PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Adams*, 2023 NSPC 13

Date: 20230420
Docket: 8399648
Registry: Dartmouth

Between:

His Majesty the King

v.

Brion Michael Adams

Judge:	The Honourable Judge Bronwyn Duffy
Heard:	March 7, 8 and 16, 2023, in Dartmouth, Nova Scotia
Decision	April 20, 2023
Charge:	320.14(1)(a) of the **Criminal Code of Canada**
Counsel:	Michael Blanchard, for the Public Prosecution Service of Nova Scotia Brion Adams, on his own behalf

By the Court:

[1] Mr. Brion Adams is charged with a single count of operating a conveyance while his ability to operate it was impaired to any degree by alcohol, or drug, or both, contrary to section 320.14(1)(a) of the *Criminal Code*. The allegation date is on or about the 1st day of October, 2019, at or near Lower Sackville, Nova Scotia. It is a dual procedure count and the Crown elected to proceed by summary process.

[2] Trial evidence was heard on March 7 and 8, 2023, and closing submissions were made by the Crown Attorney on 8 March 2023 and by Mr. Adams on 16 March 2023. The Court reserved decision to today's date.

[3] There was a 714.1 application heard on 31 January 2023 for a Crown witness to be permitted to testify via videolink; that application was granted.

Summary of Trial Evidence:

[4] The Crown's case consisted of five witnesses and five exhibits. I have considered all of the evidence before the Court, though not all of the evidence is detailed in this summary. The first witness was Cst. Kristopher Hansen, a certified Drug Recognition Expert (DRE) by the International Association of Chiefs of Police; his CV and Drug Evaluation and Classification Program certification were tendered as part of Exhibit 3. The Crown elicited testimony in relation to Cst. Hansen's professional experience, education, successful completion of training and evaluations conducted, and his current certification on the date of the allegation. The Crown submitted that the Court rely on the provisions of subsection 320.38(a) of the *Criminal Code* with respect to the qualifications of the DRE, and the Court confirmed that a qualification *voir dire* would be dispensed with in accordance with the legislation and with *R. v. Bingley* 2017 SCC 12. The limited scope of expertise of the DRE in administering the 12-step procedure and the direction in *Bingley* were recently reviewed in *R. v. Baillie,* 2022 NSPC 17.

[5] Cst. Hansen performed the drug influence evaluation on Mr. Adams commencing at 1705 hours on 1 October 2019 and ending at 1813 hours that day. His notes of the tests were recorded on a Face Sheet, and detailed in a Narrative, both of which were tendered as part of Exhibit 3. A document summarizing the 12 steps and including a pupilometer to gauge pupil size in various lighting was filed

as Exhibit 4, and a diagram showing various indicia of impairment on the vertical Y-axis and drug types on the horizontal X-axis to display was Exhibit 5.

[6] Cst. Hansen evaluated Mr. Adams on each of the 12 steps, and noted as follows:

1. Breath Alcohol Test: There was no demand for a breath sample because there was no indication roadside that alcohol was a factor.
2. Interview with the Arresting Officer: the investigating officer told Cst. Hansen what his grounds were, and why he arrested the accused, which included his having responded to the scene of a motor vehicle collision, and the accused exhibiting behaviour that was "sloth-like", slow and deliberate, slow answering questions and staring straight ahead, bloodshot eyes, crying and constricted pupils. I note parenthetically that the observations of the investigating officer will be detailed more fully later in these reasons.
3. Preliminary Examination: Cst. Hansen made the immediate observations that the accused appeared tired, was crying, his eyes were bloodshot, and he had a raspy slow voice. He noted that his coordination appeared slow. He observed that he had droopy eyes, with the top eyelid half shut, and described his pupils as constricted. His pulse was 66 beats per minute.
4. Eye Examinations: Cst. Hansen noted no horizontal gaze nystagmus, no resting nystagmus, and no vertical nystagmus; Mr. Adams was able to follow and track a stimulus. However, the DRE conclusion regarding convergence was that Mr. Adams was not able to converge his eyes, though he noted that not everyone is able to cross their eyes.
5. Divided Attention Tests: These tests involved a Modified Romberg Balance test, assessing body sway and time estimation, a walk and turn test, a one leg stand for 30 seconds each leg, and a finger to nose test. Cst. Hansen said that Mr. Adams swayed side-to-side roughly six inches, and estimated the passage of 30 seconds in 51 seconds. During the walk and turn tests, Cst. Hansen testified, in summary, that Mr. Adams was unable to keep his balance twice, broke his stance, was unable to follow instructions and started before being told to start, stopped repeatedly during the walk and turn, missed touching heel to toe, used his arms for balance and took the wrong number of steps. Cst. Hansen testified that Mr. Adams "performed horribly". For the

one leg stand, Mr. Adams was unable to perform this on one foot because of hardware that was removed in surgery a short time prior. He swayed while balancing and used his arm for balance, and was able to count to 17 rather than 30. Mr. Adams later testified on his own behalf with respect to his surgery on his leg and I accord little weight to the results of the one leg stand on his left foot for this reason. During the finger-to-nose test, Cst. Hansen noted Mr. Adams touched the bridge of his nose rather than the tip on one occasion, touched underneath his nose on two occasions, touched his right cheek on one occasion, and lost his balance and fell forward on another. Cst. Hansen observed that Mr. Adams' fine motor skills were impaired.

6. Clinical Indicators: Cst. Hansen testified that Mr. Adams' pulse on the second pulse measurement was below the normal range, at 58 beats per minute, his blood pressure was 118 systolic over 76 diastolic, and there was nothing noteworthy about his body temperature.

7. Pupil Size Checks: There were pupil checks performed in three different types of light: normal room light, darkness, and direct light. Cst. Hansen made findings that Mr. Adams' pupils were constricted in two of three, and at the small size of the normal range in the third. He said this is indicative of narcotic analgesic drugs.

8. Muscle Tone Observations: Mr. Adams muscle tone was found to be flaccid during the examination, noted by the DRE to be indicative of Central Nervous System depressants or narcotic analgesics use.

9. Injection Marks and Third Pulse: There were no injection sites or track marks, and Mr. Adams' third pulse was measured at 58 beats per min, which Cst. Hansen observed was again below the average.

10. Interview, Statements and Other Observations: Mr. Adams said that he takes hydromorphone three times per day. On the question of voluntariness, the Court disregards this information except to the extent it informs Cst. Hansen's grounds to make the demand for the toxicological sample pursuant to subsection 320.31(9), which provides that statements by the detained person to the DRE during the evaluation process are admissible, but only to justify the state action in making the demand (see also *R. v. Paterson*, 2017 SCC 15). Mr. Adams later testified and spoke to his hydromorphone intake and

prescription history at length, and tendered Exhibit 6 and 7 in relation to the same.

11. Opinion of Evaluation: Cst. Hansen testified that his opinion was that "[Mr. Adams] was impaired by a narcotic analgesic drug." Cst. Hansen gave a urine demand and Mr. Adams complied with that demand and gave a sample of his urine. No blood sample was taken. Upon questioning by the Crown Attorney whether there was any particular portion of the examination that most strongly indicated impairment, Cst. Hansen said that it was more from the divided attention tests, and at the beginning during the preliminary examination. He said Mr. Adams was "on the nod", which Cst. Hansen described as appearing to be asleep, though able to answer questions in a slow manner. Cst. Hansen described that Mr. Adams performed poorly on every aspect of the modified Romberg test. He said these factors "in their entirety" helped him to form the opinion that Mr. Adams' ability to operate a conveyance was impaired by a narcotic analgesic. Upon questioning as to the drug involved, Cst. Hansen referred to the Exhibit 5 diagram, and ruled out several based on pulse rate, blood pressure, body temperature, and lack of nystagmus, and testified that the "only one that fit almost perfectly was narcotic analgesic".

12. Toxicological Sample: At the conclusion of the evaluation, Cst. Hansen demanded that Mr. Adams provide a sample of his urine, noted in the "Narrative" (Exhibit 3) to be at 1759 hours, and the sample was received at 1810 hours, and sent to the National Forensic Laboratory for analysis.

[7] The Defendant asked astute questions of Cst. Hansen on cross-examination. He asked whether being fresh out of a surgery could affect performance on any of the tests, whether injury to a foot, or inner ear surgery, could affect ability to perform the tests, and whether stress levels or lack of sleep could affect the results of the evaluation. Cst. Hansen conceded that stress can affect clinical indicators, but testified that he did not know the answers to several of the questions.

[8] The second witness for the Crown was Cst. Shawn Manson, the investigating officer that attended in relation to the subject incident in Lower Sackville, Nova Scotia on 1 October 2019. Indeed, Cst. Manson attended two incidents on the date in question involving Mr. Adams. At around 1pm, he

attended Sackville Drive responding to a complaint of an incident. A vehicle driven by Mr. Adams had rolled back when the traffic light had turned green and touched the complainant's vehicle behind him; there was no damage to either. Cst. Manson said the complainant was adamant that Mr. Adams was "impaired, as in, drinking and driving."

[9] In discussion with Mr. Adams, Cst. Manson testified that he did not get impression that he was drinking and driving. Cst. Manson said Mr. Adams "blew zero as expected" in the approved screening device after being read a demand for the same and there were "no indications that he was impaired in any way".

[10] The second incident occurred the same day, about two hours later, at approximately 3pm.

[11] Cst. Manson testified that a second incident had occurred at Glendale Drive, near the sports stadium in Sackville, and when the plate was read out over the intercom, he remembered it from the first incident and decided to go "check it out", as one vehicle being involved in two collisions in one day is unusual. The subject intersection at McDougall Avenue was shown in Exhibit 1. Cst. Manson testified that when he arrived, he saw a white van, then he saw the vehicle that Mr. Adams was driving earlier, and then he saw Mr. Adams.

[12] The complainants in the white vehicle included a male and female, and Cst. Manson testified that the male was agitated. In Mr. Adams' vehicle, there was a child that the Const. estimated to be two years' old in the backseat. He testified that there was marked departure from "how I dealt with him earlier". Cst. Manson noted the accused was slow answering, sat staring ahead for a few minutes; "his answer was not what I asked", he was crying vigorously, and he was "cognitively impaired" from what Cst. Manson observed earlier. When Cst. Manson repeated questions, Mr. Adams was able to answer, but slowly. His pupils were constricted, and his movements were slow and deliberate.

[13] Cst. Manson testified that he arrested Mr. Adams, advised him of his rights and demand for a drug recognition evaluation, transported him to the police service, and then undertook to facilitate his call to counsel. The call itself was somewhat involved. Cst. Manson said that after about five minutes of being in the counsel room, the officer "peeked in" to see if he was still on the call, and saw Mr. Adams' head on the table, with the phone to his ear. Cst. Manson stepped away, and checked again approximately 12 minutes later, and this time Mr. Adams' arm was outstretched, with the phone away from his ear. Cst. Manson said that Mr.

Adams couldn't remember whether he had talked to a lawyer, so the Const. stayed in the room, called counsel again, and exited only when he saw Mr. Adams conversing. He was asked a couple of questions regarding the release process on cross-examination.

[14] The third Crown witness was James Jobes. He is a resident of Lower Sackville. Mr. Jobes testified that he and his wife were returning from a medical appointment in Bedford on the date of the allegation, between 3 and 330pm, right around when school was getting out. They were driving a 2009 Hyundai Elantra sedan. They drove up Cobequid Road, went left on to Glendale, and stopped at a red light. The vehicle in front of him stopped, he checked his rear view mirror, he was sitting chatting with his wife, and his "world exploded". He said there was no indication of a vehicle coming to a sudden stop. Mr. Jobes said the car that hit him was black or dark blue, and thought it was a Chevrolet. He said the impact drove him forward about ten feet, and his vehicle stopped before hitting the vehicle in front of him. He saw Mr. Adams at the scene of the incident exiting the vehicle from the driver's side, front seat. He said a young child was in the passenger side in the back, screaming. Mr. Jobes observations were that Mr. Adams "appeared to be impaired, staggering, speech slurred" and that his pupils were dilated. He said Mr. Adams was belligerent, and that his aggressive behaviour was surprising, he expected someone to be contrite given what happened. Mr. Jobes noted his wife still has back injuries. There was no cross-examination of Mr. Jobes.

[15] Christine Shunamon was the fourth witness for the Crown. Ms. Shunamon testified that she was driving home from work, and Mr. Adams' black car was directly in front of her; the cars ahead of him proceeded; she beeped her horn; the driver took off quite quickly, and had lost the green arrow by that time. The car proceeded through the intersection, and oncoming traffic with the green light had to hit the brakes to avoid hitting him. Ms. Shunamon testified that she remained able to observe the car after she made the left turn, and the driver was not driving in a straight line. She watched the vehicle until it ran into the back of the light-coloured car on Glendale Drive. She said the collision was not hard, but that [he] just ran into the vehicle. Ms. Shunamon exited her vehicle to see if everyone was alright, and described the "guy in the black car" as "quite out of it". She described his behaviour as acting "very deliberately", and "trying to appear normal when he didn't really seem normal." Ms. Shunamon described the weather as a nice day, and the time as in the area of 3pm. She approached Mr. Adams' vehicle, and said there was a toddler crying in the back seat, and she got in the car and tried to calm the child down until the police arrived a few minutes later. Ms. Shunamon testified

that she did not know Mr. Adams prior to this incident, and provided an in-dock identification. There was no cross-examination of this witness.

[16] The last Crown witness was national forensic toxicologist Kimberly Ann Snider. Ms. Snider's CV and report were exhibited on the qualification *voir dire*, and she testified vis-à-vis her experience, training, education, courses, employment current and past, and her experience testifying as an expert in Court. I considered all of the information on the *voir dire*, but highlight that Ms. Snider was a toxicologist from 2004 to 2009, then left to work as a pharmacist, which she is by trade, and then returned to the RCMP lab in 2014. She has myriad professional memberships and accreditations, and has testified in Court in respect of drug and alcohol toxicology many times, and indeed "lost track [of the number] after 50 times". Ms. Snider testified on the *voir dire* as to the area in which she wished to be qualified, and said the evidence she provides in Court is unbiased and impartial. Ms. Snider was not cross-examined on the qualification *voir dire*.

[17] The Crown Attorney submitted that the *R. v. Mohan* [1994] 2 SCR 9 criteria were satisfied. The SCC directs in *R. v. Sekhon*, 2014 SCC 15 that the criteria of relevance, including reliability, necessity in assisting the trier of fact, no exclusionary rule and the proper qualification of the proposed expert is a continual assessment rather than a one-time question. In *R. v. White-Burgess*, 2015 SCC 23, the Court detailed the secondary gatekeeping function of trial judge when considering whether to admit expert evidence that meets the prerequisites to admissibility; that is, an assessment of whether it is sufficiently beneficial to the trial process to warrant admission despite its potential harm. Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out.

[18] With respect to the charge before the Court, Ms. Snider's experience is relevant. The proposed expert is not the trier of fact, the trial judge is not "contracting out" or assigning its duty, but her evidence as to which drugs, if any, are present in the sample of urine taken from the accused, is probative to the ultimate issue of whether Mr. Adams was impaired by a drug while operating a motor vehicle.

[19] Ms. Snider's evidence is necessary, because the trier of fact cannot come to a conclusion on the content of the urine sample without this evidence. There is no character or other rule that would exclude her qualification, and I concluded she is

properly qualified as an expert in analysis of biological fluids for the presence of drugs, and the effects of drugs on the human body and driving ability.

[20] On the trial proper, Kimberly Snider testified that she took possession of a sample of urine, and submitted it for a variety of analyses to look for drugs. She concluded that the urine had three compounds: hydromorphone, oxymorphone, and 7-amino-clonazepam. She said hydromorphone and oxymorphone are classified as narcotic analgesics, and are used therapeutically for the reduction of pain. Hydromorphone is available by prescription, and oxymorphone is not a prescription drug. Ms. Snider testified that the effects on brain include the slowing down of brain activity, exhibited by slow response time, slow actions, can cause problems with balance, motor coordination and gait problems, and sedation. She described the effects of sedation as excessive sleepiness or somnolus, a slowness to respond, which "looks to an outside observer like they just want to fall asleep, referred to colloquially as 'on the nod'". Physiologically, a person with narcotic analgesic in their body exhibits pinpointed or restricted pupils, low blood pressure and low pulse rate. Both hydromorphone and oxymorphone were found in Mr. Adams' urine sample.

[21] The third compound found in Mr. Adams' urine sample was 7-aminoclonazepam, which Ms. Snider testified is a metabolite, or a body breakdown product. She noted that finding the amino means that at some point in time prior to the sample, he must have ingested the drug clonazepam. Ms. Snider said that clonazepam belongs to a class of drugs called benzodiazepines, all of which are Central Nervous System (CNS) depressants, which slow down brain function and cause similar symptoms to a narcotic analgesic-impaired person, including a slowed reaction time, sleepiness, balance problems and lack of motor coordination.

[22] Ms. Snider said that her findings indicate that the three noted compounds would have had to be ingested at some time prior to the sample being taken. Upon being questioned as to the effect of the combined use of those substances, she said that when use is combined, there is an additive or greater effect than when they are used alone; namely, excessive sleepiness and sedation as compared to the effect of one drug alone.

[23] Kimberly Snider testified as to the effect(s) of these drugs on the ability to operate a motor vehicle – by slowing down brain function, they are capable of impairing driving ability by affecting information processing, by slowing reaction time, so it may take someone longer to stop or hit the brake if needed. It will affect

motor coordination and balance, which can affect steering and controlling the vehicle. Myosis or pinpointed pupils can cause vision problems, information processing problems and reaction time difficulties – so physical control of the vehicle can be deteriorated by any one of these three drugs.

[24] With respect to Remark #4 in Exhibit 2, Ms. Snider said that this means the drugs are used, and do not evidence impairment, dose or time. “It tells me and the toxicologist what drugs were used.”

[25] On cross-examination, Ms. Snider confirmed that there is no link between the detection time of the drugs and the time for which they are active. She said the clonazepam can be detected for days post-ingestion, and hydromorphone and oxymorphone for more than 24 hours. She confirmed that “just because I found them in the urine, does not mean [the person] is impaired”.

[26] This witness concluded the Crown’s case, with exhibits tendered.

[27] Brion Adams testified on his own behalf. Mr. Adams has a horrific personal story. 15 months before this incident, he was working with Dexter Constructions, as a Class 1 professional driver by trade. On 27 June 2018, the loader operator loaded his truck off balance, with all weights on the right side of the truck. Later that morning, he hit a left bend, and his vehicle overturned. Mr. Adams was trapped in that tractor trailer for four hours, he described it that he “died three times, was revived three times” and was airlifted to the QEII. He testified that all of the medications that he was prescribed and taking were strictly due to involvement in this accident. His tibia and fibula were broken in 11 spots, 11 screws and a 10-inch plate were inserted in his ankle, he sustained a concussion, his nose was badly broken, his right eye was busted “wide open”, and his right ear was almost lost. Mr. Adams had 14 to 15 herniations in his lower back, the diesel fuel damaged his lungs, he has left knee problems and is awaiting another surgery, he self-reports that he has acute Post-Traumatic Stress Disorder, “severe anxiety, night terrors, and short-term memory loss.” He says there are days where he struggles getting words out. Mr. Adams says that after the accident, his relationship with his partner was “on the rocks”, that he was unable to work and keep up with the things he needed to do for his family, so much so that they decided to separate along the way.

[28] Mr. Adams testified that he “took nothing”, before this accident, no medications at all. He said there had been a plethora of medications that were trialed; there was a pain specialist involved, who prescribed him all the pain

medication. Mr. Adams said there was “a circus of things going on medically”, “all prescribing their own medications”, and his family doctor finally determined that there were “too many cooks in the kitchen” and that all prescriptions had to go through him first. He said he had six different doctors at one point, and his prescription summary was exhibited at trial as Exhibit 6, together with an Official Receipt of prescriptions from 16 July 2018 to 21 April 2022, as Exhibit 7, the latter which is a 21-page document. The photos the defendant exhibited as Exhibit 8, depicting his condition post-accident, were appalling and verify his description of the incident.

[29] In his testimony, Mr. Adams raised several issues he felt were problematic with the Crown’s case – Cst. Manson said Mr. Adams showed no signs of impairment during the first encounter, and on the second, Mr. Adams explains the difference being his general upset about the situation. In a statement made by Cst. Hansen about his failure to take the appropriate number of steps on one of the DRE tests, he explains this away by saying he had difficulty walking because of his injuries. The statement by Cst. Manson regarding the rollback of Mr. Adams’ vehicle, he says is explained by the operation of a manual transmission vehicle, which is characterized by rollbacks. The situation described by the Constable regarding Mr. Adams’ session speaking to counsel, Mr. Adams says the reason for this is his traumatic brain injury. Mr. Adams took issue with several of the comments of Mr. Jobes, most along the lines of being exaggerated descriptions of what transpired. Mr. Adams referenced the comment by Christine Shunamon that there were no obstructions on the route travelled when testifying about the subject vehicle moving from the left to right, and Mr. Adams explains this by saying he could have been moving to avoid potholes. He did make a point to note that he appreciated her tending to his son during that unfortunate time. Mr. Adams reiterated the testimony of Ms. Snider that her analysis does not provide evidence of impairment, only speaks to the drugs found in the urine sample.

[30] Finally, Mr. Adams said he is not an aggressive person, not a “drugged up drunk”, but rather a hardworking, honest, family man who takes his kids to church every Sunday. He says his “entire week consists of doctors’ appointments, chiropractors, specialists, massage, you name it, because I am unable to work.” He takes care of his family and goes to his doctors’ appointments, trying to get well. Mr. Adams says he is “very remorseful for the situation that happened”, that his licence was revoked on the scene immediately, and instead of reinstating it three months’ later, he waited six months because he was “so torn up” with his son being in the car, the fact that he could have hurt people, which was not intended. He said

he “took these medications 15 months prior to the accident” giving rise to this allegation, and is unsure of what happened. He says he had no knowledge of what could have happened to make it react in his system, that it was an isolated incident, and that he is very sorry for it happening.

[31] On cross-examination, Mr. Adams confirmed that he took hydromorphone every day since August 2019. On questioning regarding oxycodone and clonazepam, he said he had no memory of taking oxycodone, but that the anaesthesiologist provided him clonazepam to manage PTSD and anxiety. Mr. Adams confirmed he was taking the hydromorphone under physician direction, and that he was aware of the warnings on the bottle to use caution while operating a motor vehicle. Mr. Adams maintained that he took the hydromorphone for 15 months in a row and had no effects and felt like he was using caution; he took it because it was for treatment, and because it was prescribed to him. He agreed on cross-examination that on the day in question “something happened” and that “it happened very suddenly”. The Crown Attorney put it to Mr. Adams that he was impaired behind the wheel, and Mr. Adams said “something wasn’t right, I wasn’t of sound mind, I never had time to make a decision…and before I realized it I was in the back end of someone’s car." Mr. Adams said during cross-examination that he started noticing something wasn’t right around the location of Sackville High. He said on the day in question he took his first dose of hydromorphone at 7am, and the second dose at 1pm, but that the doses are usually eight hours apart. At the time of the accident, he “felt something that wasn’t right… that everything was fine until it wasn’t”.

Positions of the Parties:

[32] The Crown Attorney submits that the demanding officer relied on a sample, that subsection 320.28(4) CC is the authority for sample in question, and relies on the presumption in subsection 320.31(6), which provides that for analysis of samples taken under demand, where person has a drug in their body that is of a type that the evaluating officer has identified as impairing the person’s ability to operate a conveyance, that drug, which was present in the person’s body at the time when the person operated the conveyance, in the absence of evidence to contrary, on proof of the person’s impairment, that drug is presumed to have been the cause. The Crown submits that the Court has the expert opinion of the DRE that Mr. Adams was impaired by a narcotic analgesic, which was consistent with the toxicology screening, and highlights the observations of Cst. Hansen, summarized earlier in these reasons. The Crown argued that the DRE observations

are consistent with roadside indicia and consistent with the toxicology report. Noting Mr. Adams testimony vis-à-vis the potential effects of exhaustion, stress, and sleep deprivation, he submitted that while Cst. Hansen could not necessarily speak to it in any detail, regarding the stress, the DRE commented that pulse and blood pressure measurements were, on every test, below the normal range, and that a stressed individual would likely exhibit a higher pulse and blood pressure reading. The Crown's submission was that there was nothing in evidence to undermine the findings of the expert.

[33] The Crown noted the evidence of Cst. Manson that it is a unique experience that an officer arriving on scene would see the same person twice, the first time without concern for sobriety or attentiveness, and then a marked departure two hours later, whereupon the accused was slow-reacting, lacking in concentration and answering questions incorrectly. With respect to the potential for sleepiness or exhaustion to be the cause of Mr. Adams' behaviour, the Crown notes Cst. Manson's testimony and says this does not line up with the accused's earlier presentation at 1pm; that two hours earlier Mr. Adams was in an unremarkable state, the Crown argues is inconsistent with someone suffering from exhaustion.

[34] With respect to James Jobes' testimony, the Crown argued that he was very specific with his impressions, including his observations of tire marks on the road, that he was not amplifying or exaggerating, and had a very direct notion of what he wanted to say. The Crown noted that Ms. Shunamon's testimony and her observations on scene, namely cutting off other vehicles, going left and right in the lane, self-conscious or slow movement and strange behaviour is consistent with the observations of the attending officer and the Drug Recognition Expert.

Mr. Blanchard for the Crown made several submissions in relation to the testimony of Mr. Adams. The Crown argues the accused's testimony was that he cannot account for the behaviour, and speculated obstructions in the road, among other possible explanations; the Crown says it is open to me to reject his evidence and accept that Mr. Adams is offering only testimony to negate the possible effect of the medication. The Crown argues Mr. Adams was taking hydromorphone regularly, and he was impaired when he was taking the drugs on the day in question. Taken together with the witness accounts, the Crown submits it is open to me to accept that Mr. Adams was impaired when he was driving that day, that it was caused by the drugs. The Crown's submission is that there is not a clear, cogent narrative from Mr. Adams as to why this occurred only once, and more generally, that is such a stark outlying factor that it undermines his credibility on

the whole. The Crown submits that without any form of explanation of what happened, that is self-serving evidence and the Court should reject it. The Crown emphasized the application of the presumption noted earlier, and that even if the excuse offered by the defendant could raise any doubt, it would not change that Mr. Adams knew he was taking the medication, and that the *mens rea* is therefore satisfied and a conviction should flow from that. In relation to the mental element of the offence, the Crown submitted for consideration the cases of *R. v. Rushton,* 1963 CanLII 743 (NSSC), arguing it stands for the proposition that the accused knows or ought to have known that he voluntarily consumes, and then that is sufficient for *mens rea*. The Crown Attorney also referenced the Supreme Court of Canada decision in *R. v. King,* [1962] SCR 746, in which Mr. King had taken a drug on the direction of his doctor, as support for the *mens rea* being satisfied in the case at bar.

[35] The defendant, for his part, underlines the comments of the forensic toxicologist that the medication could have been taken days or even weeks prior. He argued that his multiple injuries could be responsible for his slow reaction time, and his red eyes the consequence of lack of sleep. He said the failure to take the correct number of steps during the DRE evaluation could also be explained by his injuries and operations, and the surgery on his weak leg the reason for the roll-back of his vehicle. Mr. Adams referenced the Constables noting his unusual behaviour during the counsel call, and said his "very severe traumatic brain injury" and lack of sleep was the reason he could not remember. Mr. Adams said that Mr. Jobes was exaggerated in portions of his testimony, and that he believes Mr. Jobes was trying to exaggerate the incident, noting that both vehicles were drivable after the incident. He underlined that no one identified his vehicle with any more particularity than as a darker-coloured car, but were able to make a sound statement on his condition. In closing, Mr. Adams emphasized that he had no knowledge of taking any medications other than his prescribed ones.

Analysis:

[36] In a criminal trial, the Crown must establish beyond a reasonable doubt that the accused committed the allegations levelled against him. The burden of proof remains with the Crown, and never shifts to the accused. These principles are fundamental to the presumption of innocence. Proof beyond a reasonable doubt is not proof to an absolute certainty; it is not proof beyond any doubt; reasonable doubt is also not an imaginary or frivolous doubt (*R. v. Lifchus*, [1997] 1 SCR 320; *R. v. Starr*, [2000] 2 SCR 144). The Supreme Court also directs that the burden of

proof lies much closer to an absolute certainty than it does to a balance of probabilities.

[37] The direction of the Supreme Court in *R. v. W(D),* [1991] 1 SCR 742, applies here, as a credibility assessment is involved. Proof beyond a reasonable doubt applies to issues of credibility, and I must apply the three-step analysis to the evidence in this case. A credibility assessment involves both credibility and reliability. Credibility relates to the veracity of the witness, the witness' sincerity, and willingness to tell the truth as they believe it. Reliability involves the capacity for accurate observation, recall and recounting of events or circumstances, and may be affected by factors, without limitation, such as flawed observation, defective recall or lack of understanding or ability to communicate. An incredible witness cannot give reliable evidence on the same point. A credible witness, however, may give unreliable evidence – a witness may be truthful in testifying but honestly mistaken (*R. v. HC,* 2009 ONCA 56; *R. v. DDS,* [2006] NSJ No. 103; *R. v. G(M),* [1994] 73 OAC 356).

[38] A trier of fact is entitled to believe all, some or none of a witness' testimony. I am entitled to accept parts of a witness' evidence and reject other parts. Further, I can afford different weight to different parts of the evidence. I bear in mind the Court of Appeal's comments in *R. v. Mah,* 2002 NSCA 99, in saying that *W(D)* describes how the credibility assessment relates to the issue of reasonable doubt. The judge's function is to decide whether each of the essential elements of the allegations have been proven, and the ultimate issue is not parsing whether the judge believes the accused or the complainant or some or all of what each said - "the issue at the end of the day in a criminal trial is not credibility but reasonable doubt" (para. 41).

Impaired Operation by Drug

[39] The test for determining impairment is set out in *R. v. Stellato* 78 C.C.C. (3d) 380 (O.C.A.) aff'd 90 C.C.C. (3d) 160 (S.C.C.). There is no requirement of marked departure, but rather impairment in the ability to operate a motor vehicle is made out if the evidence establishes any degree of impairment from slight to great. Where observations of conduct comprise the proof of impairment, a slight departure from normal is unlikely sufficient to achieve a conclusion of proof beyond a reasonable doubt (*R. v. Andrews* (1996), 104 CCC (3d) 392 (Alta. CA), leave to appeal to SCC refused).

[40] This case involves evidence of erratic driving, and indeed a collision. With respect to impaired driving charges that involve evidence of bad driving, the Saskatchewan Court of Appeal in *R. v. Cramer*, 2019 SKCA 118, said there is no obligation to make a preliminary determination as to whether bad or erratic driving, or any other aspect of the evidence, can be attributed only to the consumption of drugs or alcohol. This would amount to considering evidence in a piecemeal fashion, a proscribed method of evidentiary analysis. The Court goes on to say there could be cases where erratic or bad driving is explained as being attributable to something other than drugs or alcohol, and evidence may be led in this regard, but "this reality is something different than the suggestion that the issue of whether bad or erratic driving is attributable to alcohol consumption should be formally broken out as a separate and preliminary piece of analysis in the consideration of whether an accused person's ability to drive was impaired by drugs or alcohol." (para 39). Our Court of Appeal adopted a like approach four years earlier, in *R. v. Schofield,* 2015 NSCA 5.

[41] In this case, the investigating officer that attended in relation to the subject incident in Lower Sackville, Nova Scotia indeed attended two incidents on the date in question involving Mr. Adams. At around 1pm on 1 October 2019, Cst. Manson attended Sackville Drive responding to a complaint of an incident. A vehicle driven by Mr. Adams had rolled back when the traffic light had turned green and hit the complainant's vehicle behind him; there was no damage to either. The complaint was of an impaired driver; however, notwithstanding the collision, upon speaking with Mr. Adams, Cst. Manson did not believe he was impaired.

[42] The second incident, some two hours later, was decidedly different according to Cst. Manson. When he arrived on the scene of this collision, he saw a white van, then he saw the vehicle that Mr. Adams was driving earlier, and then he saw Mr. Adams. Cst. Manson noted the accused was slow answering, sat staring ahead for a few minutes; "his answer was not what I asked", he was crying vigorously, and he was "cognitively impaired" from what Cst. Manson observed earlier. When Cst. Manson repeated questions, Mr. Adams was able to answer, but slowly. His pupils were constricted, and his movements were slow and deliberate. He arrested Mr. Adams, advised him of his rights and demand for a drug recognition evaluation.

[43] This evidence is consistent with the evidence of James Jobes and Christine Shunamon with respect to the observations of the collision and Mr. Adams' behaviour. However, I agree with Mr. Adams that Mr. Jobes testimony was

exaggerated, and at times maudlin. Mr. Jobes observations were that Mr. Adams "appeared to be impaired, staggering, speech slurred" and that his pupils were dilated. None of the officers who attended noted that Mr. Jobes was staggering, and their observations were that his pupils were constricted, not dilated. I accept Mr. Jobes' evidence to the extent that there was a collision and Mr. Adams' vehicle hit that of Mr. Jobes, but I accord little weight to his evidence beyond that.

[44] Ms. Shunamon's testimony I found to be forthright and frank, and her observations on scene clear and matter-of-fact. Her testimony was internally consistent, and her description of Mr. Adams' driving, cutting off other vehicles, going left and right in the lane, and particularly his self-conscious or slow movement and strange behaviour is consistent with the observations of the attending officer and the Drug Recognition Expert.

Drug Recognition Evaluation Evidence

[45] Cst. Hansen was a certified Drug Recognition Evaluating Officer by the International Association of Chiefs of Police as a Drug Recognition Expert. For the purposes of administering the 12-step drug evaluation of Mr. Adams, Exhibit 3 of his certification as a drug recognition expert was established to be in accordance with the requirements of the *Regulations* made pursuant to subsection 320.38(a) of the *Criminal Code,* and no qualification *voir dire* was engaged in relation to the same.

[46] In *Bingley, supra,* the Supreme Court of Canada confirmed that DRE opinion evidence is admissible to prove the offence of drug impaired driving, codified in section 320.28(2) *Criminal Code*. The *Bingley* considerations were reviewed in *Baillie,* paras 79 through 85. In the final analysis, *Bingley* stated that the evaluating officer receives specialized training in the administration of the 12-step drug recognition evaluation and the inferences that may be drawn therefrom. The Supreme Court was clear that it is for this limited purpose that a DRE can assist the Court by offering expert opinion evidence.

[47] In assessing the facts of this case, I am alert to the Crown's onus to prove the essential elements of the allegation before the Court beyond a reasonable doubt, and this burden never shifts to the accused. With respect to the DRE evaluation evidence, I am reminded by the Supreme Court that this expert evidence with respect to the 12-step evaluation is not conclusive evidence of impairment (*Bingley*).

[48] The observations of Cst. Hansen during the 12-step evaluation were described in detail in paragraphs four through six of these reasons. His comments relating to the preliminary examinations, eye exams, divided attention tests, clinical indicators, pupil size checks and muscle tone observations were consistent with impairment by a narcotic analgesic.

[49] Cst. Hansen testified that his opinion was that Mr. Adams was impaired by a narcotic analgesic drug. He said the portions of the examination that most strongly indicated impairment were the divided attention tests, and at the beginning during the preliminary examination. He said Mr. Adams was "on the nod", which Cst. Hansen described as appearing to be asleep, though able to answer questions in a slow manner. Cst. Hansen described that Mr. Adams performed poorly on every aspect of the modified Romberg test. He said these factors "in their entirety" helped him to form the opinion that Mr. Adams' ability to operate a conveyance was impaired by a narcotic analgesic. Upon questioning as to the drug involved, Cst. Hansen referred to the Exhibit 5 diagram, and ruled out several based on pulse rate, blood pressure, body temperature, and lack of nystagmus, and testified that the "only one that fit almost perfectly was narcotic analgesic".

[50] The DRE evaluation evidence must be considered in context; this evidence alone is not conclusive of impairment. In this case, there is evidence of bad driving from two witnesses. James Jobes was the victim of the collision, and I accept his evidence to the extent that Mr. Adams collided with his vehicle. Ms. Shunamon's testimony and her observations on scene, namely cutting off other vehicles, going left and right in the lane, self-conscious or slow movement and strange behaviour is consistent with the observations of the attending officer and the Drug Recognition Expert. The attending officer on scene, Cst. Manson, had two interactions with Mr. Adams on the day in question, and his observations of Mr. Adams' behaviour, detailed earlier in these reasons, are consistent with the observations of the DRE evaluating officer. During the second encounter, Cst. Manson noted the accused was slow answering, sat staring ahead for a few minutes; "his answer was not what I asked", he was crying vigorously, and he was "cognitively impaired" from what Cst. Manson observed earlier. When Cst. Manson repeated questions, Mr. Adams was able to answer, but slowly. His pupils were constricted, and his movements were slow and deliberate.

Forensic Toxicology

[51] Kimberly Snider testified as an expert in toxicological analysis of biological fluids for the presence of drugs, and the effects of drugs on the human body and driving ability, after a qualification *voir dire*. She testified that she took possession of a sample of urine, and submitted it for a variety of analyses to look for drugs. I am satisfied on the evidence that continuity of the sample was proven, and the sample of urine provided to Ms. Snider was the sample extracted from Mr. Adams on 1 October 2019. She concluded that the urine had three compounds: hydromorphone, oxymorphone, and 7-amino-clonazepam. She said hydromorphone and oxymorphone are classified as narcotic analgesics, and are used therapeutically for the reduction of pain. Ms. Snider testified that the effects on brain include the slowing down of brain activity, exhibited by slow response time, slow actions, can cause problems with balance, motor coordination and gait problems, and sedation. She described the effects of sedation as excessive sleepiness or somnolus, a slowness to respond, which "looks to an outside observer like they just want to fall asleep, referred to colloquially as 'on the nod'". Physiologically, a person with narcotic analgesic in their body exhibits pinpointed or restricted pupils, low blood pressure and low pulse rate. Both hydromorphone and oxymorphone were found in Mr. Adams' urine sample.

[52] The third compound found in Mr. Adams' urine sample was 7-aminoclonazepam, which Ms. Snider testified is a metabolite, or a body breakdown product. She noted that finding the amino means that at some point in time prior to the sample, he must have ingested the drug clonazepam. Ms. Snider said that clonazepam belongs to a class of drugs called benzodiazepines, all of which are Central Nervous System (CNS) depressants, which slow down brain function and cause similar symptoms to a narcotic analgesic-impaired person, including a slowed reaction time, sleepiness, balance problems and lack of motor coordination.

[53] Ms. Snider said that her findings indicate that the three noted compounds would have had to be ingested at some time prior to the sample being taken. I reiterate Remark #4 in Exhibit 2; The presence of drugs and/or drug metabolites in the urine merely confirms prior drug use. "It tells me and the toxicologist what drugs were used." This point was emphasized on cross-examination, and Ms. Snider confirmed that there is no link between the detection time of the drugs and the time for which they are active.

[54] I note, however, the combined operation of subsections 320.28(4) and 320.31(6), which provides for a legislative presumption that is applicable in this case: the demanding officer relied on a sample; subsection 320.28(4) CC is the

authority for sample in question; the presumption in subsection 320.31(6) provides that for analysis of samples taken under demand, where person has a drug in their body that is of a type that the evaluating officer has identified as impairing the person's ability to operate a conveyance, that drug, which was present in the person's body at the time when the person operated the conveyance, in the absence of evidence to the contrary, on proof of the person's impairment, that drug is presumed to have been the cause.

Credibility Assessment

[55] The direction of the Supreme Court in *R. v. W(D),* [1991] 1 SCR 742, applies here, as a credibility assessment is involved. I have considered all of the evidence carefully, including all of the evidence of Mr. Adams, who testified on his own behalf at trial. Though I have not recorded the entirety of his evidence in these reasons, I have summarized it in paragraphs 26 through 30.

[56] Mr. Adams endured a dreadful accident in 2018, and is fortunate to be alive. Mr. Adams continues to be beleaguered by its effects. He was engaged in his testimony, and I believe he was honest with the Court in his description of what transpired during his workplace accident, and the effects on his physical and mental health and his family as a result. Mr. Adams was forthright about the litany of medications that he was prescribed post-accident, and continued to take at the time of the incident before the Court, which includes hydromorphone, a narcotic analgesic. The *W(D)* assessment instructs me, in the first instance, to acquit in the event I believe the accused. However, *W(D)* does not instruct me to acquit if the accused does not offer exculpatory evidence. I am also entitled to accept parts of a witness' evidence and reject other parts. I believe Mr. Adams that the physical repercussions and surgeries to which he testified could have some effect on his performance on the DRE evaluation. I believe him that fatigue and stress may have contributed to his impaired condition. I note, at this stage, the conclusion in *R. v. Pelletier* (1989), 51 CCC (3d) 161 (Sask. QB)., that an accused may be convicted of this offence although his impaired condition is due partly to fatigue and partly to the consumption of the impairing substance – alcohol, in that case.

[57] I think it is also important to note the comments of Paciocco JA, para 30, in *R. v. C.L.*, 2020 ONCA 258, in discussing the determination in *R. v. J.J.R.D.,* 2006 CanLII 40088:

> …I accept the Crown submission that *J.J.R.D.* endorses the proposition that a proper conviction can be arrived at even where exculpatory testimony has no obvious flaws if the Crown mounts a

> strong prosecution: *R. v. O.M.*, 2014 ONCA 503, 313 C.C.C. (3d) 5, at para. 40. In such a case a trier of fact may appropriately find that the incriminating evidence is so compelling that the only appropriate outcome is to reject the exculpatory evidence beyond a reasonable doubt and find guilt beyond a reasonable doubt. There may be exceptional cases where it is appropriate for a trial judge to explain this avenue of conviction to the jury. …

In this case, however, I do not consider that Mr. Adams offers exculpatory evidence. He has not denied taking hydromorphone; he has not denied that something happened that day when he was driving: I repeat his testimony here. He said he "took these medications 15 months prior to the accident" giving rise to this allegation, and is unsure of what happened. He says he had no knowledge of what could have happened to make it react in his system, that it was an isolated incident, and that he is very sorry for it happening. Mr. Adams confirmed that he took hydromorphone every day since August 2019. On questioning regarding oxycodone and clonazepam, he said he had no memory of taking oxycodone, but that the anaesthesiologist provided him clonazepam to manage PTSD and anxiety. Mr. Adams confirmed he was taking the hydromorphone under physician direction, and that he was aware of the warnings on the bottle to use caution while operating a motor vehicle. Mr. Adams maintained that he took the hydromorphone for 15 months in a row and had no effects and felt like he was using caution; he took it because it was for treatment, and because it was prescribed to him. He agreed on cross-examination that on the day in question "something happened" and that "it happened very suddenly". The Crown Attorney put it to Mr. Adams that he was impaired behind the wheel, and Mr. Adams said "something wasn't right, I wasn't of sound mind, I never had time to make a decision…and before I realized it I was in the back end of someone's car." Mr. Adams said during cross-examination that he started noticing something wasn't right around the location of Sackville High. He said on the day in question he took his first dose of hydromorphone at 7am, and the second dose at 1pm, but that the doses are usually eight hours apart. At the time of the accident, he "felt something that wasn't right.. that everything was fine until it wasn't". To my mind, Mr. Adams' testimony also does not raise a reasonable doubt. The evidence of each witness is to be assessed in context of the totality of the evidence. Mr. Adams testimony satisfies me that there may have been other contributing factors to his impairment that day, but the DRE evaluation, the observations of the officer attending on scene, and the bad driving evidenced by the collision and the evidence of Christine Shunamon and James Jobes, the evidence of the forensic toxicologist of the content of the sample and the operation of the legislative presumption, satisfy me that Mr. Adams was impaired by a narcotic analgesic when he was driving that day. The Crown has proven the essential elements of the *actus reus*, including ID, jurisdiction, and Mr. Adams'

operation of a conveyance while his ability to operate it was impaired by a narcotic analgesic. I do not find it necessary to address the issue of tolerance. Contrary to the *Baillie* case, where the Court found that Mr. Baillie had acquired a tolerance to cannabis, there was absolutely no driving evidence before the Court. While Mr. Adams does say that he had been medicated with hydromorphone for 15 months prior to the accident, in this case the combined evidence of the collision, behaviour observations of the three witnesses on scene, the DRE evaluation evidence and the evidence of Mr. Adams' behaviour during his time in police custody while setting up his counsel call, I am not satisfied that tolerance to drugs is an issue in this case, and indeed it was not raised. This is bolstered by Mr. Adams' evidence on his own behalf, that "something wasn't right" during that period, and that he "wasn't of sound mind". I turn now to *mens rea*.

Mental Element

[58] While the *actus reus* of the impairment offence is the act of assumption of care or control when the voluntary consumption of alcohol or a drug has impaired the ability to drive, the *mens rea* is rather the intent to assume care or control after voluntary consumption of the substance (*R. v. Toews*, [1985] 2 SCR 119, 21 CCC (3d) 24). As the Ontario Court of Appeal concluded in *R. v. Murray* (1985), 22 CCC (3d) 502, the mental element is established where the accused voluntarily consumed a drug which he knew might impair his ability to drive even if the accused as a result of previous experience believed the drug would not take effect until he completed driving – the commonalities to the case at bar are notable. Mr. Adams knew he was taking the medication; he confirmed he was taking the hydromorphone under physician direction, and that he was aware of the warnings on the bottle to use caution while operating a motor vehicle. Mr. Adams maintained that he took the hydromorphone for 15 months in a row and had no effects and felt like he was using caution; he took it because it was for treatment, and because it was prescribed to him. He agreed on cross-examination that on the day in question "something happened" and that "it happened very suddenly".

[59] In *R. v. King*, [1962] SCR 746, Mr. King had taken a drug on the direction of his doctor, and in concluding satisfaction of the *mens rea*, the Court said "… that element need not necessarily be present in relation both to the act of driving and to the state of being impaired in order to make the offence complete." Particularly germane to this case, the Court said "…a man who did not appreciate his impaired condition when he started to drive cannot escape liability on the ground that his

lack of appreciation was brought about by voluntary consumption of liquor or drug." (also see *R v. Rushton,* 1963 CanLII 743 (NSSC)).

[60] The case of *R. v. Mavin* (1997), 119 CCC (3d) 38, is also relevant here, as Mr. Adams voluntarily consumed the narcotic analgesic while being aware of the risks associated with ingestion while driving, as evidenced by his confirmation that he was aware of the warnings on the bottle to use caution while driving. The fact that he did not experience such effects on prior occasions does not absolve him of the responsibility. At paragraph 39, the Court articulates what comprises the requisite *mens rea*:

> [39] In summary, it is not here disputed that Mr. Mavin was in an impaired condition when driving his automobile on April 8, 1995. Therefore, his criminal responsibility for that act boils down to whether he had the necessary mens rea. An individual is considered to have had the requisite mens rea to support a conviction for impaired driving under s. 253(a) of the **Code** if his or her impairment resulted from self-induced voluntary intoxication which comprehends instances of voluntary ingestion of alcohol or a drug intentionally for the purpose of becoming intoxicated, or acting recklessly, aware the impairment could result, but persisting despite the risk. Within this legal context the challenge to the appeal court's upholding of Mr. Mavin's conviction of impaired driving will be now examined.

[61] This notion is concisely stated in paragraph 54 of *R. v. Chaulk,* 2022 CanLII 111252 (NL PC):

> **A Summary (the mens rea element):**
> [54] If the Crown establishes that the accused operated a motor vehicle while his or her ability to do so was impaired by a drug, alcohol, or a combination thereof, a rebuttable presumption arises that the accused's condition was voluntarily created, i.e., that the accused's impairment was caused by the voluntary consumption of the alcohol or drug. The Crown does not have to prove that the accused intended for his or her ability to operate a motor vehicle to become impaired.

[62] Having made these determinations after evaluation of the entirety of the evidence, I find the Crown has established beyond a reasonable doubt that Mr. Adams' ability to operate a conveyance on 1 October 2019 was impaired to any degree by a drug, and as a result, I make a finding of guilt and a conviction is entered.

Bronwyn Duffy, JPC