Meehan testified that it was dusk. Although it was her evidence that there are 2 street lights in close proximity to the end of her driveway, one at the bottom of the driveway and one across the street, Fig. 2 and the photographs in the Tupper Report at Appendix "A" (A9 and A10 in particular), shows a street light near Ms. Meehan’s driveway and a utility pole only on the other side of the road.

[38] Another adult, Scott Baker, out in April Johnson’s barn at 537 Main Street, heard the kids out on the road saying that someone had been hit. This was about 7:30 p.m. when it was getting dark, although Mr. Baker recalls that it was still light out.

[39] Mr. Baker ran down the road. First he saw a black car. Then he saw Mr. Brogan carrying Joshua. He told Mr. Brogan to put the boy down. Mr. Baker knew that an injured person should not be moved. Mr. Brogan put the boy in the grass by the sidewalk and tried to give him CPR. He was panicking, saying: "O my God, he came right out in front of me, he came out of nowhere."

[40] Mr. Baker could smell alcohol from Mr. Brogan. He smelled this when he was kneeling down beside Joshua with Mr. Brogan next to him, probably about 12 inches away. It was fairly strong and smelled to Mr. Baker like rum. He made no further observations of Mr. Brogan. Mr. Baker was trying to get Joshua breathing and stayed with him until the fire truck arrived.

[41] Robin Woods' mother, April Johnson, was in her house at 537 Main Street when she heard kids screaming that someone had been hit by a car. The children hanging out at School Street were screaming in front of the house. When Ms. Johnson got to the scene, she recognized Joshua who was lying in the grass. Mr. Brogan was in front of his car on the driver's side. His driver's door was open. After he asked Ms. Johnson if the child in the grass was hers, and she said no, he told her "the little fella jumped out" in front of him.

[42] Darren LeBlanc was outside his house at 558 Main Street when he heard a loud thump and a lot of screaming. After he ran down to the road and saw it was a child that had been hit, he rushed over to the Florence Volunteer Fire Department, about a kilometer away, where he was a member and a medical first responder, and got the fire truck. When he arrived back at the scene Greg Jessome, a paramedic, was working on Joshua. Mr. LeBlanc found that when he went to retrieve items from his medical bag, such as airway tubes, he had to use a flashlight to see what he was doing.

[43] At the scene, Mr. LeBlanc noticed Mr. Brogan, whom he knew, and asked: "What the hell happened?" Mr. Brogan told him that the "little fella come from nowhere." Mr. LeBlanc could smell alcohol coming off Mr. Brogan. When his

memory was refreshed by looking at the statement he had given to police, Mr. LeBlanc recalled that he had smelled the alcohol from Mr. Brogan's breath. At the time he smelled it, his nose was 10 - 12 inches from Mr. Brogan's mouth.

[44] Greg Jessome was paged to the scene as a member of the Florence Volunteer Fire Department. He was an EMC paramedic with nine years experience. When he arrived, he saw several people on the side of the road trying to work on the little boy. Mr. Brogan, whom he knew from the community, was at the boy's head and Scott Baker was at the boy's side. When Mr. Jessome reached the boy, he was not breathing. Mr. Brogan was saying: "Help him, Greg, do something for him, I didn't even see him." Mr. Brogan was saying the boy, "just came out." Mr. Jessome testified that Mr. Brogan was in effect saying that the boy "was just there" before he crashed into him.

[45] Mr. Jessome's observations of Mr. Brogan were that he was in a panic, definitely not himself. In the 20 seconds of contact he had with Mr. Brogan at the scene, he made no other observations of him.

[46] Mr. Baird, a paramedic with EHS Nova Scotia for 21 years with a certification at the highest level, Advanced Care, also responded to the scene of the accident. When he arrived with his partner, he took over from Mr. Jessome and Mr. Baker. Joshua was unresponsive. Mr. Baird inquired about whether there was a helmet so he could examine it for any signs of trauma, but bystanders told him there was no helmet. Mr. Baird's primary assessment was that Joshua was in critical condition, likely with a

head injury. Mr. Baird and Greg Jessome accompanied Joshua in the ambulance to the hospital.

[47] Mr. Baird described the scene that evening as a "dark corner". The weather was "dark" and the road conditions were dry. He testified to observing skid marks in the northbound lane of the road but was focused on Joshua and did not attribute the skid marks to any particular vehicle.

[48] Cst. Melski of the Cape Breton Regional Police Service also responded to the dispatch about the accident on Main Street. He described it as a dark, calm, nice night. The sun had just gone down. The roads were dry. When Cst. Melski arrived, the paramedics were attending to Joshua, who was just off the sidewalk. A man, whom he later learned was Mr. Brogan, was sitting a couple of feet away. As I will discuss now, Cst. Melski both spoke to and made certain observations of Mr. Brogan, as did Cst. Shane Baker and a civilian witness, Patricia MacLeod.

*Evidence Suggesting Impairment*

[49] Cst. Melski, the first police officer to arrive at the scene, asked Mr. Brogan to accompany him to the Lincoln. As they went toward the car, Mr. Brogan was staggering and very unsteady on his feet. Cst. Melski made these observations when Mr. Brogan was walking on "a flat, paved surface", presumably the road. It was Cst. Melski’s evidence that Mr. Brogan was not walking in a straight line. He observed that Mr. Brogan sat down "right away", by the curb, about 10 - 15 meters from the car. "He just put his hand down and sat down right away", is how Cst. Melski described

what he saw. When Cst. Melski went over to Mr. Brogan, he smelled a strong smell of alcohol off his breath. Cst. Melski, who testified to having extensive experience dealing with persons under the influence of alcohol, put the smell of alcohol from Mr. Brogan at an 8, on a scale of 0 - 10 where 0 represents no smell and 10 represents the strongest smell of alcohol in Cst. Melski's experience.

[50] Based on these indicators of alcohol impairment, once at the car, Cst. Melski arrested Mr. Brogan for impaired driving. He testified it was his belief that "from the way he was walking... he would not be able to operate a motor vehicle the way someone could who was sober." He rated Mr. Brogan's level of impairment, on a scale of 0 - 10, as a 6. At North Division, Cst. Melski also noted that Mr. Brogan's eyes were bloodshot.

[51] About ten minutes after he arrived at the scene, Cst. Shane Baker saw Mr. Brogan talking to Cst. Melski over by a garbage box. He also observed Mr. Brogan walk to his car with Cst. Melski. Mr. Brogan was unsteady on his feet. When Cst. Baker went over to speak with Cst. Melski and Mr. Brogan, he could smell a strong smell of alcohol on Mr. Brogan's breath. Cst. Baker was about two feet away from Mr. Brogan when he smelled the alcohol.

[52] Although Defence cross-examined Cst. Baker closely about the fact that he did not record in his police notes any observations of smelling alcohol off Mr. Brogan at the scene or Mr. Brogan's unsteady gait, Cst. Baker indicated that he only records in his notes what he needs to for the purposes of refreshing his memory later. He testified that if it is an observation he is going to remember, then he does not record it. In this

case, Cst. Baker indicated that these observations were recorded in the police report he prepared before he went off shift in the very early morning of September 28, 2006. In light of this, I am satisfied that the absence of these observations in Cst. Baker ’s police notes is not an indication that Cst. Baker’s recollections about Mr. Brogan are unreliable.

[53] In addition to the witnesses who smelled alcohol on Mr. Brogan’s breath and made observations about his balance, another civilian witness in the area of the scene observed signs consistent with Mr. Brogan’s impairment by alcohol. Patricia MacLeod’s attention was drawn to the scene by the "hollering and screaming" of children. From about 70 feet away, she noticed Mr. Brogan near her neighbour’s driveway (the MacKeigan driveway) by the brown wooden garbage box. She described her vision as good, and said she does not need glasses. Ms. MacLeod testified that Mr. Brogan’s gait "was a little off" and he was "a little unsteady on his feet." As she testified to having observed Mr. Brogan for "a good 5 - 10 minutes", and only saw him walk "just a few steps", something she acknowledged under cross-examination, Mr. Brogan must have been stationary most of the time Ms. MacLeod was watching him.

[54] On cross-examination, Ms. MacLeod acknowledged that she could not recall what Mr. Brogan was wearing when she was observing him or who was in his immediate vicinity. She did not tell the police in her statement, taken a couple of weeks after the incident, about seeing Mr. Brogan or making any observations of his gait. At the time, she said she was focused on a bicycle wheel she saw by Mr.

Brogan's parked car which she did tell police about. She did not think at the time that it was important to tell the police about seeing Mr. Brogan that night.

*Mr. Brogan's Breathalyzer Readings*

[55] Mr. Brogan had to be transported from North Division, where he was taken first, to Central Division, because there was no breathalyzer technician at North Division. Upon arriving at Central Division, Mr. Brogan called a lawyer. At 9:35 p.m. as police waited for the breathalyzer technician to arrive, Mr. Brogan advised that he was diabetic and required insulin. He asked that his wife be called to bring the insulin.

[56] Mr. Brogan's breathalyzer tests were done at 10:20 and 10:44 p.m. On both occasions the BAC results were 130 mgs. %. In between the two tests, at 10:31 p.m., Mr. Brogan took some insulin by using a needle to inject it in his stomach area. There is no suggestion that this would have affected Mr. Brogan 's BAC.

*Mr. Brogan's Statements to Police*

[57] Mr. Brogan's statements to police officers were admitted into evidence by Defence consent, without the requirement of a *voir dire*. The Defence conceded that Mr. Brogan's statements to police were voluntary and were not obtained in violation of Mr. Brogan's *Charter* rights.

[58] At the scene, Cst. Melski had Mr. Brogan come over to speak to him, away from the people working on Joshua. Mr. Brogan sat down by the MacKeigan's

wooden garbage box. Cst. Melski asked Mr. Brogan who was driving the vehicle that struck the child. Mr. Brogan said he was. He told Cst. Melski that there were 3 - 4 kids on the right side of him and he hit one of the children. He was not sure what the boy had been riding. Mr. Brogan said he had been coming from Sydney Mines after buying lottery tickets. On cross-examination, Cst. Melski confirmed that Mr. Brogan was cooperative and seemed very concerned, concern that he continued to express throughout the night.

[59] At North Division, Mr. Brogan told Cst. Baker that as he came down Main Street, a youth on a pedal bike crossed in front of him from his left. He told Cst. Baker that he had had a couple of beers that night, a statement that Cst. Melski confirmed he overheard. Later, at the time of the breathalyzer testing, Mr. Brogan told Cst. Melski that he had had 4 - 5 beers and then said he had had 5 beers at the most.

[60] Mr. Brogan spoke again with police when he met with Cst. O'Donnell, on September 29, 2006 about getting his car returned to him. The conversation with Cst. O'Donnell was entered into evidence as Exhibit #19.

*The Accident Investigation*

[61] On September 27, 2006, Cst. Sheldon O'Donnell was a Level 3 Traffic Analyst in the Traffic Safety Unit for the Cape Breton Regional Police Service. He arrived at the scene on Main Street at 8 p.m. and remained there until 12:30 a.m. He described it as a clear, mild night. In the course of his investigation, Cst. O'Donnell took field measurements of the scene (Exhibit #18A), assisted Mr. Tupper, obtained a large

diagram map of the scene from the Cape Breton Regional Municipality Engineering Department's survey station (Exhibit #20) on which the location of objects, Joshua's body, the Lincoln, various residences etc., are noted, and took statements from witnesses. Exhibit #20 was used for Fig. 2 at page 8 of the Tupper Report and a portion of it also appears at page 15.

[62] Cst. O'Donnell testified that he found no signs of braking at the accident scene. When asked about Lawrence Briand's evidence of seeing skid marks on the road, Cst. O'Donnell was quite definite. He said: "There were no skid marks on the road." I am satisfied to rely on Cst. O'Donnell's observations and find there is no evidence that Mr. Brogan attempted to stop his car or apply the brakes before the accident. Lawrence Briand did not examine the scene closely, and his attention was focused on the critically injured little boy. Cst. O'Donnell on the other hand spent a significant amount of time at the scene and was looking for evidence to help him reconstruct how the crash occurred. The absence of any evidence of braking is consistent with Mr. Brogan stating that he did not see Joshua before he hit him and that he "came out of nowhere."

*The Report and Opinion of the Expert Engineer - Allison D. Tupper*

[63] The Crown tendered by consent of Defence, the report of Allison D. Tupper, a consulting professional engineer who had been retained to reconstruct the circumstances surrounding the collision between Mr. Brogan's Lincoln and Joshua. Mr. Tupper reviewed a substantial amount of information provided by Crown counsel: photographs (including those in Exhibit #4); a videotape of the scene; Cst.

O'Donnell's field measurements of the scene; Exhibit #20, the CBRM large scaled plan drawing; statements from witnesses, including the statements from all the witnesses who testified at trial; police notebook entries; copies of police occurrence reports; the Crown brief prepared by Cst. O'Donnell; and the report of the Medical Examiner, Dr. Matthew Bowes. In addition, Mr. Tupper took photographs of Main Street from the perspective of a northbound driver, obtained the specifications of Mr. Brogan's Lincoln and the BMX bicycle, and on November 16, 2007, examined, measured, and photographed an exemplar 1993 Lincoln Town Car and the actual black BMX bicycle, which had been reassembled.

*Main Street*

[64] Mr. Tupper observed in his report that Main Street is straight between School Street and Civic Number 573 (which is on the opposite side of the road, i.e., the west side, from the MacKeigan's horseshoe-shaped driveway). He noted that Main Street then swings toward the east with bushes on the inside of the curve limiting view of objects ahead until the end of the curve in the area of Civic Number 591 Main Street (which is located directly opposite from where Mr. Brogan parked his car after the collision with Joshua.) Essentially then, Mr. Tupper described in his report a curve in Main Street that starts around where the accident occurred and straightens out about 45 meters further on, travelling north. I base the 45 meters on Cst. O'Donnell's evidence that the distance between where the accident occurred (in proximity to the chrome car part found in the road [see photograph 3 in Exhibit #4 for example]) and the parked Lincoln, was about 45 meters.

*The Lincoln Town Car*

[65] On September 27, 2006, Mr. Brogan was driving a black 1993 Lincoln Town Car. It had a length of 18.3 feet and a width of 6.4 feet. It weighed 4,026 pounds. Mr. Tupper noted that the damage to the Lincoln was concentrated at the right front corner (in other words, the passenger side), and consisted of a broken headlight lens, a broken marker light lens, displacement of a piece of chrome molding, scratches on the top of the engine bonnet and the top and side of the right front fender, and a greyish impact area and dent on the right (passenger's) side of the hood. I note that Cst. O'Donnell testified to the front license plate having been knocked off at one end. Cst. O'Donnell also testified to the location on the road of the broken headlight lens, marker light lens and the chrome molding. These items are indicated in Figure 7 of Mr. Tupper's report, which shows a portion of Exhibit #20.

*The BMX Bicycle*

[66] The BMX (Bike Motor Cross) being ridden by Joshua was a black 16 inch bicycle. Mr. Tupper described this bike as designed for stunts and use on rugged terrain courses. Mr. Tupper reported that the bike had no brakes on the rear wheel and, although it was fitted with front caliper brakes controlled with a handlebar lever, those brakes did not work at material times.

*Description of Damage*

[67] Mr. Tupper examined the BMX bike and found the following damage: a concentrated depression or dent on the right hand side of the down tube with the frame having bent outwards toward the left around this buckle; the rear wheel was twisted and jammed in place between the chain stays and the seat stay; the handlebar stem had broken inside the head tube so that the handlebars and front forks had separated from the main body of the bicycle. The fracture (shown in photographs D3 and D4 attached to Mr. Tupper's report) occurred below the sliding jam nut that holds the handlebar stem in place.

*Positioning of the Vehicles*

[68] Mr. Tupper was able to work with the reassembled BMX bicycle and a replica 1993 Lincoln Town Car. The photographs attached as Appendix E to the Tupper Report show how Mr. Tupper reconstructed the position of the vehicles at the point of impact. As Cst. O 'Donnell testified, there was only one way the bicycle could have been struck: on its right side. This is evident from the photographs of Mr. Tupper's alignment of the BMX and the replica Lincoln. (Tupper Report, Exhibit #2, photographs E1 through E4) They can be seen to fit together like jigsaw pieces. The impact of the Lincoln with the bicycle could only have occurred as this evidence indicates. Mr. Tupper concluded in his report that when the vehicles were positioned with the dent in the BMX's down tube adjacent to the right hand (passenger) end of the Lincoln's front bumper, the end of the handlebar was immediately over the scratch on the hood and the bicycle's back wheel was at the edge of the license plate holder. Mr. Tupper determined that the impact of the car with the bicycle would have knocked Joshua on to the hood of the car.

*Where the Accident Occurred*

[69] Mr. Tupper concluded that the collision "probably occurred in the right hand lane at or near the south side" of the northern-most leg of the MacKeigan horseshoe driveway. He arrived at this conclusion because the debris field extended north from this point and due to the fact that given the direction of the bicycle when hit, the prime collision forces were directed towards the north. This is very consistent with where Tristan Luker described the accident occurring and close to where Joshua was laid in the grass. Mr. Tupper provided diagrams (Figs. 10 and 11) in his report to show where, in his opinion, the Lincoln collided with Joshua.

*Unavoidable Accident/Reaction Time Issue*

[70] It was Mr. Tupper's opinion that Joshua Penny, being too small for the BMX, which also was not in good condition, ran into difficulty controlling the bike and veered into the northbound lane of Main Street. He would have been moving to the right and would have had to correct his direction to the left to get back to the sidewalk. It was when the bicycle was in this position, returning to the side of the road, that Joshua was struck on his right side by Mr. Brogan's car.

[71] Mr. Tupper made an assumption that Joshua was travelling at a speed of 15 - 20 feet per second as he was managing to keep up with Tristan and Mikey, even though he was a small six year old on a full size BMX bike. Mr. Tupper calculated that at a speed of 15 feet per second, approximately 1.3 - 1.7 seconds transpired from the time Joshua left the shoulder of the road to the point when he was hit.

Calculations done on a speed of 20 feet per second would reduce this to 1.0 - 1.3 seconds. Mr. Tupper noted that this meant a window of 1.0 - 1.7 seconds for a driver to have observed the bicycle manoeuver, perceived it as a hazard and react to it by starting an avoidance measure. Mr. Tupper had previously noted in his report that the perception and reaction time (PRT) for an ordinary person in ordinary circumstances is taken to be 1.5 seconds. The PRT is the period of time that elapses from when a hazard first becomes available to be seen and the point when the driver's resultant avoidance measure starts to take effect, e.g. braking.

[72] Mr. Tupper commented in his report on certain compounding factors in the collision between Mr. Brogan's car and Joshua Penny. The collision occurred when it was no longer daylight. This meant that Mr. Brogan was dependent largely on headlight illumination for seeing the bicycle. The scene of the accident was in a right hand curve in the road which would have meant that the Lincoln's headlights would have been aimed more towards the left hand side of the road than the right hand side where Joshua was travelling. The BMX bike would not have received the full illumination of the Lincoln's headlights. This would have contributed to Mr. Brogan having less time to see the bicycle than would have been the case in daylight.

[73] Mr. Tupper formed an opinion, which he stated was consistent with the "highest degree of probability", that in as little as one second before impact, Joshua suddenly veered westerly (to the right) into the northbound lane of Main Street and then turned easterly (left, back toward the sidewalk) in front of Mr. Brogan's car. It was Mr. Tupper's opinion that under such circumstances an average alert driver would not have had enough time even to start an avoidance measure. In Mr. Tupper's view, the

collision was inevitable once the bicycle started to veer from the shoulder into the northbound lane in front of the oncoming car.

**Position of the Crown**

[74] The Crown's position is that the collision between Mr. Brogan's car and Joshua Penny was avoidable, had Mr. Brogan not been impaired by alcohol. The Crown has argued that Mr. Brogan was impaired by alcohol and, as a consequence, did not advert to or was not aware of the hazards on Main Street at 7:30 p.m. on September 27, 2006. The Crown described these hazards as the children gathered near the intersection of School Street and Main that should have alerted Mr. Brogan to the immediate presence of children in the area, the reduced light conditions as darkness was falling, and the slight bend in the road. The Crown argued that if Mr. Brogan had not been impaired by alcohol, his driving would have been more responsive to the conditions on Main Street that evening and he would have been able to avoid the collision with Joshua Penny.

[75] The Crown argues that the first signs of Mr. Brogan's impairment emerged at the scene, as described by Darren LeBlanc, Greg Jessome, Patricia MacLeod and Csts. Baker and Melski. In addition to the observations made by these witnesses, the Crown relies on the opinion of Lori Campbell, the expert forensic toxicologist. Ms. Campbell prepared a report (Exhibit # 23) and testified at trial. Ms. Campbell's "back-extrapolation" of Mr. Brogan's breathalyzer readings support the Crown's position that Mr. Brogan was impaired when he was driving down Main Street on September 27, 2006. As the breathalyzer tests were conducted more than two hours

after the crash, the Crown is not able to rely on the statutory presumption created by section 258(1)(c) of the *Criminal Code* that Mr. Brogan's BAC at the time of the accident was the same as at the time of the tests. However, the evidence of the readings is still admissible. *(R. v. Dureuelle, [1992] S.C.J. No. 69 at paragraph 17)* The Crown retained Ms. Campbell to extrapolate back from Mr. Brogan's readings at 10:20 p.m. and 10:44 p.m. to 7:35 p.m. She concluded that Mr. Brogan's BAC at 7:35 p.m. when he ran into Joshua Penny was 157 - 185 mgs.%. In Ms. Campbell's opinion, with a BAC in this range, at the time of the accident Mr. Brogan would have been in an impaired state. I will be discussing the issue of the readings and Ms. Campbell 's opinion in more detail in due course.

[76] The Crown has argued that Mr. Brogan's impairment is grounds for convictions for dangerous driving causing death or impaired driving causing death or impaired driving. The Crown's position is that criminal negligence causing death is made out when Mr. Brogan's impairment is coupled with the fact that he is an insulin-dependent diabetic. The Crown has argued that an insulin-dependent diabetic can be subject to destabilized blood sugar levels, and that hypo- or hyperglycemia will have an additive impairment effect if there is also alcohol impairment. The Crown has submitted that an insulin-dependent diabetic who drives while alcohol impaired is criminally negligent, without more being required, including any evidence of hypo- or hyperglycemia at the time, because the potential of suffering either a hypo- or hyperglycemic episode while driving makes him that much more dangerous than a non-diabetic impaired driver.

**The Position of the Defence**

[77] The Defence has submitted that there is no evidence of faulty or improper driving by Mr. Brogan on September 27, 2006 and, no evidence that his admitted drinking had anything to do with causing the accident. The Defence relies on Mr. Tupper's conclusion that the crash was unavoidable even for an alert, sober driver, a conclusion the Defence submits raises the reasonable doubt required for a not guilty finding on the charges.

[78] The Defence has argued that Mr. Brogan was not impaired on September 27, 2006 and that in any event, even if he was, he could not have avoided the collision with Joshua Penny. Whether impaired or not, the Defence submits Mr. Brogan's driving was not a contributing cause of the collision that killed Joshua Penny. It is the Defence position that Joshua Penny died due to a tragically unavoidable accident for which Mr. Brogan bears no responsibility. The Defence did not state their case for Mr. Brogan in these precise terms, but I believe it would represent their position: the collision with Joshua Penny could have happened to anyone driving down Main Street on September 27, 2006 at 7:30 p.m.

[79] The Defence disputes the evidence that Mr. Brogan was impaired, arguing that the smell of alcohol is not proof of impairment. As for Mr. Brogan's gait, unsteadiness, inability to walk a straight line and having to sit down, these motor problems are all consistent with being badly shaken by the horrific experience of the collision and knowing that Joshua Penny was in critical condition, which would have been apparent to Mr. Brogan at the scene. Mr. Brogan was observed to be very upset at the scene, frantically trying to administer CPR and pleading with Greg Jessome to do something to help Joshua.

[80] The Defence also notes that Mr. Jessome made no observations of Mr. Brogan smelling of alcohol and Shannon Meehan, who lived at 584 Main Street, and noticed Mr. Brogan walking back and forth at the scene, did not report seeing anything unusual about his behaviour or movements.

[81] The Defence points to evidence that suggests Mr. Brogan was not impaired when he was driving. Mr. Brogan's spontaneous descriptions of what he observed at the time of the crash were consistent with the evidence and what Mr. Tupper concluded about how the collision occurred. Mr. Brogan told Cst. Melski there had been "3 - 4 kids" to his right side as he was driving. He told Cst. Shane Baker at the scene that as he came down Main Street a child "on a pedal bike crossed in front of him from his left." He told April Johnson, Darren LeBlanc and Scott Baker that Joshua had come from nowhere, suddenly appearing in front of his car. He said much the same thing to Greg Jessome, telling him he did not see the boy, "he just came out." The Defence argues that Mr. Brogan's stated observations of a child on a bicycle suddenly and unexpectedly coming from his left-hand side, with children on his right side are consistent with Mr. Tupper's conclusions that Joshua suddenly veered to the west and then east across Mr. Brogan's northbound lane when he was hit. An impaired driver would not have made such accurate observations, says the Defence.

**Issues**

[82] It has been established, and is not disputed, that Joshua died as a result of injuries he sustained when Mr. Brogan drove into him with his Lincoln. That leaves three critical issues for me to resolve:

(1) Was Mr. Brogan impaired by alcohol when he crashed into Joshua Penny?

(2) If he was, did his impairment significantly contribute to the accident?

(3) Has the Crown proven any of the charges against Mr. Brogan beyond a reasonable doubt?

**The Issue of Impairment**

*Evidence of Drinking*

[83] The evidence that Mr. Brogan was drinking prior to the accident is undisputed. He told police he had between 2 - 5 beers before setting out to drive and he produced breathalyzer readings of 130 mgs.%. Although his BAC is in dispute in this trial, Mr. Brogan pleaded guilty to being over the legal limit on September 27, 2006. It can be safely concluded that Mr. Brogan had been drinking before he headed home along Main Street.

*Indicia of Impairment*

[84] Even slight impairment is enough to make out the offence of impaired driving. *(R. v. Stellato, [1994] S.C.J. No. 51)* I have already indicated the evidence that suggests Mr. Brogan may have been impaired by alcohol on the evening of September 27, 2006. At the scene a number of witnesses noted a smell of alcohol on Mr. Brogan's breath. There is also the evidence of him being unsteady on his feet and having problems walking on a flat, level surface, even to the point of having to sit

down. His eyes were bloodshot. However, this evidence does not establish beyond a reasonable doubt that Mr. Brogan was impaired by alcohol. Mr. Brogan smelled of alcohol because he had been drinking, a fact he admitted to. The smell of alcohol alone is not sufficient to find that he was impaired and even a strong smell of alcohol does not prove how much a person has had to drink or the degree to which a person may be impaired. *(R. v. Webber, [2003] S.J. No. 721 at paragraphs 35 - 36 (Sask. P.C.); R. v. Gray, [2005] O.J. No. 1010 at paragraph 33 (Ont. C.J.); R. v. Cooper, [1993] O.J. No. 501 (Ont. Prov. Div.))*

[85] Mr. Brogan's unsteadiness also lends itself to an explanation other than impairment. Mr. Brogan had just experienced the trauma of hitting a little boy with his car. He had carried the little boy to the sidewalk. He knew Joshua was critically injured and was panicky. The fact that shortly afterwards he was having trouble walking normally could have been the effects of the shock and distress he was experiencing. I am prepared to accept that witnesses, particularly Cst. Melski who had the best opportunity to observe Mr. Brogan, noted that he was unsteady but I do not find that this evidence, taken with evidence of an odour of alcohol and bloodshot eyes, establishes beyond a reasonable doubt that he was impaired. In my opinion, in the circumstances, more is required to prove Mr. Brogan's impairment beyond a reasonable doubt.

*The Arrest for Impaired Driving, the Breathalyzer Demand and the Test Results*

[86] Cst. Melski arrested Mr. Brogan at the scene for impaired driving based on his observations of Mr. Brogan's condition. He also made a demand that Mr. Brogan

submit to a breathalyzer test. I find that Cst. Melski did have the reasonable and probable grounds for the arrest and the demand and I also note that the Defence has not argued that the grounds were not present. Are the grounds that justify an arrest for impaired driving and the making of a breathalyzer demand conclusive of impairment?

[87] They are not. Indicia of impairment that are found sufficient to establish the reasonable and probable grounds for a breath demand or an arrest for impaired driving do not automatically amount to proof beyond a reasonable doubt that the person was impaired. *(see, for example, R. v. Nagy, [2006] O.J. No. 4989 (Ont. Ct. Just.))* Furthermore, the mere fact that Mr. Brogan had a BAC of more than 80 mgs.% at the time of the accident is not evidence itself of impairment. *(R. v. Good, [1991] O.J. No. 2183 (Ont. C.A.))*

*Expert Evidence*

[88] It is the totality of the evidence that I have to consider in determining whether the Crown has proven beyond a reasonable doubt that Mr. Brogan was impaired when he was driving on September 27, 2006. As I mentioned earlier in these reasons, a forensic toxicologist, Ms. Campbell was called by the Crown to testify concerning her opinion of whether Mr. Brogan was impaired. The Defence countered with expert opinion evidence from Dr. Gerry McKenzie, a pharmacologist. Both experts were qualified to give opinion evidence with no issue being raised as to their respective

qualifications. I will now examine the evidence they gave and the conclusions they reached.

**Lori Campbell - Crown Expert**

[89] Lori Campbell has worked for the RCMP for 17 years, first as a Forensic Alcohol Specialist and in the last 3 - 4 years also as a Forensic Toxicologist. She received a request from Cst. O'Donnell on April 24, 2007 to extrapolate Mr. Brogan's BAC back to the time of the accident. She also offered her opinion on the issue of impairment. She provided a report dated May 15, 2007 that was admitted into evidence by consent. (Exhibit #23)

[90] Ms. Campbell was qualified to give expert opinion evidence in five areas:

(1) Toxicology, the areas of impairment and sources of impairment;

(2) Ingestion, absorption, distribution and elimination of alcohol in the human body;

(3) Concentration of Blood Alcohol Concentration in the human body;

(4) Theory and operation of approved instruments, particularly the BAC Datamaster; and

(5) Effect of alcohol and similar volatiles on the human body in respect of motor vehicles.

[91] In making the "back-extrapolations", Ms. Campbell relied on certain assumptions. These were:

(1) That Mr. Brogan's alcohol elimination rate was 10 - 20 mgs/100 mls of blood; and

(2) That Mr. Brogan had not consumed any alcohol within a half-hour of the event or anytime afterwards to the time the readings were obtained. Ms. Campbell indicated that she had based her calculations on Mr. Brogan not having consumed any alcohol in the 5 minutes before the accident.

[92] Where, as here, the Crown expert assumes no bolus drinking on the part of the accused, the Crown must prove the absence of bolus drinking beyond a reasonable doubt. *(R. v. Grosse, [1996] O.J. No. 1840 at paragraph 10 (Ont. C.A.) leave refused [1996] S.C.C.A. No. 465 (S.C.C.))* I am satisfied that the Crown has done so in this case. There is no evidence of Mr. Brogan drinking just prior to or at the scene of the accident. No liquor or beer was found in his car, and none can be seen in the photographs of the interior of the car (photographs 40 through 44 in Exhibit #4). Cst. O'Donnell gave the area a thorough going-over while doing his investigation of the accident scene on September 27 and found no evidence of any bottles in the vicinity.

[93] Ms. Campbell was advised that the crash of Mr. Brogan's car into Joshua Penny had occurred at 7:35 p.m. She was provided with Mr. Brogan's Datamaster readings of 130 mgs.% obtained at 10:20 p.m. and 10:44 p.m. She calculated that two and three-quarter hours had elapsed between the crash and the first reading. Assuming the 10 mgs. % - 20 mgs. % elimination rate and no alcohol consumption after the crash, Ms. Campbell extrapolated that Mr. Brogan's BAC at 7:35 p.m. would have been 157

- 185 mgs.%. In her opinion, assuming a BAC at the legal limit at 7:35 p.m., and using Mr. Brogan's height and weight, achieving this BAC at 10:20 p.m. indicated a pre-accident minimum alcohol consumption of 3.5 - 4.7 bottles of beer or 5 - 7 ounces of hard liquor.

[94] On cross-examination Ms. Campbell acknowledged that the Datamaster has a margin of error of 10 mgs.% either way. She agreed that factoring that margin of error into her calculations would produce back-extrapolations of Mr. Brogan's BAC at 7:35 p.m. of 147 - 195 mgs.%. And while Ms. Campbell agreed that the consumption of alcohol within the thirty minutes prior to the crash could affect her back-extrapolation calculations, making them lower, as I have found, there was no evidence led that Mr. Brogan had been drinking in the 30 minutes before the accident. Therefore, I accept as sound this assumption by Ms. Campbell that underlies her opinion.

[95] Ms. Campbell was asked about the significance of the elimination rates. She testified that without testing the individual it was not possible to know his or her elimination rate. However, Ms. Campbell indicated that 10 mgs.% - 20 mgs.% is the accepted forensic rate and has been employed many times by other forensic toxicologists. She noted that higher elimination rates are present in chronic drinkers or alcoholics. She did not make an assumption that Mr. Brogan was either, as she did not know what type of drinker he was.

[96] It was Ms. Campbell's opinion that regardless of a person's tolerance to alcohol, at 100 mgs.% and above, "everyone is considered impaired with respect to

the operation of a motor vehicle." She testified that at 100 mgs.% BAC a person's mental faculties and sensory function are impaired even if this is not obvious. It was her evidence that there is a substantial consensus in the forensic community, based on significant testing, that 100 mgs.% BAC is the level at which impairment occurs. The higher the BAC above 100 mgs.%, the more impaired a person will be. Ms. Campbell herself has administered tests analyzing reaction time and divided attention, both of which relate to driving, and has reached the conclusion that 100 mgs.% BAC is the level where impairment starts for most people.

[97] Ms. Campbell also discussed in her evidence the effect that alcohol impairment has on driving ability. Alcohol is a drug that acts as a central nervous system depressant. It is progressive in nature, meaning that the more a person consumes, the more the person is affected. Alcohol impairs mental function, such as decision-making, judgment and concentration, central and peripheral vision, and depth vision. A person impaired by alcohol may misjudge how far away a person is. An impaired driver has to concentrate more attention on the task of driving and will be less able to multi-task. Ms. Campbell explained that driving is a divided attention task with good drivers scanning the environment for possible hazards while controlling the vehicle and travelling effectively. An impaired driver is less able to divide their attention and will pay more attention to one task over others. This has the effect that certain driving-related tasks get neglected as the driver focuses his or her attention more narrowly.

[98] Ms. Campbell testified that a driver with an elevated BAC will take more time

to process information, make a decision and execute the manoeuver. What takes the longest, said Ms. Campbell, is processing the information about an event encountered while driving and deciding what to do.

[99] Ms. Campbell also testified that alcohol also lowers a person's inhibitions. In the context of driving, this can mean an inflated view of driving competence and an assumption of risks that might otherwise not be taken. An impaired driver on a familiar road may become more confident due to the disinhibiting effects of the alcohol because the road is known to them. It was Ms. Campbell's evidence that all of these impairments would be much more pronounced in a person with a BAC of 157 - 185 mgs.% than in someone with a lower BAC.

[100] In Ms. Campbell's opinion, with BAC levels of 157 - 185 mgs.%, Mr. Brogan's awareness of his surroundings would have been affected, as impairment makes it more difficult to perceive what is going on around the vehicle and an impaired awareness reduces the likelihood a person will adjust their driving to developing situations. Ms. Campbell testified that Mr. Brogan's alertness and judgment and reaction time would have been impaired and less good than when he was sober.

[101] Ms. Campbell acknowledged that she did not know Mr. Brogan and had conducted no tests on him. The Defence, by establishing this, was seeking to show that Ms. Campbell's opinions were not based on knowledge of Mr. Brogan's elimination rate, alcohol tolerance level, threshold for impairment, general health or driving ability. During the cross-examination of Ms. Campbell, the Defence asked her to calculate what the alcohol consumption of an individual of Mr. Brogan' s height

and weight (5 feet 5 inches and 161 pounds) would have to have been where the BAC was 80 mgs.% at 7:35 p.m. and 147 mgs.% at 10:20 p.m. Ms. Campbell determined that 3 bottles of regular beer would have been the pre-accident consumption. Using 100 mgs.% (the threshold for impairment which has been broadly accepted in the forensic community) at the time of the accident and 147 mgs.% at 10:20 p.m., Ms. Campbell indicated the consumption would have had to be 2.1 beers prior to the accident. Ms. Campbell was also asked to calculate the pre-accident alcohol consumption using a BAC of 120 mgs.% at 7:35 p.m. and 130 mgs.% at 10:20 p.m. She determined that the beer consumption for these numbers would have been 1.2 bottles.

[102] Mr. Brogan himself told police he had had between 2 - 5 beers. No evidence was tendered to suggest that Mr. Brogan suffers from any chronic health problems that would affect his alcohol absorption and elimination rates. As I have said, there is no onus on Mr. Brogan to disprove the case against him, but reasonable doubt does not involve speculation about facts I have no knowledge of.

**Dr. Gerry McKenzie - Defence Expert**

[103] Dr. Gerry McKenzie, an expert pharmacologist, was qualified to give expert opinion evidence concerning:

(1) The absorption, distribution, metabolism and elimination of alcohol, and the effects of alcohol on human behaviour and performance;

(2) The effects of drugs and chemicals on the central nervous system and their interaction with alcohol and other drugs; and

(3) Blood alcohol analysis and calculation of blood alcohol levels.

[104] While Dr. McKenzie agreed with the additional BAC back-extrapolation calculations done by Lori Campbell in the witness box at the Defence request, he testified that he was unable to say what Mr. Brogan's BAC would have been at 7:35 p.m. on September 27, 2006 because a considerable amount of information was not available. He said for accurate calculations it is necessary to know:

> Whether the person had any alcohol prior to or after the crash;
>
> What the person's actual elimination rate is as using a range reduces the accuracy of the calculation. Dr. McKenzie did agree that the vast majority of people have an alcohol elimination rate in the range of 10 mgs.% - 20 mgs.%;
>
> and
>
> What medical conditions the person might have that would affect the elimination rate or the distribution of alcohol in the body.

[105] Dr. McKenzie testified that it was also unknown if the BAC recorded for Mr. Brogan later that evening represented a rising or a plateauing BAC. He was unprepared to accept that Mr. Brogan's 130 mgs.% Datamaster readings were correct.

[106] Dr. McKenzie disagreed with Ms. Campbell's opinion that everyone would be impaired at 100 mgs.% BAC. He testified there was considerable disagreement about this threshold and said it was not generally accepted. Dr. McKenzie did agree that the percentage of the population who experience impairment in their driving at BAC

levels below 80 mgs.% is small, as is the percentage of the population who are not impaired at 100 mgs.%. He agreed that Mr. Brogan could be impaired at some point below 120 mgs.%, he did not know.

[107] Dr. McKenzie rejected the suggestion that Mr. Brogan's BAC may have contributed to the accident. Dr. McKenzie testified it was his opinion, relying on the Tupper Report, that external factors, such as alcohol impairment, if there was any, played no role in the crash, as there was simply no time for Mr. Brogan to respond to events.

[108] Dr. McKenzie did agree that Mr. Brogan's alertness as he drove down Main Street would have been affected by the back-extrapolated BAC levels. He also agreed that if Mr. Brogan's alertness had not been affected, he might have slowed down. He agreed that if the car is driving more slowly, there is more time to react if something happens except, he said: "Going more slowly doesn't change his reaction time if he doesn't perceive the situation as dangerous."

[109] Dr. McKenzie testified: "If you see [children] in the area, I assume some drivers would slow down but not all the time, it all depends on the situation. If he perceived danger of some kind further back in time to the time of the accident, alcohol at that BAC level would affect his ability to make proper decisions."

[110] Dr. McKenzie acknowledged that at "those BAC levels" it is less likely that Mr. Brogan would have paid attention to the children he drove past at School Street and Main. He went on to say he still did not think that alcohol may have contributed to the

crash because there was no time for Mr. Brogan to react to the sudden appearance of Joshua on his bicycle. Dr. McKenzie said it was not particularly important if Mr. Brogan observed people on the sidewalk. He said bicycles on the sidewalk are an event but not one that requires a reaction.

[111] The Crown questioned Dr. McKenzie about insulin dependant diabetes. Dr. McKenzie agreed that insulin-dependant diabetics can be subject to hyperglycemia (less common) and hypoglycemia (more common) which can impair the ability to drive. A Type 1 diabetic regulates their condition with insulin injections. Once the person is stabilized, they administer a regular amount unless it is adjusted because their condition worsens. Dr. McKenzie testified that the effects of hypo- or hyperglycemia on a driver are like impairment by alcohol, only worse. He testified that either a deficiency or excess of blood sugar would, if it did exist, aggravate impairment by alcohol.

**Analysis and Conclusions on the Issue of Impairment**

[112] Ms. Campbell's back-extrapolations of Mr. Brogan's BAC were calculated on the basis of her assumptions about elimination rates. Even Dr. McKenzie agreed that the rate of elimination standard used by Ms. Campbell applies to the vast majority of people. There is no direct evidence to indicate that Mr. Brogan falls outside this norm; however, as I will discuss, there is evidence that suggests Mr. Brogan was not as impaired as would be expected of someone with BAC levels in the range of 147

mgs.% to 195 mgs.%. Therefore, while I accept Ms. Campbell's opinion that Mr. Brogan's BAC at the time of the accident was above the forensically accepted threshold for impairment (100 mgs.%), I am left with a doubt as to the degree of Mr. Brogan's impairment.

[113] Ms. Campbell's opinion that Mr. Brogan had an elevated BAC in the range of 147 mgs.% to 195 mgs.% at the time of the accident invites the conclusion that the observations of him at the scene, most notably his unsteadiness when walking on the flat surface of the road, were observations of an advanced stage of impairment which Ms. Campbell described in her report as intoxication. However the effects of shock after the traumatic experience of the accident cannot be discounted when it comes to assessing Mr. Brogan's motor coordination at the scene. I also note that a number of witnesses describing their observations of Mr. Brogan did not suggest he was impaired. He was seen carrying Joshua, putting him down in the grass when directed to, and performing CPR. His ability to perform these tasks, his recognition that Joshua wasn't breathing, a fact he reported to Cst. Baker, the accuracy of his description of what he saw just before the collision and his responsiveness to questions, leaves me with a reasonable doubt about the extent of his impairment. The totality of the evidence does not satisfy me that Mr. Brogan was in a state of intoxication at the time of the accident.

[114] The scene evidence and the obligation to resolve any doubt in Mr. Brogan's favour leads me to conclude that Mr. Brogan's BAC was either at the lower end of the range calculated by Ms. Campbell, or, perhaps due to an elimination rate outside the standard, even lower. I accept that Mr. Brogan had a BAC above the threshold for

impairment at 7:30 p.m. on September 27, 2006 and was therefore impaired when he hit Joshua, but I am not satisfied it has been proven beyond a reasonable doubt that Mr. Brogan was more than slightly impaired at the time of the accident.

**Causation**

[115] As I indicated in my discussion of the applicable law at the start of this decision, the finding that Mr. Brogan was impaired at the time of the accident does not lead to a determination of guilt on the charges against him. For Mr. Brogan to be found guilty on any of the charges, I have to be satisfied that the Crown has proven beyond a reasonable doubt that his impairment, and/or some other aspect of his driving, caused the accident. An example of a causation finding in a case of an impaired driver being involved in an accident is *R. v. Andrew, [1994] B.C.J. No. 1456 (B.C.C.A.)* where the trial judge accepted expert evidence about the effects of alcohol on vision and judgment and facts about the collision, including that it occurred on the shoulder of the oncoming vehicle's lane as a result of an irrational and intentional driving manoeuvre "for which no possible alternative reason compatible with sobriety could be advanced."

[116] I will note at this point that the focus in a causation inquiry is on the accused and not the victim. *(Nette v. The Queen, supra)* What that means in this case is that facts such as the BMX being too big for Joshua and not having working brakes, Joshua possibly being harder to see because of his dark clothing and the absence of reflectors, and his not wearing a helmet do not diminish any legal responsibility Mr.

Brogan may have for his death. *(R. v. Creighton, supra, at paragraph 106; R. v. Menezes, [2002] O.J. No. 551 at paragraph 92 (Ont. S.C.J.))*

[117] In respect of causation, the issue I must decide is whether the accident occurred because of Mr. Brogan's impairment or was unavoidable. A finding that an accident was unavoidable will raise a reasonable doubt as to criminal responsibility even where the driver was impaired. *(R v. White, [1994] N.S.J. No. 149 (N.S.C.A.))* In *White,* the Nova Scotia Court of Appeal referred to the "obvious example of somebody falling off an overpass in front of the driver so close that no driver however careful and sober could have avoided the consequences." *(paragraph 47)*

[118] The Crown has argued that the conditions on Main Street as night fell on September 27, 2006 were objectively dangerous, something that Mr. Brogan, in an alcohol-impaired state, failed to recognize and respond to. It is the Crown's position that Mr. Brogan's collision with Joshua Penny was avoidable had he adverted to conditions on Main Street and adjusted his driving accordingly. I understand the Crown to be saying that criminal responsibility for dangerous driving causing death or impaired driving causing death is made out by the effect of Mr. Brogan's impairment by alcohol on the manner of his driving leading up to the collision with Joshua. There are a number of factors that must be examined relative to this - the presence of children on Main Street, the visibility on the road, Mr. Brogan's rate of speed, and his driving.

*The Presence of Children on Main Street*

[119] The presence of children on Main Street seems to be well-recognized by the residents of the area. April Johnson testified that there were always a lot of kids in the School Street area of Main Street. She described it as a "popular hang-out spot" and this is confirmed by the gathering of children there on the evening of September 27, 2006. Ms. Johnson had been concerned that someday a child would be killed by a car because drivers speeded on Main Street. She had even previously called the police to voice her concerns.

[120] Other witnesses also described Main Street as an area where there were lots of kids. Shannon Meehan said there were always lots of kids in the area and Darren LeBlanc, who had lived on Main Street for 5 years, testified to the same effect. He said that a lot of people exceeded the speed limit by going 75 - 80 kms/hour. Scott Baker had observed that there were always kids on the road with skateboards. Josh Munroe knew Joshua Penny because he "always" saw him with his skateboard.

[121] Mr. Brogan lived in this neighbourhood, only a kilometer or a kilometer and a half from Mr. LeBlanc's home at 558 Main Street. It is a reasonable inference that he would have been aware that children were a predictable feature of Main Street. Indeed, in his statement to Cst. O'Donnell on September 29, 2006, Mr. Brogan said: "this is not the first time it happened", presumably referring to an accident or near-accident. He went on to tell Cst. O'Donnell about kids "going as fast as they can" and said "these two little kids almost... got killed 6 or 7 times already." He then said that someone had called an hour before the September 27th accident to report that "these kids are going to get killed, laying on the road, one of them..." although it is unclear whether this was information he knew on September 27th or learned

afterwards. In any event, I am satisfied the evidence establishes that Mr. Brogan was aware of the presence of children in the area of Main Street.

[122] Given Mr. Brogan's familiarity with the area, his knowledge that children were frequently on and around the road and the general use of the street by children, the presence of children on Main Street on September 27, 2006 cannot be said to have been unanticipated or unexpected. *(R. v. Kwasnica, [2006] B.C.J. No. 1821 at paragraph 35 (B.C.S.C.))* There is evidence however that Mr. Brogan expected the children would be on the sidewalk, not on the road, indicated by his hollering after the collision, "Why weren't youse on the sidewalk?" It is also reasonable to assume that Mr. Brogan living in that general neighbourhood had driven along Main Street before probably on many occasions when children were present, without incident. There is no evidence to suggest otherwise.

*Lighting/Visibility*

[123] Visibility along Main Street on September 27, 2006 at 7:30 p.m. was reduced by the approach of nightfall. The other visibility issue was noted by Mr. Tupper in his report where he described bushes on the inside of the curve in the road limiting the view of objects ahead. (Tupper Report, at page 8) In Mr. Tupper's opinion the

accident occurred just at the start of the bend in the road. (Figs. 10 and 11, Tupper Report)

[124] It is difficult to determine with any precision the degree to which light levels were reduced at 7:30 p.m. on September 27, 2006. Patricia MacLeod testified that at the time she saw Mr. Brogan at the scene, it was getting "dusky". She said it was "dark, dark" with the street light a "glow", not yet bright. Other witnesses said it was dusk or dark. Lawrence Baird described the scene of the accident as "a dark corner". It sounds as though this is what Mr. Brogan was describing in his statement to Cst. O'Donnell when he said "...down there is that black place..." (Exhibit #19, at page 4) (I did wonder if this was a transcription or typographical error and should read, "...down there *in* that black place...", not that it would make a difference to the point I am making.) Cst. O'Donnell testified that the lighting on Main Street was not great in any event.

[125] According to the Tupper Report, Fig. 11 at page 23, the point of impact between the Brogan car and Joshua's bicycle was before and not directly under, the MacKeigan street light. Not much light would have been afforded by this street light at dusk, when it was not fully on in any event. I accept that as nightfall was just coming on, the street lights would not have been at full strength. The conclusion I draw from all the evidence is that the lighting at the time of the accident can best be described as "gathering dusk." The sun had gone down and dark would come on quickly. Darren LeBlanc arrived soon after the collision, by his estimate 4 - 5 minutes, and he had to use a flashlight at the scene to find the airway tubes in his medical bag. Even if Mr. LeBlanc took a little longer than he recalls to get down to the fire station

a kilometer away and back with the truck, the crash had only just occurred and his evidence shows that daylight was disappearing when Mr. Brogan came into the bend just before the MacKeigan driveway and hit Joshua.

[126] What Mr. Brogan saw as he drove along Main Street in gathering dusk is difficult to discern from the evidence. There were two groups of children for him to notice: the School Street group which numbered about 8 - 10, and Tristan, Mikey and Joshua. It seems likely that Mr. Brogan would not have seen Tristan, Mikey and Joshua approaching at a distance along the road toward him due to the curve and the bushes. Mr. Brogan's statement to Cst. Melski that, just before he hit Joshua, he saw 3 - 4 kids on his right indicates that he was observing Tristan, Mikey and Joshua and not the School Street children. What Mr. Brogan's observations suggest is that he saw 3 kids, Tristan, Mikey and Joshua, and then the next thing he saw was Joshua a fraction of a second before impact. This indicates that Joshua's veering movement to the right, before he corrected back, happened so fast in conditions of poor visibility that Mr. Brogan did not see it.

[127] There is no evidence concerning what Mr. Brogan may have done when he perceived the children off to his right on Main Street. Perhaps he did slow down at that point or perhaps not: in any event, as Dr. McKenzie said in his evidence, going more slowly does not improve reaction time if the driver does not perceive the situation as a hazard. Dr. McKenzie noted that children on a sidewalk are not an event requiring a reaction.

[128] Gathering dusk, the "black hole" at the bend, the angle of the Lincoln's headlights at the bend, the street lights at only partial strength and the lack of any reflective material or accessories on Joshua's clothing or the BMX could explain why Mr. Brogan did not see Joshua cross from the curb into the northbound lane in front of him just before the collision. Another significant factor is what Mr. Tupper concluded was the time lapse for Joshua's manoeuver, what he called the "out-of-control time" of 1.0 to 1.7 seconds. As this includes the time for Joshua to correct back toward the sidewalk, the veering into the northbound lane had to have happened in an instant.

[129] There is also the issue of Mr. Brogan's impairment to consider as the reason he did not see Joshua until the impact. The effects of alcohol impairment on vision and perception could explain him not noticing Joshua moving into his lane, but the fact that he saw kids to his right undermines that. I accept Mr. Brogan's statement that before the collision he saw kids off to his right. I also accept that he saw Joshua in that terrible moment of impact, coming from his left. That he had not seen him before the collision is supported by the absence of braking or skid marks at the scene. In his spontaneous statements at the scene, Mr. Brogan provided an accurate description of the circumstances, kids to the right, Joshua coming into his path from the left. It is not possible to know with absolute certainty why Mr. Brogan did not see Joshua veer to the right, but given how quickly this happened according to Mr. Tupper's opinion, and the other factors - including lighting and visibility - I cannot say beyond a reasonable doubt that Mr. Brogan's impairment affected his perception of his surroundings. Given Mr. Brogan's discernment of important details, the number of factors working against Joshua being highly visible and Mr. Tupper's "out-of-control time"

calculations, I am far from persuaded that Mr. Brogan's impairment had anything to do with his not seeing Joshua move into his lane.

[130] The Crown has asked me not to accept Mr. Tupper's assumptions that underlie his conclusions about the "out-of-control time" as it is referred to in his Report. Mr. Tupper arrives at his opinion on the "out-of-control time" based on his assumptions about the speed Joshua was going on the BMX. Mr. Tupper notes the following in his Report about bicycle speed:

> A typical adult jogger goes one mile in six minutes. That is a speed of 10 miles per hour or 15 feet per second. Youngsters riding BMX bicycles can easily overtake and pass a jogger. Although Joshua was a small six year old on a full size BMX bicycle, he was apparently travelling at the same speed as his older companions. It is not unreasonable to assume that he was going faster than a jogger... I assume for the purposes of this analysis that at material times before impact Joshua Penny was travelling a speed of 15 - 20 feet per second.

[131] Mr. Tupper went on to conclude that at a speed of 15 feet per second, approximately 1.3 - 1.7 seconds transpired from the time the bicycle left the shoulder of the road to the time of the collision. Using 20 feet per second, Mr. Tupper found that this "out-of-control" time would have been 1.0 - 1.3 seconds.

[132] I know from Tristan Luker's evidence that Joshua was just behind him as they cycled south on Main Street. I accept this particular evidence, although not all of Tristan's testimony. Tristan' s recollection of where he was located when Joshua was hit conforms closely to where Mr. Tupper determined the accident occurred, a finding supported by the location of debris, such as the pieces from the Lincoln and Joshua's

sneaker. Tristan's recollection of Joshua's front tire being parallel to his back tire shows that Joshua was keeping up quite well. I am satisfied that the assumption made by Mr. Tupper about Joshua 's speed on the BMX is reliable. As Joshua was slightly behind both Tristan and Mikey, I find that it is more likely he was going 15 feet per second than 20, making the "out-of-control" time 1.3 - 1.7 seconds.

*Rate of Speed*

[133] There is no hard evidence concerning the issue of Mr. Brogan's speed. The Crown has said I should infer, from the severe injuries to Joshua detailed in the Medical Examiner's Report (Exhibit #1, at page 6), that Mr. Brogan was going fast when the accident happened. The Crown has submitted that I can draw this inference without any expert opinion evidence. I do not believe I can do so. In *R. v. Hall, [2004] O.J. No. 4746 at paragraph 45 (Ont. S.C.J.)*, the trial judge detailed the evidence she heard from an experienced police officer trained in accident reconstruction on the issue of what the damage to the vehicle indicated about the speed it was traveling at the time of impact with the pedestrian. The trial judge noted the police officer's opinion that the amount of damage was consistent with a high-speed impact. I am of the view that comparable evidence would be required for me to make any assessment of what Joshua's injuries indicate with respect to the speed of the Lincoln. I note that the photographs indicate limited and minimal damage to Mr. Brogan's car which was in a driveable condition after the accident.

[134] There was also no evidence of braking or skid marks found at the scene. It is

therefore not possible to objectively calculate the speed of the Lincoln based on the time it took to stop. *(Hall, supra, at paragraph 55)*

[135] As for the evidence that was led at trial, Jordie Pero saw Mr. Brogan drive by School Street at what he thought was "a normal rate of speed." Tristan Luker testified that when he saw Mr. Brogan's car coming toward them, it was travelling fast. The Defence has asked that little weight be accorded to Tristan's evidence because he did not tell police in his statement that he had seen Mr. Brogan's car going "fast." Even if he did observe this, and it simply was not brought out when he was questioned by police, I do not conclude from this evidence, and the Crown does not suggest, that Mr. Brogan was speeding as some people were said to do on Main Street.

[136] Tristan was not asked what he meant by "fast", whether that was a description that Mr. Brogan was going faster than other cars had been going or faster than Tristan was used to seeing cars go on that road. Fifty kilometers an hour could be perceived as fast, especially if the person making the observations is a small boy who is close to the road. I conclude I am not able to infer from this comment by Tristan that Mr. Brogan's speed was a marked departure from the norm of a reasonable driver at that place and time.

[137] The evidence at trial does not assist me in determining what speed Mr. Brogan was going when he hit Joshua. The Crown has acknowledged that there is no evidence proving that Mr. Brogan was driving above the 50 km/hour speed limit. As I found above on the issue of inferring the Lincoln's rate of speed from Joshua's injuries, I conclude that without expert evidence I cannot assume from the impact damage to the

bicycle that Mr. Brogan was driving any faster than the legal limit. I cannot know without an expert opinion whether an impact at 50 kilometers an hour or 40 kilometers an hour or less could cause the degree of damage sustained by the BMX. I find it reasonable to infer from the evidence that Mr. Brogan's speed was, as Jordie Pero observed, normal, that is to say, neither very fast nor very slow, within the speed limit and not imprudent.

*Mr. Brogan's Driving*

[138] Weather and road conditions on September 27 were clear and dry. There is no evidence at all that Mr. Brogan's driving prior to the accident was erratic or involved weaving, swerving or loss of control. Jordie Pero, who saw the Lincoln up by School Street, noticed nothing about it other than its normal speed. There is no evidence of driving disinhibition, as described by Ms. Campbell, where impaired drivers experience an increase in self-confidence and engage in imprudent behaviour as a result of an impaired perception of risk. A driver whose over-confidence has been fueled by alcohol might speed along a familiar road but, as I have said, there is no evidence that Mr. Brogan was speeding. There is no evidence of Mr. Brogan's driving other than Jordie Pero's observations that his speed was "normal" and Tristan Luker's that it was "fast." Cst. O'Donnell in his evidence specifically mentioned that when he arrived at the scene there was "a lot of chatter" that Mr. Brogan had driven over the sidewalk. Cst. O'Donnell examined the scene carefully and concluded that no such thing had happened. The grass was not knocked down or churned up from tire impressions and there were no fresh scrapes on the curb. Mr. Tupper concluded that the collision occurred in Mr. Brogan's northbound lane just before the MacKeigan

driveway. Mr. Brogan's car did not deviate from that lane after the impact and was pulled over to the side just down the road from where Joshua was hit.

*Conclusions on Mr. Brogan's Driving and the Collision with Joshua*

[139] The Crown has argued that at 7:30 p.m., September 27, 2006, conditions on Main Street were such that Mr. Brogan should have adjusted his driving, and that by slowing down he could have avoided hitting Joshua. The Crown submits that what became an unavoidable accident could have been avoided by Mr. Brogan making the appropriate decisions earlier. The Crown says Mr. Brogan failed to recognize and respond to the risks because he was impaired. The Crown's case is that Mr. Brogan, driving at or below the speed limit, should have slowed down once he noticed the School Street children. However, these children presented no hazard for Mr. Brogan to advert to. Traveling the speed limit on Main Street was not imprudent even in the presence of children in the area. Mr. Brogan's exclamation, "Why weren't youse on the sidewalk?" indicates his awareness that children used the sidewalks and his shock that a child was in the street. Mr. Brogan driving the speed limit did not present a hazard to the two groups of children he passed. A hazard was created when Joshua swerved suddenly and unexpectedly into the northbound lane. The expert opinion of Mr. Tupper, which I accept, is that when that happened, even an alert driver would have had no time to react and avoid a collision. If an alert driver would not have had time to react, then it is not relevant that Mr. Brogan's reaction time may have been reduced due to impairment nor is it relevant what Mr. Brogan's level of impairment may have been. The situation provided no opportunity to put Mr. Brogan's reaction time to the test. This is not a case where a quick reaction could have saved Joshua.

This is a case where there was no time to react to what happened let alone avoid the collision.

[140] What the Crown has asked me to accept in this case amounts to no more than speculation about Mr. Brogan's speed or what he did not perceive as he proceeded along Main Street. The Crown has not proven beyond a reasonable doubt that Mr. Brogan failed to avoid hitting Joshua because he was impaired. Mr. Tupper's conclusion that even an alert driver could not have avoided this collision, which was inevitable once Joshua started to veer into the northbound lane, raises a reasonable doubt that Mr. Brogan's impairment had anything to do with the accident.

[141] I am also satisfied by the other evidence I have just reviewed that Mr. Brogan's driving up to the point of the impact with Joshua did not show overt signs of impairment and, whatever Mr. Brogan's level of impairment, did not contribute to the collision. Furthermore, there is no evidence that Mr. Brogan's driving constituted a marked departure from the standard of a reasonable person in those circumstances at that time.

[142] It is useful to contrast this case to *R. v. Hall, supra,* where the issue of an unavoidable accident was raised in the defence of an impaired driver who killed a pedestrian. In *Hall*, Molloy, J. of the Ontario Superior Court of Justice, noted that Mr. Hall's situation was distinguishable from one where pedestrians suddenly run out in front of a motorist who does not have time to stop. *(paragraph 73)* In *Hall*, four pedestrians who were crossing a four lane roadway had to scatter out of Mr. Hall's path because of his rate of speed and acceleration as he bore down on them. Molloy,

J. found that Mr. Hall's impairment contributed to the emergency situation where he was speeding in a pedestrian-congested area, even though the pedestrians should not have been crossing at that location. *(paragraphs 79 and 80)* Mr. Hall's impairment affected his reaction to the emergency making the impairment a material contributing cause to the death that occurred. Due to his impairment, Mr. Hall was found not to have appreciated the danger presented by his speed in proximity to the pedestrians.

[143] Molloy, J. found that Mr. Hall's driving was manifestly dangerous. He was driving while impaired by alcohol in an area busy with pedestrians, and speeding. Witnesses specifically mentioned that their attention was drawn to Mr. Hall's vehicle because it was traveling so much faster than other traffic in the area. Molloy, J. found that Mr. Hall's driving was a marked and substantial departure from what would be expected of a reasonable prudent driver. The risk of serious harm to others in the area was obvious and foreseeable. She convicted Mr. Hall of dangerous driving causing death and acquitted him of criminal negligence. *(Hall, supra, at paragraph 85; upheld [2007] O.J. No. 49 (Ont. C.A.); application for leave to appeal dismissed [2007] S.C.C.A. No. 298)*

[144] This case is markedly different from the *Hall* case. There was no obvious or foreseeable hazard on Main Street at 7:30 p.m. on September 27, 2006. Children were out as they usually were. Mr. Brogan was driving in his proper lane within the speed limit. His driving was not manifestly dangerous or imprudent. Mr. Brogan did not create an emergency situation. Although he had a BAC that would have impaired his driving, there is no evidence of that impairment manifesting itself in his driving. There was no apparent danger that Mr. Brogan failed to appreciate because of his

impairment. There was a sudden and unpredictable collision with Joshua Penny. An accident reconstruction expert, making reasonable and supportable assumptions, arrived at the conclusion that the tragic accident was unavoidable. That opinion and the other evidence I have reviewed raises a reasonable doubt that Mr. Brogan's impairment caused the accident that killed Joshua. A simple determination, without more, that Mr. Brogan was impaired at 7:30 p.m. on September 27, 2006 is not enough to support a finding that Mr. Brogan is criminally responsible for Joshua's death. *(R. v. Ewart, supra, (Alta. C.A.) at paragraph 14)*

*Criminal Negligence - The Impaired Insulin-Dependent Diabetic Driver*

[145] I must finally deal with the Crown's submission on criminal negligence in this case, as it raises some issues I have not yet addressed, although they are somewhat moot in light of my finding on the issue of causation.

[146] The offence of criminal negligence causing death is "at the high end of a continuum of moral blameworthiness." *(R. v. J.L., [2006] O.J. No. 131 (Ont. C.A.))* Criminal negligence is made out where it is proven that the conduct of the accused showed a marked and substantial departure from the standard of behaviour expected of a reasonably prudent person in the circumstances. *(Waite v. The Queen,supra)* The higher level of moral blameworthiness associated with criminal negligence is the wanton or reckless disregard for the life or safety of others.

[147] In this case, the Crown has argued that Mr. Brogan should be found guilty of

criminal negligence causing death because he was not only impaired when he collided with Joshua Penny, he was also an insulin dependant diabetic. As I understand the Crown's position, Mr. Brogan showed a wanton or reckless disregard for the life or safety of others by driving while impaired by alcohol and, as an insulin dependant diabetic, being at risk of developing hypo- or hyperglycemia, conditions that would compound his impairment.

[148] I reject this construction of criminal negligence and its application to the facts of this case, even had I found that Mr. Brogan's manner of driving caused the accident. The evidence is that Mr. Brogan used insulin to control his diabetes. He was cognizant enough of his condition and its proper management to request insulin while he was at the Central Division police station and administered it to himself once it arrived. This was at 10:31 p.m. There is no evidence that at the time of the accident, three hours earlier, Mr. Brogan was experiencing either a hypo- or a hyperglycemic state. Given that Dr. McKenzie testified that impairment by alcohol would be amplified by hypo- or hyperglycemia, if Mr. Brogan had been experiencing unstable blood sugar levels, I would have expected the evidence from witnesses at the scene to be more consistent with gross intoxication. There is no evidence that Mr. Brogan's diabetes was not well controlled by the regular and routine administration of insulin. This case bears no resemblance whatsoever to *R. v. Grant, [1991] B.C.J. No. 3988 (B.C.S.C.)* provided to me by the Crown.

[149] Furthermore, if an impaired insulin-dependent diabetic were to have a hypo- or hyperglycemic episode while driving, the significance of it in the context of criminal

responsibility would have to be subjected to analysis under the test in *Hundal, supra,* where Cory, J. held:

> ...if an explanation is offered by the accused, such as a sudden and unexplained onset of illness, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk involved and of the danger in the conduct manifested by the accused.

[150] There can be no automatic liability as the Crown seems to be suggesting. Imposing moral culpability for criminal negligence on an insulin-dependent diabetic simply because they drove while impaired by alcohol, without more, would be contrary to principles of fundamental justice and a violation of section 7 of the *Charter*. *(Reference re: Motor Vehicle Act (B.C.), [1985] S.C.J. No. 73)*

[151] In *Creighton, supra,* McLachlin, J. (as she then was) observed that the law "does not lightly brand a person as a criminal." *(paragraph 113)* Accepting the Crown's argument on criminal negligence in this case would, in my opinion, be contrary to this principle. It would furthermore also violate the *Charter's* equality guarantees under section 15 establishing that everyone is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination on prohibited grounds such as disability. *(Law v. Canada, [1999] S.C.J. No. 12; Law Society of British Columbia v. Andrews, [1989] S.C.J. No. 6)* Mr. Brogan has a disability: he is an insulin dependent diabetic. The argument that a disability and its possible manifestations would make an accused automatically guilty of criminal negligence if they drove while impaired by alcohol and caused an accident does not withstand scrutiny under constitutional and criminal law principles. It is a

fundamental principle of justice that criminal liability must not be imposed in the absence of moral fault. *(Creighton, supra, at paragraph 146, per McLachlin, J.)* The law prohibits impaired driving, it does not permit a racheting up of the moral blameworthiness of accident-causing impaired drivers to criminal negligence simply because they are insulin-dependent diabetics.

*Impaired Driving*

[152] I have found beyond a reasonable doubt that Mr. Brogan was impaired when he was driving on September 27, 2006. For reasons I already explained, I am not satisfied the evidence establishes that he was more than slightly impaired, although as the Crown is not required to prove any specific level of impairment, even slight impairment is sufficient proof of the offence. However, as Mr. Brogan has already pleaded guilty to driving with a BAC over .08, for which I am entering a conviction, he cannot also be convicted of impaired driving arising out of the same cause or matter. *(R. v. Kienapple ,[1974] S.C.J. No. 76*; *Regina v. Boivon (1976), 34 C.R.N.S. 227 (Que.C.A.); R. v. Houchen, [1976] 31 C.C.C. (2d) 274 (B.C.C.A.))*

**Conclusion**

[153] It will be apparent from these lengthy reasons that I am not satisfied the Crown has proven the case against Mr. Brogan beyond a reasonable doubt and displaced the presumption of innocence. I am therefore acquitting Mr. Brogan of the charges before

the court. My decision should not be read as requiring a change to any laws. The law prohibits impaired driving and imposes heavy penalties for criminal negligence, dangerous driving and impaired driving causing death. The failure of the Crown's case against Mr. Brogan lies not in the law but in the facts. Although he was in violation of the law against impaired driving, I have concluded that Mr. Brogan is not guilty of causing the accident that killed Joshua Penny. I have come to this conclusion because that is where the evidence has taken me.

[154] I know that my decision in this case will be difficult for some members of the public and particularly the family of Joshua Penny to understand. They will question how an impaired driver who is involved in a fatality can be found not guilty. They will struggle with the fact that Mr. Brogan drove into Joshua causing his death and yet has been acquitted of the offences charged in relation to that death. While I have endeavoured to explain the law and my reasoning, I recognize that my decision will bring new pain, frustration and disappointment to the Penny family. I feel tremendous sympathy for the Penny family for their shattering loss. I can imagine nothing worse than losing a child. But I have no hesitation in saying that strict adherence to the high standards of criminal justice, particularly the burden of proof applicable in criminal trials, is fundamental to the preservation of the rule of law and the integrity of our legal system. Adherence to the fundamental principles underpinning the criminal justice process properly requires that in determining guilt or innocence sympathy be set aside.

Anne S. Derrick
Judge of the Provincial Court of Nova Scotia