IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Vanmerrebach, 2008 NSSC 3

Date: 20080108
Docket: CR. No. 276982
Registry: Halifax

Between:

Her Majesty the Queen

-and-

Trevor Robert Vanmerrebach

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: December 10, 11, 12, 13,17, 18, 19, 2007 in Halifax, Nova Scotia

Oral Decision: January 8, 2008

Written Decision: January 8, 2008

Counsel: Crown - Christine Driscoll
Defence - Thomas Singleton

Wright J. (Orally)

INTRODUCTION

[1] At approximately 1:00 o'clock in the morning on November 13, 2005 the accused, Trevor Vanmerrebach, was driving home in his 1987 Ford Mustang with two of his lifelong friends as passengers, after they had spent the evening gathered at another friend's home. They were travelling on a winding rural highway known as the Old Sambro Road in good nighttime driving conditions. Shortly before they reached his home community of Williamswood, the accused lost control of his car as it exited a curve. The car began to rotate sideways whereupon it slid completely across the left-hand lane and sailed over a ditch before slamming into a utility pole with enormous force. Upon impact, the car virtually disintegrated, creating a huge debris field, before coming to rest farther down the ditch.

[2] The force of the impact also ejected all three occupants of the car. Tragically, the rear seat passenger, Michael Supple, was pronounced dead at the scene. The front seat passenger, Christopher Duggan, was seriously injured as was the accused, although to a lesser degree. Both were rushed to hospital by ambulance soon afterwards.

[3] The accused was eventually charged with criminal negligence in the operation of a motor vehicle causing the death of Michael Supple and causing bodily harm to Christopher Duggan, contrary to ss. 220 and 221 of the Criminal Code respectively. He was also charged with dangerous driving causing the death of Michael Supple and causing bodily harm to Christopher Duggan, contrary to ss. 249(4) and 249(3) respectively.

[4] The accused was also eventually charged with impaired driving of a motor vehicle causing the death of Michael Supple and causing bodily harm to Christopher Duggan, contrary to ss. 255(3) and 255(2) of the Criminal Code respectively. At the end of the trial, however, the latter two charges were dropped by the Crown because of insufficient evidence being admitted to establish the commission of those offences.

ELEMENTS OF THE OFFENCES AND CRIMINAL LAW PRINCIPLES

[5] Beyond the identity of the accused as the driver, jurisdiction, and the time and place of the offence (none of which are in dispute here), the essential elements of the offence of criminal negligence causing death and causing bodily harm respectively, are as follows:

(1) That the accused operated a motor vehicle; and
(2) That the accused, in the operation of a motor vehicle, showed a wanton or reckless disregard for the lives or safety of others; and
(3) That the accused's conduct caused the death of Michael Supple and caused bodily harm to Christopher Duggan respectively.

[6] Again, with the identity of the accused, jurisdiction, and the time and place of the offence not in issue here, the essential elements of the offence of dangerous driving causing death and causing bodily harm respectively, are as follows:

(1) That the accused operated a motor vehicle; and
(2) That the accused operated the motor vehicle in a manner that was dangerous to the public; and
(3) That the accused's operation of the motor vehicle caused the death of Michael Supple and caused bodily harm to Christopher Duggan respectively.

[7] It should be noted at the outset that dangerous driving causing death or bodily harm is an included offence under a charge of criminal negligence causing death or bodily harm respectively, by virtue of s. 662(5) of the Criminal Code.

[8] There is no dispute in this case over the fact that the death of Michael Supple and the bodily harm to Christopher Duggan was caused by the accused's operation of his motor vehicle. That causal link is obvious on the facts of this case and defence counsel has so conceded in his closing submission. The core issue for determination therefore is whether the Crown has proven beyond a reasonable doubt that the accused showed a wanton or reckless disregard for the lives or safety of others in the operation of his motor vehicle or, in the alternative, that the accused operated his motor vehicle in a manner that was dangerous to the public.

[9] Before turning to the specifics of this case, there are two basic principles fundamental to every criminal trial to be recognized. They are the requirement of a standard of proof beyond a reasonable doubt and the presumption of innocence. The burden is on the Crown to prove each essential element of an offence beyond a reasonable doubt. That burden never shifts to the accused.

[10] The presumption of innocence remains with an accused throughout the trial. It is only displaced if , after considering all the evidence, the court is satisfied beyond a reasonable doubt that the accused is guilty. This presumption means that the accused is considered to be, that is presumed to be, innocent. Accused persons have no obligation to prove that they are not guilty, nor have they any obligation to explain the evidence presented by the Crown. The laws presumes an accused to be

innocent, that is, not guilty, until the court, having considered all of the evidence, is satisfied that the Crown has proven each and every one of the elements of the offence charged beyond a reasonable doubt.

[11] This standard of proof beyond a reasonable doubt denotes a very high threshold for the Crown to meet. It is not sufficient that, on the balance of probabilities, the accused may have, or even is likely to have, committed the offence. The offence must be proved beyond a reasonable doubt. That does not mean the Crown must prove guilt of the offence with absolute certainty which would in most cases be a virtually impossible high standard to meet. But it must be with near certainty, according to the Supreme Court of Canada in *R. v. Starr*; that is to say, closer to the standard of absolute certainty than to a mere balance of probabilities. Reasonable doubt is based on reason and common sense. It is a doubt which logically arises from the evidence.

[12] If, at the conclusion of the trial, there is a reasonable doubt on any essential element of the offence, then the law requires that the benefit of that doubt must be given to the accused who must be found not guilty.

[13] If I am going to draw any inferences against the accused, it must be the only reasonable inference open upon the proven facts.

[14] Conversely, if the Crown succeeds in proving each of the essential elements of the offence beyond a reasonable doubt, the presumption of innocence is displaced and the Court is required to convict.

SUMMARY OF EVIDENCE AND FINDINGS OF FACT

[15] I turn now to the evidence. I am going to summarize what I consider to be the central parts of the evidence for both Crown and Defence. I am, of course, taking all of the admissible evidence into consideration, whether specifically mentioned here or not, in reaching a verdict.

[16] The evening of November 12, 2005 began like many other weekend evenings for the accused and his friends. They gathered at someone's home to hang out together, listen to music and have some beer. Some of the group, although not the accused, were also users of marijuana.

[17] The gathering on this occasion was at the home of Brandon Misener in Spryfield. The accused arrived in the vicinity of 6 p.m. by which time Mr. Duggan and Mr. Supple were already there. About half an hour later, the accused went out by car, accompanied by one or two others, to the liquor store to buy some beer. There is conflicting evidence as to the quantity of beer purchased, the recollections varying between Mr. Duggan's number of 15, the accused's number of 24 and Mr. Misener's number of 32 (although nothing ultimately turns on this discrepancy).

[18] After returning to Mr. Misener's residence, the four friends sat around listening to music and having some beer. I conclude from the evidence that Mr. Misener and Mr. Duggan were also smoking marijuana. During the course of the evening, as many as four other people joined the gathering but they had all left by the time that Mr. Misener and Mr. Supple, who were cousins, got into an argument over some furniture (Mr. Supple having been living at Mr. Misener's home for about a week). The argument became somewhat heated with the result that the

party broke up and all but Mr. Misener left for home near midnight. By this time, according to the evidence of the accused, he had consumed around two or three bottles of beer over the course of the evening.

[19] As fate would have it, Mr. Duggan's car would not start because of a malfunctioning alarm system. Mr. Supple unexpectedly needed a ride also where he was vacating Mr. Misener's residence with some of his belongings. Those fortuitous circumstances placed both Mr. Duggan and Mr. Supple in need of a drive home in the accused's car.

[20] The evidence of the witnesses at trial was fairly consistent up to this point, with most discrepancies arising over peripheral details. It should be mentioned that Mr. Misener said in his testimony that he thought that each of them had consumed eight bottles of beer but I consider that piece of evidence to be unreliable where Mr. Misener admittedly was intoxicated that night and the tenor of his answer was more of a guess than from actual memory. The only other witness able to speak to that was Mr. Duggan who observed the accused drinking beer that evening but didn't know how many he had. There was no suggestion by anyone that the accused used marijuana.

[21] It is at this juncture, when the accused headed for home accompanied by his friends, that the evidence sharply diverges between the versions of the accident given by Mr. Duggan versus that of the accused. Mr. Duggan testified that there was nothing abnormal about the accused's manner of driving when they first left Mr. Misener's home in Spryfield. They then proceeded to a trailer court in

Harrietsfield to check on some other friends but upon finding no one home, they then headed towards the accused's home in Williamswood, taking the Old Sambro Road. As noted earlier, this highway is a rural road which had been recently re-paved and the nighttime driving conditions were good.

[22] According to Mr. Duggan's evidence, shortly after they entered the Old Sambro Road upon leaving Harrietsfield, the accused performed a driving manouevre known as a doughnut which essentially involves the hard acceleration of a vehicle in a sharp circular motion which, of course, produces circular tire skid marks on the pavement. Mr. Duggan testified that the accused then began driving very fast towards Williamswood, during which he performed two or three doughnut manoeuvres and five or six fishtail manoeuvres which he described as back end slides of the car. Indeed, at the request of the police, Mr. Duggan later participated in the production of a police video by retracing the route taken that night and providing a running commentary of where the accused performed some of these driving manoeuvres along the Old Sambro Road.

[23] Mr. Duggan was unable to say how fast the car was travelling because he didn't look at the speedometer. However, he testified that it was fast enough to scare him and that he felt like he might die. He further testified that both he and Mr. Supple told the accused to slow down because he was going too fast and to let them out of the car. According to Mr. Duggan, the accused gave no response and kept driving in the same manner until he lost control of it. The last thing Mr. Duggan remembers is the car sliding in a 180 degree turn towards the ditch.

[24] At the time of the accident, the accused was 21 years of age and had held a driver's license for approximately a year and a half. He had acquired the Mustang only about a month prior to the accident which was equipped with a 5.0 litre engine and a manual transmission. The car had been safety inspected about four months prior to the accident and was said by the accused to be in good mechanical condition before the accident occurred (except for the need of a new water pump of no consequence here).

[25] The version of the accident given by the accused is that he was driving along the Old Sambro Road at the posted speed limit, which varied from 50 kph to 80 kph. He denied having performed any doughnuts or fishtail manoeuvres whatsoever along the way. He also testified that at no time was he yelled at to slow down. His explanation for the accident was that as he entered a 60 kph zone (reduced from a 70 kph zone), he downshifted from third gear to second gear to reduce his speed and that when he did so, the gas pedal got stiff. He pushed down on the pedal to free it up but the pedal then stuck to the floor. He said the car then started accelerating and he lost control of it. He said he tried to keep the car on the road by steering it and was trying to get the pedal back up by pushing on it. When the pedal didn't respond, he said there was not much he could do and he panicked. He did say he tried to apply the brakes but that they were ineffective to overcome the acceleration. Instead, the car continued to pick up speed, all the while in second gear. The accused said that in his state of panic, he did not think to depress the clutch to put the car in neutral to eliminate the power to the wheels. He says he has no idea of what speed the vehicle reached before he lost control of it. He acknowledged that in that state of emergency, he did not exclaim to his passengers

that the gas pedal was stuck or ask for their help in any way. He also testified that he had experienced no problems with the gas pedal prior to the accident.

[26] It is patently obvious from the physical evidence at the accident scene that this was a very high speed single car collision. The police evidence included several photographs of the remains of the vehicle and the very widespread debris field. The police evidence also included a map of the accident scene prepared by Cst. Gary Gallant, an accident reconstructionist with Halifax Regional Police. Cst. Gallant and his partner, Cst. Faulkenham, arrived at the scene at approximately 2:25 a.m. and after walking the area, proceeded to take some 152 measurements at the scene which began with the first tire skid mark and ended just beyond the far perimeter of the debris field (which spanned approximately 195 metres). These measurements were entered into a computer program which produced a map of the scene upon which Cst. Gallant has superimposed the resting place of the vehicle, the resting place of the body of Michael Supple, and various items comprising the debris field.

[27] The opinion of Cst. Gallant is that the accused lost control of his vehicle exiting a slight right curve on the Old Sambro Road by first oversteering to the left and then oversteering to the right and then to the left again. The tire marks on the highway show that the car began to rotate counterclockwise across the left lane of travel before it went over the ditch and slammed into a utility pole. The car rotated further around the utility pole and came to rest in the ditch some 15 metres away. Overall, the measured distance between the start of the first skid mark on the road to the final resting place of the car was approximately 152 metres.

[28] What the physical evidence at the scene tells us is that the speed of this vehicle was sufficient to:

(a) Cause the driver to lose control while exiting a slight right curve in the road;

(b) Produce tire skid marks spanning a distance of approximately 130 metres before the car reached the ditch;

(c) Maintain enough momentum for the car to sail over the ditch and knock flat a clump of five small maple trees before hitting a utility pole;

(d) Impact the utility pole with the lowest point of damage to the pole being 1.95 metres from the ground, all with sufficient force to break the utility pole;

(e) For the car to then travel another 15 metres before coming to a final resting place after plowing up the ditch;

(f) To eject all three occupants from the vehicle with Mr. Supple's body being found draped over a stone wall completely across the road some 16 metres distant;

(g) Create an enormous debris field from a totally demolished car of which only two examples need be given, namely, the finding of the car battery 45 metres away where it struck a stone wall and burst before travelling another 5 metres, and the finding of the front wheel assembly (including tire, wheel, brake rotor and front suspension) some 35 metres from the pole.

[29] Indeed, the evidence of various police officers and firefighters who were on the scene was that this was one of the worst accident scenes they had ever encountered in terms of the disintegration of the car in a single vehicle accident and the huge debris field left behind.

[30] It is now left to the court to assess the credibility of the evidence given by

Mr. Duggan and by the accused as to how this accident happened. First of all, it should be recognized that it is not a question of reducing the case to a simple credibility contest. Rather, the court must look at the whole of the evidence and decide, on the basis of the evidence that the court does accept, whether the Crown has proved each essential element of the offences charged beyond a reasonable doubt. In doing so, the court can accept all, part or none of the evidence given by any particular witness. Individual pieces of evidence must not be examined in isolation but must be considered in the context of the evidence as a whole.

[31] I must also consider whether a witness is entirely independent as well as the witnesses' apparent memory capacity and whether the testimony given is reasonable and consistent not only within itself, but when stacked up against all the other evidence before the court.

[32] It must also be recognized that the principle of reasonable doubt applies to the issue of credibility. When it comes to assessing the credibility of the testimony given by the accused, the following approach must be taken in accordance with the direction given by the Supreme Court of Canada in *R. v. W.(D.)* [1991] 1 S.C.R. 742:

> First, if I believe the evidence of the accused, I must acquit in the absence of any blameworthiness.
> Secondly, if I do not believe the testimony of the accused but I am left in reasonable doubt by it, I must acquit.
>
> Thirdly, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[33] I have carefully listened to and considered the evidence of the accused. I do not find his explanation for the occurrence of this accident to be a plausible one.

The accused would have the court believe that his gas pedal suddenly stiffened when he was shifting from third gear to second gear to comply with a reduced speed zone and that when he pushed down on the pedal, it stuck to the floor so that the car took off uncontrollably at an exorbitant rate of speed. The court is asked to believe that stomping on the brake pedal had no effect whatsoever and that the accused did not even think to depress the clutch to eliminate the power to the drive wheels, even though he was familiar with the use of clutches from his prior ownership of another vehicle and his use of an ATV dating back some five years previously. Granted, allowances have to be made for drivers' reactions in the agony of collision but it strains credulity that a person familiar with a standard transmission would not almost reflexively depress the clutch in such an emergency. It also strains credulity that the accused would not exclaim to his passengers in fear that the gas pedal had become stuck.

[34] There are also some specific points of evidence given by the accused which raise an aura of scepticism over his testimony. First, one would not expect that a driver of a car with a standard transmission would be able to specifically remember two years later that he was shifting from third gear to second gear when the gas pedal stuck, where shifting gears is such a routine and repetitive action while driving. Beyond that, it strains credulity that a motor vehicle, even with that powerful an engine, could achieve such an exorbitant rate of speed while still in second gear.

[35] Secondly, the accused first testified on cross-examination that he didn't know if the seized gas pedal was flat to the floor. He then said he was trying to get

his foot under the pedal to lift it. Then, when asked whether or not his foot fit underneath the pedal, he answered "just the tip". He then said he specifically remembered that which is highly unlikely in the chaos of the moment.

[36] Thirdly, when asked in direct examination whether either of his passengers told him to slow down, he said that they did not. When asked the same question in cross-examination, however, the accused's first response was that the stereo was going before reverting to his original answer that they did not say any such thing to him.

[37] What the court finds even more troublesome, however, is the fact that at no time until he took the stand at trial did the accused give any indication to anyone that it was a stuck gas pedal that caused the accident to happen. I hasten to add that I take no adverse inference whatsoever from the fact that the accused made no mention of this in his videotaped police statement where he exercised his Charter right to silence on the advice of his lawyer. However, it is different when it comes to his post accident conversations with Mr. Duggan and his mother, Darlene Duggan.

[38] Mr. Duggan's evidence was that the accused called him after he returned home from hospital to apologize, adding the comment that Mr. Duggan should sue him for everything he had. These were lifelong friends speaking with one another, with the accused admittedly feeling horrible over the death of Mr. Supple, and yet nothing was said about a stuck gas pedal as the cause of the accident. Even the accused did not assert that he had given any such explanation to Mr. Duggan on the

telephone. Similarly, the evidence of Darlene Duggan was that the accused apologized to her on the telephone, adding the same comment about a lawsuit, and that nothing was said about a stuck gas pedal as the cause of the accident.

[39] If the accused's version of the accident were true, so as to absolve him from any blame for the happening of the accident, human nature is such that one would expect him to have given that explanation to his lifelong friend long before taking the stand at his trial.

[40] Since I do not believe the evidence of the accused as to how this accident happened, nor am I left in a reasonable doubt by it, it is therefore incumbent upon me under the *W.(D.)* test to decide whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[41] In assessing the evidence of Mr. Duggan, I recognize the possibility that he has a motive to tailor his evidence to foster the civil lawsuit that he has commenced against the accused for damages. I am also aware from the evidence that Mr. Duggan has one prior criminal conviction for an offence of dishonesty, namely, a single incident of the fraudulent use of a credit card. I also take into account his own evidence that he had consumed four or five bottles of beer, and perhaps one or two joints of marijuana, over a five or six hour time span during that evening. Mr. Duggan said something to the effect that he was getting a little buzz on but that he was not getting drunk that evening.

[42] I recognize that this may affect his recollection of some of the details of the routine activities that took place earlier during the course of the evening. However, looking at his evidence as a whole, I accept his testimony that the accused was intentionally driving his car at an excessive rate of speed on his way home that night. I also accept his evidence that he asked the accused to slow down but that his request was ignored. As well, I accept his evidence that the accused performed some combination of doughnut and fishtail manoeuvres during the ride home although I hasten to add that there is no evidence that either of such manoeuvres caused the car to go out of control. Mr. Duggan cannot be said, in my view, to have embellished his testimony when there were certainly opportunities for him to do so.

[43] In the result, I find that the sole cause of the occurrence of this accident was the excessively high rate of speed at which the accused was intentionally operating his motor vehicle on a curved roadway. I would add that there has not been sufficient evidence admitted at trial to establish that the consumption of alcohol was a material factor.

LEGAL ANALYSIS

[44] Having made those findings of fact, I now turn to a review of the established legal principles governing the subject offences of criminal negligence and dangerous driving, in determining whether the conduct of the accused warrants criminal responsibility. These legal principles were succinctly summarized in the recent decision of the Ontario Court of Appeal in *R. v. J.L.* [2006] O.J. No. 131, a case in which the accused had been charged with criminal negligence causing death after he drove his vehicle with his friend sitting on the hood and then braked,

causing the friend to fatally fall to the pavement. Weiler, J.A. summarized the applicable legal principles as follows (within paras. 14-19):

> 14. I turn now to the question of whether the trial judge erred in his assessment of the level of the appellant's culpability. The offence of criminal negligence causing death is at the high end of a continuum of moral blameworthiness. A lesser offence along the same continuum is the dangerous operation of a motor vehicle in s. 249 of the Criminal Code which requires that the vehicle be driven, "in a manner that is dangerous to the public, having regard to all the circumstances ...". At the lower end of the continuum is careless driving under the Highway Traffic Act, R.S.O. 1990, c. H.8, s. 130. See R. v. Hundal (1993), 79 C.C.C. (3d) 97 (S.C.C.) at 106, Cory J. Whether specific conduct should be categorized as criminal negligence is one of the most difficult and uncertain areas in the criminal law: Anderson, supra, at 484-485.
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> 15. The lesser offence of dangerous driving requires that the accused's conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation. If an explanation is offered by the accused for his driving, "the trier of fact must be satisfied 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." Hundal, supra, at 108. The standard is the modified objective standard.
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> 16. Criminal negligence requires a more elevated standard. The departure from the norm must be more marked in both the physical and the mental elements of the offence. See R. v. Palin (1999), 135 C.C.C. (3d) 119 (QC. C.A.), leave to appeal refused [1999] C.S.C.R. No. 106 (S.C.C.) at 126-27, Deschamps J.A. The requirement for a greater marked departure in both the physical and mental elements is consistent with the higher level of moral blameworthiness associated with criminal negligence, namely, wanton or reckless disregard for the life or safety of others...
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> 18....To establish that conduct is wanton or reckless the consequences must be more obvious. The greater the risk of harm the more likely it is that the consequences are the natural result of the conduct creating the risk. It is from this conduct that the conclusion that the accused had a wanton or reckless disregard for the lives or safety of others is drawn: Anderson, supra, at 486-487. In this case, the admission of the appellant as to his state of mind is an important factor, but so, too, is his driving. The offence of criminal negligence punishes, not a state of mind, but the conduct of the accused. See R. v. Tutton (1989), 48 C.C.C. (3d) 129 (S.C.C.) at 139-40, McIntrye J. Thus the physical action of the appellant is as critical to the determination of wanton or reckless conduct as the mental element.
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> 19. As summarized by Hill J. in R. v. Menezes, [2002] O.J. No. 551 at para 72:
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>> The term wanton means "heedlessly" (Regina v. Waite (1996), 28 C.C.C. (3d) (Ont. C.A.)) "ungoverned" and "undisciplined" (as approved in Regina

> v. Sharp (1984), 12 C.C.C. (3d) 428 (Ont. C.A.) at 430, Morden J.A.) or an "unrestrained disregard for the consequences" (Regina v. Pinske (1988), 6 M.V.R. (2d) 19 (B.C.C.A.) at 33, Craig J.A. (affirmed on a different basis [1989] 2 S.C.R. 979, Lamer J. The word "reckless" means " heedless of consequences, headlong, irresponsible." Sharp, supra, at 30.

[45] Beyond the foregoing passage quoted from *Menezes*, the reasons for judgment authored by Justice Hill contain a most useful and thorough analysis of the topic (at paras. 72-78) which, for the sake of brevity, I will simply incorporate by reference in this decision.

[46] I also refer, as did Hill, J. in *Menezes*, to the decision of the Supreme Court of Canada in *R. v. Creighton* (1993) 83 C.C.C. (3d) 346. That case involved an accidental death from an injection of cocaine rather than a motor vehicle fatality, but the decision contains a lengthy discussion of the general principles of criminal negligence. After reviewing the jurisprudence, our now Chief Justice McLachlin, writing for the majority, summed up as follows:

> The foregoing analysis suggests the following line of inquiry in cases of penal negligence. The first question is whether actus reus is established. This requires that the negligence constitute a marked departure from the standards of the reasonable person in all the circumstances of the case. This may consist in carrying out the activity in a dangerous fashion, or in embarking on the activity when in all the circumstances it is dangerous to do so.
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> The next question is whether the mens rea is established. As is the case with crimes of subjective mens rea, the mens rea for objective foresight of risking harm is normally inferred from the facts. The standard is that of the reasonable person in the circumstances of the accused. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he or she failed to direct his or her mind to the risk and the need to take care.

[47] *R. v. J.L.*, *supra*, similarly tells us that the starting point of the analysis is the determination of whether, and the extent to which, the accused’s manner of driving represented a marked departure from the norm in all the circumstances of the case.

Here, I have made findings of fact that the accused drove his powerful motor vehicle at a highly excessive rate of speed on a winding rural road late at night and continued to do so over the protests of his friends. Even though he was familiar with that road, the risk of losing control of his vehicle at such speed on one of its many curves should have been obvious to him. In any event, the legal test to be applied is whether such negligence constitutes a marked departure from the standard of care of a reasonable person in all the circumstances of the case. There is a marked departure when a reasonable person would have been conscious of the risks to others while engaging in such activity (see *R. v. Markovic* (1998) 17 C.R. (5th) 371 (Que. C.A.). The greater the risk of harm, the more likely the consequences of an accident resulting therefrom.

[48] In applying these legal principles to the facts of this case, I have no hesitation in finding that the negligence of the accused in the operation of his vehicle constitutes a marked departure from the standard of care of a reasonable person.

[49] That takes me to the next question of whether the mens rea for negligence offences has been established, negligence being the basis of liability for dangerous driving as well as criminal negligence. As noted above, in cases of penal negligence, the mens rea requirement is objective foresight of the risk of harm to others which is normally inferred from the facts. The standard is that of the reasonable person in the circumstances of the accused, which has come to be known as the modified objective test (see *Creighton* and *Hundal*, *supra*).

[50] As Justice Hill aptly summarized it in *Menezes* (at para 75), the mens rea for the crime of criminal negligence can be determined objectively from the conduct of the accused - the driver either recognized and ran an obvious and serious risk to the lives and safety of others, or alternatively, gave no thought to the risk involved. The mental element only requires objective foresight of harm. The greater the risk of harm created, the easier it is to conclude that a reasonably prudent person would have foreseen the consequences.

[51] Similarly, the mens rea for the offence of dangerous driving should be assessed objectively but in the context of all the events surrounding the incident including the nature, condition and use of the road driven upon. The question to be asked is not what the accused himself intended but rather whether, viewed objectively, the accused exercised the appropriate standard of care (see *R v. Hundal*, *supra*).

[52] In applying the modified objective test to the facts of this case, again I have no hesitation in inferring the requisite mens rea for penal negligence. There was an obvious foreseeability, viewed from a reasonable person standpoint, of the high risk of bodily harm to the occupants of the accused's vehicle by driving at such an excessive rate of speed on a road of that nature late at night with little illumination. With such a high degree of risk created, it is not difficult to conclude that a reasonably prudent person would have foreseen the consequences. I am therefore satisfied beyond a reasonable doubt that both the actus reus and mens rea of penal negligence has been established.

[53] What is more difficult to assess is the level of culpability or moral blameworthiness that should be attached to the conduct of the accused. In other words, where along the continuum of moral blameworthiness from the low end of careless driving under provincial legislation to the high end of criminal negligence should the accused's driving fall?

[54] In answering this question, I again refer to the appellate decisions in *J.L.* and *Palin* which held that in order to rise to the level of criminal negligence, the departure from the norm must be more marked in both the physical and the mental elements of the offence. This requirement is consistent with the higher level of moral blameworthiness associated with criminal negligence, namely, wanton or reckless disregard for the lives and safety of others. It is therefore incumbent on the court to decide whether the conduct of the accused was so morally blameworthy as to amount to wanton or reckless disregard for the lives and safety of his passengers. As noted in *J.L.*, the physical actions of the accused are as critical to the determination of wanton or reckless conduct as the mental element.

[55] As the Ontario Court of Appeal reiterated in *J.L.*, whether specific conduct should be categorized as criminal negligence is one of the most difficult and uncertain areas in the criminal law. The court must be satisfied that the Crown has proven beyond a reasonable doubt that the accused, in the operation of a motor vehicle, showed a wanton or reckless disregard for the lives or safety of others. The conclusion that there was such wanton or reckless disregard is to be drawn from the conduct which falls below the standard of care of a reasonable person (see *R. v. Anderson* (1990) 53 C.C.C. (3d) 481 (S.C.C.) At p. 485).

[56] Although every case must be decided on its own facts, it is useful to canvass the case law generally, especially where objective standards apply, to identify the specific acts of negligence in the operation of a motor vehicle which have been found to constitute criminal negligence or, alternatively, the lesser offence of dangerous driving.

[57] Beyond the cases referred to me by counsel, and those mentioned in the 2008 edition of **Tremeear's Criminal Code**, I have canvassed the several cases annotated in both **Criminal Code Driving Offences** (Carswell) at page 1-104 ff. and in **Canadian Criminal Code Offences** (Chapters 13 and 14) by John L. Gibson. There appears to be very little case authority where the causal factor of speed and speed alone has resulted in a conviction for criminal negligence. The closest example I've been able to find is *R. v. Scales* (2005) 18 M.V.R. (5th) 190. In that case, the accused lost control of his car on a tight curve while travelling at night at a very excessive speed, whereupon the car struck a median and rolled over, killing a passenger. The British Columbia Court of Appeal upheld the conviction by the trial judge of criminal negligence causing death and dangerous driving causing death on the finding that the speed of the car was very excessive having regard to the nature of the roadway.

[58] More commonly in criminal negligence cases, however, the court has found one or more additional acts of negligence combined with the excessive speed factor, e.g., driving while impaired, racing, driving on the wrong side of the road, reckless passing and running red lights or stop signs. It is such combinations that

increase the extent of the marked departure from the standard of care of a reasonable person.

[59] More predominantly in the case law, the causal factor of speed and speed alone is found to sustain a conviction for dangerous driving (see, for example, the appellate decisions in *R. v. Richards* (2003) 174 C.C.C. (3d) 154 (Ont. C.A.) And *R. v. Quesnel* (1996) 20 M.V.R. (3d) 46 (B.C.C.A.). In the latter case, where the accused driver lost control of his vehicle while attempting to negotiate a curve at an excessive speed and struck an oncoming vehicle, the court stated (at p. 49):

> While evidence of speed standing by itself will not necessary lead to a finding of dangerous driving, it may well do where as here the surrounding circumstances add a component to that speed that brings the driving up to the criminal level of dangerous driving.

[60] The court then went on to describe the various circumstances surrounding the roadway and the accused's driving and upheld the conviction for dangerous driving causing bodily harm.

[61] From my review of the case law, which illustrates the difficulty of applying in practise the distinction between criminal negligence and dangerous driving, I am left with a reasonable doubt as to whether the conduct of the accused here meets the high standard of criminal negligence. The accused was obviously travelling the Old Sambro Road at an excessively high rate of speed, perhaps to show off to his friends the power and handling of his newly acquired Mustang or perhaps out of plain foolishness. While such manner of driving unquestionably constitutes a marked departure from the norm, I am left with a reasonable doubt as to whether his conduct was so morally blameworthy that it amounted to wanton or reckless

disregard for the lives and safety of others, within the legal meaning of those concepts and their application in previously decided cases. The accused is therefore acquitted of Counts 1 and 2 of the indictment.

[62] At the same time, however, I am satisfied beyond a reasonable doubt that the accused drove his motor vehicle in a manner that was dangerous to the public, thereby causing the death of Michael Supple and bodily harm to Christopher Duggan. This was not a momentary lapse of attention or judgment on his part. I have already found that the accused was speeding along the Old Sambro Road once he left the Harrietsfield trailer park and performed some combination of doughnut and fishtail manouevres associated with that speed. As in *Quesnel*, I find that the surrounding circumstances here, namely, the excessive degree of speed on a winding rural road in darkness creating such high risk, add a component that brings his driving up to the criminal level of dangerous driving.

[63] The fact that the accused's driving endangered only his friends as passengers does not preclude his conviction under s. 249. Passengers do not lose their character as members of the public merely by virtue of being passengers in the accused's car (see *R. v. St. Louis* (1973) 11 C.C.C. (2d) 533 (B.C.S.C.)). I would accordingly enter a conviction against the accused for dangerous driving causing the death of Michael Supple and causing bodily harm to Christopher Duggan under Counts 3 and 4 of the indictment respectively.

J.