

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Oulton*, 2009 NSSC 422

Date: 20091026

Docket: CRH No. 292354

Registry: Halifax

Between:

Her Majesty the Queen

v.

Stephen D. Oulton

Judge: The Honourable Justice M. Heather Robertson

Heard: October 13, 14, 15, 16, 19, 20, 21, 22 and 26, 2009, in
Halifax, Nova Scotia

Decision: October 26, 2009 (**Orally**)

Written Release: June 25, 2010

Counsel: Gregory Lenehan, for the Crown
J. Brian Church, Q.C., for the Defendant

Robertson, J.: (Orally)

[1] Following a motor vehicle accident on November 24, 2006 at Windsor Junction, Nova Scotia, Stephen D. Oulton was charged with unlawfully being in care and control of a motor vehicle with a blood alcohol concentration (“BAC”) exceeding 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(b) of the *Criminal Code of Canada* and further relating to the same incident was charged with causing bodily harm while in the care and control of a motor vehicle while his ability to operate the vehicle was impaired by alcohol contrary to s. 255(2) of the *Criminal Code of Canada*. Five individuals had significant personal injuries.

APPLICABLE LEGAL PRINCIPLES

[2] The court has the obligation to prove beyond a reasonable doubt that the consumption of alcohol was “a significant contributing cause of the accident” and that “some fault on the part of the driver must be found, aside from the fact of the impairment alone.” *R. v. Cabral*, [2001] M.J. No. 38 (Man. C.A.); *R. v. Nette*, [2001] S.C.J. No. 75.

[3] The *Criminal Code* does not prescribe any specific test for determining impairment. Impairment is an issue of fact which the trial judge must decide on the evidence and the standard of proof is neither more nor less than that required for any other element of a criminal offence. Before convicting an accused of impaired driving, the trial judge must be satisfied that the accused’s ability to operate a motor vehicle was impaired by alcohol or a drug. If the impairment establishes any degree of impairment ranging from slight to great, the offence has been made out. *R. v. Stellato*, 12 O.R. (3d) 90 (Ont. C.A.), affirmed by the Supreme Court of Canada, [1994] 2 S.C.R. 478, S.C.J. No. 51.

[4] Absent other explanation for an accident, causation can be established from evidence that includes the circumstances of the accident itself. *R. v. Rhyason*, [2006] A.J. No. 1498, paras. 39-40 (Alta. C.A.).

[5] Where a reasonable doubt is raised that a driver’s impairment was the significant contributing cause of the fatal accident, the result will be an acquittal. (See, for example, *R. v. Cabral*, [2001] M.J. No. 38 (Man.C.A.); *R. v. Anderson*, [1990] S.C.J. No. 14; *R. v. Ewart*, [1989] A.J. No. 1036 (Alta. C.A.); *R. v. Isaak*,

[1988] Y.J. 113 (Y.T.C.); *R. v. Petznick*, [1987] O.J. 2474 (Ont. Dist. Ct.); and *R. v. Stellato*, (supra).

[6] The standard of proof as well is well established. The Crown must prove its case that the accused committed the offence and prove all the elements of the offence, date, time, place and i.d. was not an issue at this trial. And, of course, the accused denied that he was impaired at the time of the accident and the cause of it. The Crown has to prove its case beyond a reasonable doubt which has been well defined by the Supreme Court of Canada in *R. v. Lifchus*, [1997] S.C.J. No. 77,

. a reasonable doubt is not a doubt based upon sympathy or prejudice;

. rather, it is based upon reason and common sense;

. it is logically connected to the evidence or absence of evidence;

. it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and

. more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[7] Proof beyond a reasonable doubt is closer to absolute certainty that it is to probable guilt. When the accused testifies the trial judge must instruct him or herself according to *R. v. W(D)*, (1991), 63 C.C.C. (3d) 397.

[8] When the accused testifies the trial judge must instruct him or herself according to *R. v. W(D)*, (1991), 63 C.C.C. (3d) 397. The often quoted three-part test:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[9] I shall now review the evidence and keep in mind these cautions.

[10] This case is very fact driven and as I said my analysis is necessarily of some length.

[11] In this case with the operation of $W(D)$ is also important. It is possible in this case that Mr. Oulton might be impaired but not responsible for the collision and that would have to be of course be based on his claims of his post-collision alcohol consumption accounted for his high blood alcohol reading later that night. And, his claim that the collision was simply unavoidable.

[12] In any event, I must be satisfied that the Crown has made its case beyond reasonable doubt.

THE ACCIDENT SCENE

[13] There were actually two automobile accidents on the night of November 24, 2006. The first occurred at approximately 9:00 p.m. when Jordan Lusher, driving a 1989 White Ford Probe in a southerly direction from Fall River to Sackville, swerved into the oncoming lane of traffic momentarily, then cut the steering wheel sharply to the right in an attempt to bring the vehicle back into its proper lane of travel. The driver lost control and collided with a utility pole just off the shoulder of the road. The Ford Probe hit the pole head on at 73 kilometres per hour, with enough force to fracture the pole. The momentum of the accident then forced the Ford Probe back on the roadway where it came to rest. It was then three-quarters on the roadway, the front of the vehicle facing almost north in the lane in which it had been travelling.

[14] The second accident occurred at approximately 9:15 p.m. when the accused, driving a 1995 Toyota Corolla also travelling south on this road came over a blind crest and collided with the white Ford Probe hitting its passenger's side door with such force that the door was sheared off and became stuck under the Toyota, which came to rest finally in the south bound lane of travel, just a little beyond and parallel to the Ford Probe, which it had moved on impact just off the shoulder of the road.

[15] The accident scene is accurately depicted by the work of Allison Tupper, an accident reconstruction expert, who appeared on behalf of the accused. His scaled drawings of the collision are shown beginning at Figure 8, page 22 of his report through to Figure 15, on page 34 of his report. These are an accurate reflection of the travel of the vehicles based on their skid marks, the collision, i.e., point of impact and final resting place of the vehicles after impact.

[16] Counsel agree as to the accuracy of these drawings. These depictions are also in accord with the measurements taken by Constable Smith of the RCMP in his collision analyst report field notes of February 9, 2007.

[17] I also accept the evidence of Paul Sangster, qualified as an expert mechanic, that the Toyota was in good operating order, with respect to brakes and tires. The Ford Probe was also mechanically sound; however, had bald tires that would not pass a provincial safety inspection.

[18] The occupants of the Ford Probe, Jordan Lusher and his girlfriend Holly Weeks were wearing seat belts at the time of the first accident. Mr. Oulton did not wear a seatbelt and as a result of the impact of his collision with the Lusher vehicle he may have suffered a mild concussion and did suffer a laceration to the front of his head, by reason of his head impacting on his windshield.

[19] At the moment of impact of the accused's vehicle with Ford Probe, other persons who had stopped at the scene of the first accident to assist Jordan Lusher and Holly Weeks were struck by the accused's vehicle. They had been standing near the passenger door of the Lusher vehicle and/or in the centre of the road when struck.

[20] They were Melanie Peters (broken tibia and fibula on right leg, torn anterior cruciate ligament (ACL), who required five surgeries to correct her right leg; Holly Weeks (hair line fracture of her rib and black eyes and pain associated with the rib fracture); James Osborne (distress and spasms in his lower back); Patricia Langille Baker (fractured ankle, fractured kneecap, shoulder injury and loss of 1 ½ inch leg bone crushed by the accident); and lastly, Marlene Langille, her mother (fractured wrist, chronic shoulder pain and post traumatic stress disorder).

[21] I heard the testimony of eleven witnesses who came upon the first accident scene before the Oulton vehicle struck Mr. Lusher (the second accident).

Following the second accident, five more civilian witnesses stopped at the scene before police and emergency vehicles arrived.

[22] From this evidence I am able to describe the scope of the accident, identifying each witness' arrival at the scene.

[23] Their evidence is important in establishing the time line of events, and in particular the actions of the accused after the second collision occurred. It is Mr. Oulton's evidence that when he came over the crest of the hill, he could see cars on either side of the road. He testified he did not see 4-way flashers. He agreed that his headlights illuminated the vehicles on the side of the road. He testified:

The first thing I know there's something in front of my car, a boy jumped out from behind ...

Regardless ... it was so dark, couldn't see the open wide door of the Ford Probe, could only see the boy.

[24] He believes the accident was unavoidable.

[25] Jordan Lusher testified that after he hit the utility pole he got out of his car to inspect the damage, having first established that his girlfriend, Holly Weeks, although very upset, was uninjured.

[26] Travelling from Sackville northward to Fall River, James Brooking and his girlfriend, Amanda Blair, came upon the scene. He recognized Jordan's car and stopped one or two car lengths ahead of the Lusher vehicle on the opposite side of the road. He testified that he turned on his 4-way flashers. He got out of his car and brought Jordan his girlfriend Amanda's cell phone so he could call for help. He returned to his car. He testified that other vehicles then began to stop at the first accident site. He was present when the Oulton vehicle struck the Lusher vehicle, but soon left to take Amanda home, once she had retrieved her cell phone. He later returned to the site about 15 minutes later on the advice of his sister. By then the police had arrived.

[27] The next vehicle to arrive travelling from the same direction as the Lusher vehicle north to south, was another friend of Jordan Lusher's, James Osborne, on his way to Sackville with his girlfriend Melanie Peters, to get something to eat. He

described coming over the crest of the hill and seeing that his friend's vehicle had hit a pole. He stopped, let Melanie out and parked his car a little further down the road beyond the Lusher car on the east side. He recalled seeing Jordan standing in the yard by the pole (acknowledged as 442 Windsor Junction Road) talking on a cell phone.

[28] He described how Melanie got partly in the passenger seat with Holly Weeks to comfort her and see that she was alright. The passenger door was open. He was standing on the road when he heard someone yell "get the fuck out of the way" and he noticed headlights coming at him. He testified he turned to get out of the way, heard screeching tires, then a smash and was hit by this vehicle in his back, but realized he needed to keep his head above the bumper. He testified that it all felt like it was happening in slow motion. He could not recall if other vehicles had arrived at the scene before Mr. Oulton's vehicle struck.

[29] However, it is clear from the evidence that Marlene June Langille and her daughter Patricia Langille Baker arrived at the scene of the first accident before Mr. Oulton's vehicle struck. They were travelling north toward Fall River, and saw a vehicle slow down across from Mr. Lusher's vehicle, appear to inquire if anyone was hurt, and then drive off. They stopped opposite the accident on the east side of the road opposite Mr. Lusher's vehicle and just ahead.

[30] Patricia Langille testified that when she and her mother arrived she recalled seeing Jordan and Holly and another young girl at his car (that would be Melanie Peters). She recalled walking diagonally across the road from the rear of their car to the Lusher vehicle. She recalled her mother giving her cell phone to Jordan.

[31] She did not see the oncoming Oulton vehicle and remembers waking up sitting on the pavement in great pain, her right leg all mangled. She recalled a man approaching her with blood all over his head and she told him not to come near her. She passed out and awakened again on the opposite side of the road in the dirt. She recalled her location on the road when struck as being with her mother at the door of the Lusher car, speaking to Holly and Melanie.

[32] Her mother described much the same arrival at the accident scene. She testified that she stopped her red minivan on the opposite side of the road from the Lusher vehicle and put her 4-way flashers on. She was not certain if she left headlights on, but remembered distinctly she put her 4-way flashers on and they

were engaged. She had pulled her vehicle off the road. She got out and remembered giving Jordan her phone to call the police, as he said his cell phone was not working. She recalled standing near the open door of the car, with a girl in the car and one in front of her, Melanie Peters and her daughter Patricia just behind her. She heard a scream, turned her head to see who screamed, saw headlights coming toward her and was then hit. She remembered flying through the air and being slammed onto the ground some distance down the road, with her hands and feet full of glass.

[33] Linsey Hope, was the last vehicle to stop and assist at the first accident, before the Oulton vehicle struck the Lusher vehicle. She was travelling north toward Fall River and initially drove by the accident scene, but deciding she should stop and see if there were any injuries she made a u-turn north of where the Lusher vehicle struck the pole. She returned going south and parked her vehicle just pass the Lusher vehicle about two car lengths beyond the west shoulder of the road. She engaged her 4-way flashers.

[34] She testified that the second accident occurred soon after she approached the passenger door of the Lusher vehicle where several ladies were standing near Holly who remained in the passenger seat. She heard someone yell “look out” and testified that she had enough time to jump to the east side of the road opposite the Lusher vehicle.

[35] After the Oulton vehicle struck the Lusher vehicle she immediately began an assessment of the site and the injuries sustained by those who were at the site. Ms. Hope was, of all the witnesses who testified, the most impressive in her recall of the events of that night. She is a teacher by profession and had taught in the Northwest Territories until her husband died there and she returned home to teach in Nova Scotia. However, she was also a trained medical first responder, who worked part time on ambulances while in the Northwest Territories. She was certified in the north in basic trauma and life support.

[36] Her evidence is important. She attended to the worst injured, Melanie Peters, after the collision. She was very clear that after the Oulton vehicle came to rest after the point of impact, Melanie Peters was on the roadway between the two vehicles, with the bottom part of her legs located just in front of the rear wheels of the Oulton vehicle, but under his car.

[37] Mr. Oulton's evidence was that after the collision he circled his car twice and that Ms. Peters was not under his car, but partially under the Lusher car and lying parallel to it.

[38] Ms. Hope and other witnesses described Mr. Oulton's behaviour after the collision. I will deal with that shortly.

[39] Mr. Pinaud came out of his house after he heard the first crash, the Lusher vehicle hitting the pole. He had had four to five beers he testified and although he also viewed the second collision from his lawn, his evidence was not very helpful to the Court.

[40] William MacDonald arrived after Ms. Hope at the scene of the first accident and before the second. (So, I made a slight error there - Ms. Hope was not the last - Mr. MacDonald arrived at the scene of the first accident and before the second). He barely had time to survey the scene before the Oulton vehicle struck. He was still inside his vehicle when a shower of glass came over his car. He then got out to render assistance to the injured.

[41] Witnesses Paul Deschenes, Lynn Reilly, John Reilley, Virginia Hadley and Christopher Webb arrived after the second crash. I will not review all of their evidence, but I will highlight the significant portions of their testimony in light of Mr. Oulton's testimony before me. However, let me next deal with Mr. Oulton's blood alcohol level.

BLOOD ALCOHOL LEVEL

[42] Ms. Lori Campbell was qualified as a forensic specialist in the disciplines of alcohol and toxicology. In the written judgment I will fill in the complete typewritten qualification that was accepted by the Court:

The Crown seeks to qualify Ms. Campbell as an expert witness; a forensic specialist in the disciplines of alcohol and toxicology.

The Crown seeks to have Ms. Campbell give opinion evidence on: the absorption, distribution and elimination of alcohol and other volatiles in the human body; the effect of alcohol on the central nervous system (CNS) alone and in combination with other drugs; retrograde extrapolation of blood alcohol

concentrations; and the conversion of serum alcohol concentration to whole blood alcohol concentration

[43] She testified as to Mr. Oulton's blood alcohol levels on November 24, 2006.

[44] Her analysis of samples of blood serum obtained from the QEII by warrant after Mr. Oulton was treated there reveal that Mr. Oulton's readings at 11:10 p.m. on the night of November 24, 2006, the blood serum contained in 35 millimoles per litre of alcohol which converts to milligrams per 100 millilitres by multiplying by a factor of 4.6, i.e., a reading of 161.35. However, in whole blood this reading would be lower by a range of 5 – 25%. Therefore, using the more forgiving range of 25%, the conversion to alcohol in whole blood is 1.29.0 at the collection time of 11:10 p.m. Ms. Campbell testified that at the time of the accident that reading would have been 1.49 - 1.99 at 9:15 p.m. I believe in my editing I will reflect on the first conversion made to 1.29.0 at the collection time of 11:10 p.m. The police had given Ms. Campbell information about the amount of alcohol consumed before the accident. She was told he had consumed two five-ounce glasses of wine at supper time between 7:00 p.m. and 8:00 p.m. that night. If he consumed the wine sooner, then the elimination rate would be faster and would be between .10 and .20 milligrams per hour.

[45] Based on her assumption that there was no further consumption of alcohol after the accident or within 30 minutes of Mr. Oulton colliding with the Lusher vehicle, she testified that all of the drinks he consumed before 9:00 p.m. would have been eliminated and could not have had the readings as found in the 11:10 p.m. blood sample.

[46] She testified that 35. millimoles exceeds .08 milligrams per 100 millilitres of alcohol and that an individual is impaired if their blood alcohol reading is over 1.0.

[47] Mr. Oulton's evidence is that he arrived home around 5:00 p.m. and drank one ounce of liqueur, Domé. He then went to the grocery store to buy the ingredients for a Caesar salad which his son had requested he serve for supper. He returned by 6:00 p.m. and while preparing the salad consumed one glass of wine and then the second glass by the end of supper and while in conversation with his sister just after 8:00 p.m., finishing his consumption by approximately 8:15 p.m.

[48] These time lines are in fact in contradiction to an earlier statement given to Constable Pattison on December 6, 2006, when he estimated a slightly earlier time frame for his consumption of alcohol. In any event, the blood alcohol reading of 11:10 p.m. cannot be accounted for by his pre-accident consumption of three drinks.

[49] It is important to note that when asked by the ambulance attendant Peter Tripp how much he had consumed he said two glasses of wine and a caesar salad, the same explanation he gave to Constable Flanagan at the police cruiser just after the accident.

[50] Mr. Oulton asks the Court to accept his evidence that after the collision with the Lusher vehicle he was stunned, having hit his head on the windshield and had a head injury that affected his judgment and his conduct.

[51] He testified that immediately after the collision he knew he had been knocked out, but came to and jumped out of his car looking for the boy he had struck. He described looking at the scene, seeing the Lusher car partly in the ditch, then getting back in his car to get it off the road because he heard sirens coming. Having relocated his car two lengths further south on the side of the road just past the Lusher vehicle, he got out of the car and went to the centre of the road to help Patricia Langille. He testified that it was he and another man who dragged her to the east side of the road.

[52] He testified that he just wanted to assist the injured, but realized he was injured and had blood in his eye obstructing his vision. He testified that he then went to the trunk of his car looking for rags to clean up his bleeding on his face and he noticed a 1.5 litre bottle of Hochtaler wine in the trunk. As his head hurt and he was upset, he testified he took the bottle out of the trunk, stood by the side of this vehicle and guzzled one litre of wine.

[53] This would be the amount of wine consumed from the bottle as Ms. Campbell testified she measured the remaining liquid and it was one-third of the 1.5 litre bottle.

[54] By this post-accident consumption of alcohol, Ms. Campbell testified that a reading of near the 1.29 reading could nearly be achieved. However, Mr. Oulton also testified that the two five-ounce glasses of wine he drank before the accident

were really seven to eight-ounce glasses as the night before he gave evidence to this Court and three years later, he measured the volume of the glass he had drunk from on November 24, 2006. Thus the reading of 1.29 at 11:10 p.m. could be accounted for.

[55] If I accept this evidence I would find that Mr. Oulton was not impaired when his vehicle struck Mr. Lusher's.

[56] If I reject this evidence and find that he is lying to the Court and was impaired at the time of the collision, it still remains to be established that his alcohol consumption was a significant contributing cause of the accident and that some fault on his part must be found apart from the impairment alone.

[57] The evidence of the other witnesses as to his post-collision conduct is significant.

MR. OULTON'S CONDUCT AFTER THE COLLISION

[58] James Osborne testified that Mr. Oulton got out of his car and said "I guess I hit you guys" but then became upset and said, "What the fuck were you kids doing in the middle of the road?" Mr. Osborne testified that Mr. Oulton tried to leave the scene before the paramedics arrived and had a difficult time moving his car, squealing the tires and moving back and forth because the door of the Ford Probe was lodged beneath his car.

[59] Melanie Langille testified that she saw someone in the police car, screaming and kicking at the windows and was afraid of this activity so walked away from the police car.

[60] Linsey Hope testified that the driver of the second vehicle got out after the collision staggering around, disoriented and angry and shouted, "What the fuck were you doing in the middle of the road?" It was her observation that he appeared to be intoxicated. She testified that she told him to sit down and wait for help to arrive, but he did not listen and got back in his car intent upon moving it. She testified that two boys were yelling at Mr. Oulton, telling him not to get in the car. He did. She and the boys then banged on the glass, told him not to move his car as someone was under his vehicle, but he put the car in reverse, then forward, intent on moving his vehicle. They pulled Melanie away from his vehicle. She testified

that he would have driven over her legs. Ms. Hope concentrated her attention on Melanie Peters then, but did notice the police tried to take Mr. Oulton into custody, that he was fighting back trying to punch and swing. Later she observed him in the back of the police vehicle trying to kick out the window.

[61] Amanda Blair testified that the driver of the vehicle that hit the Lusher vehicle tried to move his vehicle and Jordan Lusher told him not to.

[62] Paul Deschenes arrived after the collision and recalled a loud guy yelling and the police having trouble getting him in their car and that he was in the face of some young people arguing with them.

[63] Mr. John Reilly arrived after the second collision. He placed his vehicle in the road with strobe lights on it as a warning to other vehicles approaching the two accident scenes. He at first thought a car was on fire and approached with a fire extinguisher in hand. He realized it was steam. Together with a young guy he says he removed one victim from the centre of the road to the east side of the road. That of course we would know would be Patricia Langille Baker. He then went on to recognize Melanie Peters who was receiving some medical attention. He testified he remembered hearing yelling and screaming and saw the police having difficulty with an uncooperative guy. He went to help the police officer. The police officer had the guy near his police cruiser, but he was uncooperative and combative, so he assisted getting the man in the police cruiser. At cross-examination he further described the yelling he first heard as three male voices yelling, telling the guy not to leave, but the guy would not listen.

[64] Virginia Hadley arrived at the scene because she had received a phone call telling her that her friend Polly's sister, Marlene Langille, had been in an accident. She recognized Mr. Oulton. She testified that he was distraught and upset, cursing and swearing and did not want to get in the police car.

[65] Christopher Webb came upon the scene of the second collision and took blankets from the back of Linsey Hope's car to assist the victims. He knew both Melanie Peters whom he had coached in soccer and Linsey Hope, a family friend. He described a very agitated man walking up and down the road. He was asked by Linsey Hope to take control of the guy and keep him away from the victims. His yelling had upset the victims. He testified Mr. Oulton wanted to let everyone know the accident was not his fault, that is why he was yelling. He went to Mr. Oulton

and guided him to the front of his own vehicle , that is Mr. Oulton's Toyota about two car lengths away from the Lusher vehicle. He testified that the man wanted to walk on down the road, but he gently prevented him from doing so. He was with Mr. Oulton for five to seven minutes until the police arrived.

[66] When the police arrived (we know this to be Constable Dalphy) he said he then went to attend to Melanie Peters, but heard a commotion behind him – the police officer and Mr. Oulton. He said others helped the police officer get Mr. Oulton into the vehicle.

[67] Mr. Oulton was identified as a person in need of medical attention by Constable Dalphy and Constable Flanagan. Constable Flanagan arrived after Mr. Oulton was in Constable Dalphy's cruiser.

[68] He actually sat in the front seat of the cruiser trying to calm Mr. Oulton down, who had been kicking at the back windows. It is his testimony that he smelled alcohol in this confined space.

[69] I note that Constable Dalphy who spent some time with Mr. Oulton who was then attempting to walk down the road (his explanation being that he had to go to his shop and get Dennis) only smelled alcohol on Mr. Oulton's breath when he had returned back by the cruiser. Nor did Mr. Webb smell alcohol. This is significant because by Mr. Oulton's explanation he had the opportunity to guzzle a litre of wine between being with Mr. Webb and having Constable Dalphy turn his attention to him creates a problem. I do not believe that opportunity existed for Mr. Oulton to simply guzzle a litre of wine when he was so present and in view of other persons and I also realize that they were busy attending to victims, but they were also keeping their eye on Mr. Oulton.

[70] Quote to insert from Mr. Church's cross-examination of Constable Dalphy and Mr. Church's question is

Q. So these people, uh these couple of people tell you this and they point I presume to Mr. Oulton ... walking away ... Do you have to walk to get to go follow him.

A. Yes.

Q. Do you run or walk?

A. I would say fast pace, I wasn't running.

Q. So, was he cooperative and came back to the car?

A. He didn't want to come back - we convinced him to come back.

Q. We convinced him - how do you mean?

A. I convinced him to come back to the car "Oh I got to go and see Dennis, got to go, see Dennis" ... let's go back to the car.

Q. So, you persuaded him to come back to the car?

A. Yes.

Q. And did you have a hand on him all the time?

A. No ...

Q. So, he came back to the car. OK. So you would have had some conversation with him

A. Basically he wants to see Dennis.

Q. So you are standing side by side?

A. Again, I'm not sure exactly we are standing.

Q. OK, but you're having this conversation with him.

A. Yep.

Q. And you didn't notice any alcohol breath at this point did you?

A. Nope

Q. So you walk about 100 meters and that is just approximation - could be less or more?

A. Right.

Q. Could it be 50 feet

A. Could be but, I think it was further than that.

Q. So you bring him directly back to the police car?

A. Yes.

[71] The other RCMP officers who attended the site, Corporal Upshaw, Auxillary Constable Giffin and Constable Flanagan said they smelled alcohol on Mr. Oulton.

[72] Constables Dalphy and Flanagan assisted by Auxillary Constable Giffin brought Mr. Oulton over to the ambulance on the opposite side of the road where emergency medical technicians (“EMTs”) tried to access him.

[73] Mark Wheatley, the ground operation supervisor for the paramedic team described Mr. Oulton’s behaviour. He recalled Mr. Oulton saying “I’m fucked. I killed that girl. I killed that girl.” He was told he had not killed the girl. Mr. Wheatley testified he said, “I’m fucked anyway.” Mr. Oulton resisted being strapped to the stretcher and threatened the paramedics. Saying words to the affect “I wouldn’t stand so close if I was you, with my hands unrestrained.” He had his fists clenched. “I’m fucked. You’re all out to get me.” Mr. Wheatley called for police assistance. Mr. Wheatley testified he smelled bad breath, but not alcoholic breath from Mr. Oulton.

[74] Mr. Wheatley agreed on cross-examination that his behaviour, particularly his repetitive questions about the victims could be the result of a head injury or impairment, but he could not determine which.

[75] Peter Tripp, the paramedic, who accompanied Mr. Oulton to the QEII in the ambulance with Auxillary Constable Giffin, attempted to explain to Mr. Oulton why he needed to be made secure on a backboard due to his head injury.

[76] As he resisted heavily the police had to handcuff him to the gurney. Mr. Oulton would not allow the paramedics to check him over. The paramedic was not allowed to touch him or able to take his pulse, but he was able to measure his

respiration which was normal when Mr. Oulton calmed down, but rose to 40 when he was agitated. In his experience head injury patients do not variate between agitation and being docile, but he did testify that he was unsure if it was a head injury or alcohol related behaviour. He did testified that he was unsure if it was a head injury or alcohol related behaviour. However, his glasgow coma scale reading of 15 was normal and Mr. Oulton's reaction of his pupils to light were both signs that he did not have a serious head injury beyond the laceration to his head. His combative behaviour persisted at the hospital upon admission to emergency.

[77] We heard Dr. Kovacs' evidence in this regard. Auxillary Constable Giffin had to use force to disable Mr. Oulton, who was administered sedatives to calm him down. It was finally necessary to render him unconscious and place him on a respirator to perform an examination, including a CT scan of his head which proved negative for a surgical head injury.

[78] Dr. Kovacs agreed that a mild concussion would now show up on a CT scan.

[79] I need not review all of the police evidence. I can say that I am satisfied that Constable Flanagan first saw the wine bottle in the back of the Toyota and that Corporal Upshaw then proceeded to secure this evidence. Constable Flanagan and Auxillary Constable Giffin had to restrain Mr. Oulton to get him in the ambulance and remain with him at the QEII. Constable Flanagan was subsequently unable to make a demand on Mr. Oulton at the hospital and Corporal Upshaw subsequently make arrangements for a search warrant to secure the blood serum sample.

[80] Constables Pattison and Smith performed their duties in the accident investigation and gave evidence.

[81] Next, I turn to Mr. Tupper's evidence in recreating the collision of Oulton and Lusher vehicles.

[82] Allison Tupper has appeared on many occasions before the courts to give expert testimony. His report is based on certain assumptions set out on page 3 of his report.

[83] He was first engaged by an insurance company to assess the accident scene. He attended the scene five days after the accident on November 29, 2006. The skid marks were still on the road. He also examined the vehicles, back then in a towing

yard. He reviewed the RCMP Collision Analyst Report and read transcripts of evidence of two RCMP officers, Pattison and Smith given at a preliminary inquiry in February 2008. He assumed that at all material times the night was dark but clear and the pavement dry. No one acted as a flagger and nothing was done to warn oncoming traffic of a hazard.

[84] I have earlier referenced his site plan, Figure 2, page 7 of his report which counsel agree is an accurate depiction of the collision locus. This has been helpful to me in considering all the testimony of the witnesses at the scene that night. I also note that the door of the white Ford Probe was almost fully open at the point of impact and as also demonstrated by the vehicle damage to the Oulton car and shown on the photographs of that vehicle.

[85] Mr. Tupper shows the point of impact (POI) on Figure 2, as 000 on this scaled plan, the collision having occurred in front of civic number 442 Windsor Junction Road.

[86] The point of possible perception he described as the first opportunity to see the event. In this case the POI – Lusher vehicle in the road would:

... first become visible beyond the crest, to a southbound driver ... about 300 - 350 feet or 90 - 110 metres.

[87] This evidence is confirmed by Constable Smith's LIDAR reading, a measure taken from the driveway of 442 Windsor Junction Road, the point of impact back to the crest of the hill as measured at night time as southbound headlights came over the crest of the hill.

[88] Mr. Tupper took measurements and photographs of the site and also considered the photos taken by the RCMP officers the night of the accident. He describes these in his report.

[89] Mr. Tupper gave evidence on the time that elapsed between the moment a driver first perceives a hazard and the point at which the driver's response starts to take effect, the perception and reaction time (PRT). The distance that the vehicle moves during the PRT is the perception and reaction distance or PRD.

[90] Mr. Tupper in analysing the skid marks that Mr. Oulton made (23' of skid) testified that his speed at the start of the skid was 66 ± 2 km per hour.

[91] He assumed the Oulton car did not gain or lose speed before the brakes took effect and therefore it also approached the scene at 66 ± 2 km per hour.

[92] In determining the stopping distance, Mr. Tupper explained that it equals the PRD plus the breaking distance (23').

The hazard faced by Mr. Oulton was a stationary vehicle that was angled across three-quarters of his proper lane of travel just beyond a blind crest. The perception and recognition of that hazard was complicated by these factors:

1. Mr. Oulton would have had a reasonable expectation that the highway travel lane beyond the blind crest was clear and not blocked by a damaged car or associated pedestrians and bystanders; and
2. Any vehicle headlights shining northerly from cars at the scene would have produced visual clutter and confusion.

As described above in Section 4.4, page 8, in daylight the disabled Lusher car and associated bystanders would have become available to be seen from a distance of 300 - 350 feet or about 90 - 110 metres.

But this collision did not happen in daylight. Rather it happened on a dark country road where the existing streetlight had just been extinguished by the very car that formed the hazard. Under such circumstances, therefore:

Mr. Oulton had to rely upon his headlights to illuminate the car and the people and render them discernible to him.

[93] With respect to Mr. Oulton's headlights Mr. Tupper noted:

... that the Oulton had ordinary headlights and that they were on low beam.

Under optimal conditions with headlights in good mechanical condition, excellent weather, dry road surface and straight road, the low beam reveals objects at a distance of approximately 150 – 200 feet or about 45 – 60 metres.

The *Motor Vehicle Act* of Nova Scotia requires that a motor vehicle be equipped with at least two headlights. Those lights must be capable of being dimmed under certain conditions. Section 178(3) states that such low beam lights:

Shall give sufficient illumination ... to render clearly discernible a person 25 metres [82 feet] ahead, but shall not project glaring or dazzling light to persons in front of the vehicle, ...

In addition to the reflective illumination from headlights, a critical factor for discernment of objects at night is the contrast between the object and the background. In the subject case there was simply a dark void behind the car and the pedestrians so they would not have appeared as silhouettes.

A further factor in detection of objects at night is the dazzling effect of oncoming headlights. If headlights were illuminated on any of the north facing cars at the scene then those lights would have produced dazzle and spatial confusion for the oncoming driver.

[94] Mr. Tupper went on to testify that:

The PRT for an average driver for ordinary situations is generally taken to be 1.5 seconds. This figure can be shorter for conditioned actions of experienced drivers or longer for complicated situations and for tired or impaired people.

As discussed above in Section 8.4, the distance that the vehicle moves during the PTR is the perception and reaction distance or PRD.

In this case the brakes came on about 23 feet before the Oulton car reached the Lusher car. By definition that is when the PRT ended. Subtracting this distance from the possible perception threshold of 82 feet, shows that:

The PRD was **59 feet** long.

Dividing the PRD by the approach speed of 66 ± 2 kilometres per hour or 60 ± 2 feet per second shows that:

Mr. Oulton had an effective PRT of **1.0 - 1.1 seconds**.

[95] When compared to average PRT values, Mr. Oulton's PRT on the night of the crash was short. This shows and means, Mr. Tupper testified, that he

responded promptly and without delay to the unexpected hazard that extended across the southbound lane in front of him.

[96] So therefore Mr. Tupper made two critical assumptions:

1. That there was no warning of the hazard of the Lusher vehicle across the road; and
2. That there was dazzle from the headlights of on-facing vehicles at the scene.

[97] However, on cross-examination Mr. Tupper agreed if the facts found by the trial judge were different than his assumptions, his calculations would have to change.

[98] He agreed that if there was no dazzle, no headlights facing Mr. Oulton from the scene where Mr. Lusher's white vehicle was located three-quarters across the southbound lane, he would have had 150 – 200 feet (45 – 60 metres) of visibility.

[99] This distance would not have been far shortened by the presence of 4-way flashers that would also have been visible at 150 feet without dazzle and given him as much as two-thirds of a second more time to react, thus allowing him to stop before impact.

[100] At Mr. Oulton's reaction time of 1.1 seconds (faster than the one of 1.5 sec) Mr. Tupper calculated that the reaction time would be raised to 2.2 seconds, without dazzle, still a quick response. However, this would mean that Mr. Oulton would have enough time to respond to the scene before him and avoid the crash.

[101] The Crown's position is that but for Mr. Oulton's inebriated state before the accident occurred, he would not have crashed into the Lusher vehicle.

[102] So in summary my findings – Mr. Oulton's explanation of his post-accident alcohol consumption is simply not believable. He was being watched by various bystanders after the accident as they had the impression he wanted to leave the scene, first in moving his vehicle and next in proceeding up the road away from the accident site. I have reviewed in detail Christopher Webb and Constable Dalphy's testimony.

[103] In testifying about how he came upon the bottle of wine in his trunk, Mr. Oulton made no mention of the presence of Christopher Webb, who had remained with him until the police arrived for some five to seven minutes. When prompted by counsel he conveniently put in the guzzling of a litre of wine between the attentions paid to him by Mr. Webb and Constable Dalphy.

[104] Mr. Oulton's explanation therefore of his limited consumption of alcohol before the crash does not accord with the weight of the expert evidence respecting his blood alcohol levels at 11:00 p.m. and at 9:15 p.m.

[105] I find he was impaired while driving his vehicle at levels far exceeding .08 milligrams per 100 millilitres of alcohol in his blood, at approximately 1.49 to 1.99 at 9:15 p.m. as per the evidence of Ms. Campbell.

[106] Now with respect to the role of his impairment as a significant contributing factor to the collision and fault on the part of the driver, as to causation I can say that I have considered all the circumstances of the accident and concluded that Mr. Oulton's failure to see the first accident in front of him was due to his impaired perception by reason of his alcohol consumption that resulted in the collision with the Lusher vehicle and the injuries sustained by five people.

[107] Mr. Osborne came over the crest of the same hill and had ample time to stop and assist his friend Jordan Lusher. Indeed, according to Mr. Tupper, a young inexperienced driver may not perceive the hazard the (PTR) as quickly as a seasoned driver such as Mr. Oulton, although the young driver may be able to physically respond faster.

[108] However, Mr. Oulton had the benefit of seeing 4-way flashers on two of the vehicles, had his perception not been so clouded by his alcohol consumption.

[109] On the evidence, it is clear that there were 4-way flashers to warn of the hazard, on the preponderance of the evidence it is clear that but for the 4-way flashers, the first accident site was dark. However, it was visible to Mr. Oulton to the extent that he saw cars within the plume of his headlight as he crested the hill. On an analysis of the evidence I have concluded that there was no dazzle from head lights at the accident scene facing Mr. Oulton. Certainly at 200 feet from the point of impact the 4-way flashers should have been visible.

[110] If Mr. Oulton's perception had not been impaired he would have the required time and distance to stop before the scene. Most certainly he would have seen the presence of a white car across three-quarters of his lane, had his perception not been impaired.

[111] I do not accept from the evidence before me that people blocked the visible part of the white Ford Probe. That does not accord with the evidence of the witnesses who were at the first accident, before Mr. Oulton's vehicle struck.

[112] Nor do I accept Mr. Oulton's suggestion that another vehicle was parked on the west side of the road just before the Ford Probe and possibly reduced the capacity to see the car across the road.

[113] It is clear from Mr. Tupper's calculation that Mr. Oulton's Toyota was 1.8 feet from the edge of the pavement. The shoulder is narrow and there is a ditch on the west side of the road and Mr. Osborne would have collided with such a parked car before he struck the Ford Probe. Therefore, I have concluded from the evidence that no vehicle was located ahead of Mr. Lusher's vehicle.

[114] I accept Ms. Campbell's evidence that alcohol affects perception, peripheral views, clarity and depth. Mr. Oulton simply failed to react consistent with the level of alcohol in his blood that prevented him from properly perceiving his surroundings.

[115] I agree with Crown counsel that it is significant that even at 23 feet he testified he did not see the car across the road, only a young man jumping out in front of him.

[116] Because he was impaired, his perception of events at the accident site was also skewed. I accept Ms. Hope's detailed evidence of the location of the victims and the actions quickly taken to avoid Mr. Oulton re-injuring a victim.

[117] I believe Mr. Oulton has manufactured much of his evidence since November 24, 2006, in response perhaps to disclosures made by the Crown to explain away the high alcohol reading and time lines of his alcohol consumption.

[118] His failure to perceive and lack of judgment by reason of his drinking that night also accounts for much of his behaviour in the ambulance and at the QEII.

[119] The Crown has therefore proved its case beyond a reasonable doubt.

[120] I find Mr. Oulton guilty of the charges laid.

Justice M. Heather Robertson