SUPREME COURT OF NOVA SCOTIA
Cite as: R. v. Foley, 2010 NSSC 288

Date: 20100712
Docket: CRAD 316081
Registry: Annapolis Royal

Between:

Her Majesty the Queen

v.

James Gregory Foley

D E C I S I O N

Judge:	The Honourable Justice A. David MacAdam
Heard:	May 27, 28, June 3 and July 12, in Annapolis Royal and Digby, Nova Scotia
Written Decision:	July 29, 2010
Counsel:	Lloyd Lombard, for the Crown Darren Roderick MacLeod, for the Accused

By the Court:

[1] The accused, James Gregory Foley, stands charged that on or about November 29th, 2008, at or near Granville Road, Granville Ferry, Annapolis County, Nova Scotia, he did have the care or control of a motor vehicle that was involved in an accident with Bertram Hayden Hebb and with intent to escape civil or criminal liability did fail to stop his vehicle, give his name and address and offer assistance to Bertram Hayden Hebb, a person who appeared to require assistance contrary to Section 252 (1.3) (b) of the *Criminal Code*.

[2] There is no dispute that Mr. Foley, while driving his Ford Mustang motor vehicle, struck a wagon or cart on which Mr. Hebb was sitting and which was being pulled by a horse. Also not in dispute is that Mr. Foley left the scene of the accident, without stopping.

[3] The defence says, on the evidence, there is at least a reasonable doubt as to whether Mr. Foley left the scene of the accident, with the intent to "escape civil or criminal liability." At issue, therefore, is whether Mr. Foley left the scene of the accident with the intent to "escape civil or criminal liability." Also at issue is whether Mr. Foley was aware he had been in an accident within the meaning of s. 252.

LEGAL PRINCIPLES

[4] Credibility is a central issue. It is necessary that I carefully scrutinize the evidence. I must conduct an in-depth assessment of the credibility of all the witnesses, not only for their truthfulness but also for reliability. I must decide whether the Crown has proved beyond a reasonable doubt that Mr. Foley, being aware he had been in an accident within the meaning of s. 252, left the scene of the accident with the intent to "escape civil or criminal liability." In arriving at my determination, I must not analyze the evidence of the various witnesses in a piecemeal fashion.

[5] Credibility and reliability must be assessed, not only on the basis of inconsistencies or contradictions found in the evidence of the witnesses themselves, but cumulatively. Considering the evidence as a whole, credibility and reliability are not to be assessed simply on the demeanor of the witnesses, nor am I to reject or ignore frailties, inconsistencies or contradictions simply because the witness appears to be sincere or because the witness's evidence has a ring of truth about it. In arriving

at my findings, I also recognize a verdict of guilty may be returned on the evidence of a single witness.

[6] I further recognize that it is not a question of reducing the case to a simple credibility contest. It is not simply a question of deciding which version is true. It is possible, without believing the evidence on behalf of the accused, even on a vital issue, that I may be left with a reasonable doubt and, in such a circumstance, the accused is entitled to be acquitted.

[7] To summarize:

1. If I believe the evidence of the accused then, obviously, I must acquit;

2. If, following careful consideration of all of the evidence, I am unable to decide whom to believe, then I must also acquit the accused;

3. Even if I do not believe the evidence tendered on behalf of the accused, but I am left in a reasonable doubt by it, I must also acquit the accused.

4. Finally, even if I am not left in doubt by the evidence tendered on behalf of the accused, I must go on to ask myself whether, on the basis of all the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence, of the guilt of the accused.

[8] A reasonable doubt is a doubt based on reason, on the logical processes of the mind. It is logical reason connected to the evidence itself, including any conflicts which may exist, after having considered the evidence as a whole.

[9] In considering the evidence, including the exhibits, I recognize I do not have to necessarily accept or reject all the evidence of any witness. I am permitted to accept part of it. I am required to direct myself to all of the evidence bearing on the relevant issues in order to attribute the correct weight, recognizing individual pieces of evidence must not be examined in isolation but must be considered in the context of all the evidence as a whole.

[10] In considering the evidence of the various witnesses, I recognize that witnesses see and hear things differently and discrepancies do not necessarily mean that the testimony of a witness should be disregarded. Discrepancies in trivial matters may be,

and often are, unimportant. In assessing credibility, one must consider the opportunity the witnesses had to observe the events to which they testified, the extent to which the witnesses had any interest in the outcome of the trial or any motive for either injuring or favouring the accused. In doing so, I must consider whether the witness is entirely independent and whether the testimony is reasonably consistent within itself.

[11] The burden of proof rests on the Crown to prove all the elements of any offence beyond a reasonable doubt. There is no burden on the accused.

THE OFFENCE

[12] The offence with which Mr. Foley has been charged, namely, failure to stop at the scene of an accident, requires the Crown to prove that he had care or control of a motor vehicle, that he was involved in an accident with another person and, with intent to escape civil or criminal liability, he failed to stop his motor vehicle, or give his name and address, or offer assistance to a person who appeared to require assistance as a result of the accident.

THE EVIDENCE

[13] Constable T. E. Meldrum, an accident reconstructionist, testified for the Crown. He concluded that Mr. Hebb's horse and cart were travelling in a westerly direction, in the westbound lane of Granville Road, Karsdale, Annapolis County. Mr. Foley's Mustang, also travelling in a westerly direction, in the westbound lane, struck the rear of the cart resulting in Mr. Hebb being thrown onto the roof of the car, with the horse and cart being pushed forward and off to the shoulder of the road. He concluded, in his Traffic Analyst Investigation Report, that the Mustang then continued westerly, adding that "the driver of the Ford Mustang would have known a collision had occurred because of the damage to the vehicle as well as the loss of view through the windshield."

[14] Constable T. E. Meldrum testified that the posted speed was 80 km. He was unable to determine the speed of either vehicle, the Mustang or the cart. He said there did not appear to be any brake marks on the roadway from the vehicle that struck Mr. Hebb's cart. On cross-examination, he said when the cart was struck it rode up onto the hood of the motor vehicle. He repeated his opinion that Mr. Hebb had landed on the roof of the vehicle. The cart then fell back down to the ground. He agreed that,

where he later observed the Mustang parked, in Victoria Beach, it was visible from the road, not hidden away but was covered by tarps.

[15] Gayle Morrison testified that on November 29, 2008, at around 6 p.m., she was near the front window of her house, which was located approximately 500 feet from the edge of the Granville Road. She heard the bells of a horse cart and assumed it was Mr. Hebb. Soon after that, she heard a thud and saw things flying through the air. Although she did not see what had struck his cart, it being very dark, she saw Mr. Hebb holding the reins and his horse dragging him, while he remained on the cart.

[16] Lindsay Milne, a licensed mechanic, examined the Mustang. He determined that, although the braking was not 100%, it was not the cause of any problems at that time. He said that brakes worked. He said he ran the vehicle and noticed the lights became dimmer and, eventually, the vehicle stalled when the battery died. He said from this he concluded that the alternator was not charging the battery.

[17] Wanda Lynn Foley, the mother of the accused, testified for the Crown. She said on the evening of November 29, 2008 she heard a car coming down her driveway making a funny noise like, she said, "backfiring." After a few minutes, her son, James, came in the house and he said that Sue, his girlfriend's mother, had called and said there had been an accident on the road. Mrs. Foley said they should go and see where it happened. When they arrived there were police vehicles, fire trucks and tape across the road. She was told that there was a body on the road, at which time she backed up into a driveway. James said he would try and walk around the accident to meet his cousin, Jeremy Smith. He left the car and walked over to a fireman. When he returned, he said he had permission to walk around the accident scene. Mrs. Foley returned home where she received a call from Sue who said there had been an accident and a red car had left the scene. Shortly after she had a strange feeling and went to see where her son had parked his vehicle. She noticed that it was covered by a tarp. She obtained a flashlight and walked around the vehicle. She commented that it was not normal for him to cover his vehicle with a tarp and that it was parked in a different place than he usually parked. She could see that pieces of the windshield had been smashed and there was paint off the bumper. She did not lift the tarp. She decided to go to the RCMP.

[18] On cross-examination, Mrs. Foley said it was about a ten minute drive from her home in Victoria Beach to the scene of the accident. She said that, although the car was close to the highway, James had driven it in that night, whereas usually he would

back it in. She said although the car was covered by a tarp, it was visible from her house. During the drive with James to the accident scene, there was no real conversation, although he had been on his cell phone. He called his cousin, Jeremy Smith. She had not known that he was planning to meet with Jeremy. After he returned from speaking with the fireman, he said he was going to meet Jeremy and go with him to Annapolis Royal .

[19] After Mrs. Foley had looked at the car, she called Sue who came down and suggested that she call James on his cell phone. When she called James, she asked him what had happened and he told her that he had been driving and that he had come across Mr. Hebb, but did not have time to hit his brakes. He was crying and said he knew what to do. He said he was at the Irving garage. Mrs. Foley said this conversation occurred between 7:00 and 7:30 p.m. He also said that there was an RCMP officer there.

[20] Raymond Francis testified that on November 29, 2008, he was a member of the Annapolis Royal volunteer fire department. After he arrived at the accident scene, he was directed to where the road had been taped, to block off traffic. He noticed a car approach his location from the west and park in a driveway. Mr. Foley came over to see him and asked to be able to go to the other side of the accident scene, because he had a friend he wanted to meet. Mr. Francis told him he could, but that he had to stay outside of the taped-off area. By this time, there was one RCMP vehicle at the scene, as well as fire and emergency medical vehicles. He said, when Mr. Foley would have walked by the scene, Mr. Hebb's body would have been on the road with a blanket covering him.

[21] Also testifying for the Crown was Jeremy Smith, Mr. Foley's cousin. He said that at approximately 4:15 p.m., Mr. Foley arrived at his home at Granville Ferry and asked for help switching alternators on his car. As it was almost supper, Mr. Smith said he could not, but perhaps later or on the next day. Mr. Foley left.
Mr. Smith said Mr. Foley called him later and asked for a ride as far as town. Mr. Smith agreed. He said that Mr. Foley seemed pretty calm. He drove to the accident scene and called Mr. Foley who said he was on the other side with his mother. He appeared to Mr. Smith to still be pretty calm. When he arrived he jumped in the back seat of Mr. Smith's vehicle. He appeared to be shaken up. Mr. Smith noted that he would have just walked by the accident scene.

[22] During the drive to town, Mr. Foley said he was the person that had hit Bert (Mr. Hebb). He said he had freaked out and went home. He was "really shook up" and crying, Mr. Smith said. Mr. Foley said his car was a write-off. He also said he didn't know how it happened. One minute he was driving down the road and the next thing he was just five feet away and he did not see it until the last second. He said his lights were not very bright as his alternator was not working. Later, he said that Mr. Foley told him that he had "little to no headlights."

[23] He said he was not going very fast. He said that when he realized there was something in front of him, it was too late, that he could not stop because "it was right in front of him." He said he blanked out and the next thing he knew he was going down the road, with the roof of his car smashed in, almost down to the dash.

[24] Mr. Smith said he did not think that Mr. Foley identified what he had hit at the time. However, before he entered Mr. Smith's vehicle, he had walked past the accident scene so he knew what it was when he was talking to him. He said it was Bert Hebb and that it was him on the horse and wagon that he had hit.

[25] As they continued to drive to town, Mr. Smith said, he was speechless. Mr. Smith said that when they were about half way to town, after Mr. Foley had told him what had happened, he asked if Mr. Smith could take him to see his girlfriend for a minute. Mr. Smith dropped him off at the Irving station. He observed that there were couple of police officers there. On cross-examination, he agreed with defence counsel that, when Mr. Foley got in the car and began to cry, he said he wanted to go to town to see his girlfriend for a minute and asked him, after that, to take him to the police station in Annapolis Royal so he could turn himself in. He agreed that later Mr. Foley had said he wanted to see his girlfriend for a few minutes because he thought he was going directly to jail. He wanted to see her before he turned himself in.

[26] Mr. Smith said he told Mr. Foley that it was pretty serious and he could not hide from it. He also said that he told him he should turn himself in. He said that Mr. Foley knew that he should turn himself in and that it was serious.

[27] Mr. Smith testified that probably a couple of months later Mr. Foley told him that he had thought about hiding the car, but he had just taken it home. He said he had thought of hiding it down in Victoria Beach, where there was a waterfall called the merry pizzer. When asked to describe the conversation with the accused regarding the "merry pizzer," Mr. Smith answered, "[h]e was saying he was thinking about hiding

it but he just took it home." This conversation took place some time after the accident, "probably a couple of months or so," according to Mr. Smith. He elaborated on what the accused said:

> He was just saying that at the time he was thinking about hiding it or maybe ... down at Victoria Beach there's a waterfall called the merry pizzer and he was saying he mighta hid it there ... he was just thinkin ... he was saying that's what he was thinking at the time but he ended up just taking it home ...

[28] Mr. Smith said during the drive into town Mr. Foley said he did not really know why he did not stop, that he just freaked out and was nervous and did not really know what to do so he just went home. He also said Mr. Foley told him that there was no insurance on the car at the time. In response to the Crown's question as to what, if anything, Mr. Foley told him about what he thought he would be facing if he had stopped, Mr. Smith replied "Well he told me, after, that he *(sic)* it was vehicular manslaughter and he was scared that he was going to end up doing five years in jail." Mr. Smith clarified that Mr. Foley told him this right after he was telling him about the accident. Mr. Smith said that when they arrived at the Irving he did not get out of his car. Mr. Foley went into the station and was there for a minute and then came out and walked around to the back of the police car. Mr. Smith assumed that he told them that he was the one in the accident, because Mr. Foley put his hands on the back of the police car and then got into the back of the police car.

[29] Constable William Corkum testified that he and Corporal Vincent had travelled from Kings County and, upon receiving information as to where Mr. Foley's girlfriend was working, drove to the Irving service station. They spoke with her for five to ten minutes and, after she said she had not heard from Mr. Foley they left the service station and returned to their vehicle. They were still in the police vehicle when they saw a person approach and enter the service station. Walking by their vehicle the person had looked to be in distress, as if he had been crying. They said to each other that it could be him; on cross-examination Cst. Corkum said their conclusion was based on his demeanor. He was in the service station for a brief period and then came out in the direction of the police vehicle. Corporal Vincent, who was in the passenger seat, got out of the vehicle and said "James." He was walking in front of the vehicle when Corporal Vincent said this. He was walking with his head down, similar to when he had entered the service station. The person started crying and walked towards them. There was a brief conversation.

[30] Mr. Foley testified on his own behalf as to the circumstances leading to the collision. On direct examination, he stated that on November 28, 2008, he had been experiencing problems with the alternator on his 1987 Ford Mustang, which he had recently purchased. He obtained a replacement alternator which he installed, following which he decided to take a drive to test it. He left his home in Victoria Beach, Annapolis County, and proceeded along the Granville Road to the home of a friend. He asked his friend, Wayne Taylor, whether he wanted to take a drive and when he replied in the negative, they talked for a few minutes. He then backed his vehicle out of the driveway, but it stalled. He asked Mr. Taylor's father for a boost following which he had a brief further discussion with his friend and then proceeded along the Granville Road towards his home in Victoria Beach.

[31] Mr. Foley said he travelled less than a kilometer on a straight stretch of highway, and had engaged, maybe third or fourth gear, and was not going very fast. He estimated he was travelling maybe 60 or 70 km/hr, at the most. He said by this time it was quite dark, although the evening was "pretty good" and it was not raining.

[32] Mr. Foley said as he approached a corner in the road he saw a "wall of black" and did not have any chance to gear down. The next thing he said he remembered was going around the corner and continuing towards his home in Victoria Beach. He said he did not stop. He said it was "pretty dark" with no street lights. Although he could not recall whether he was driving with high or low beams, he said he had sufficient headlights to view the road in front of him. He said before he had a chance to turn the wheel, the collision occurred. He said he did not really remember the impact and said the next thing he recalled was continuing down and around a corner in the road, with his roof smashed in.

[33] Mr. Foley said he was aware his car had suffered damage, but he was not aware what he had hit. From the damage his car had sustained, he knew it was serious.

[34] On direct examination, Mr. Foley said that when he saw the car damage he was scared. He said it was not that he did not want to stop or take responsibility. He said he did not know why he left. He said he was not sure what had happened until he arrived home, and received a call from his girlfriend's mother telling him that there had been an accident and that Mr. Hebb had been struck. He said he then realized what he had done.

[35] On direct examination, Mr. Foley said he kept going because he was really scared. He said he had no explanation for why he left. He was scared for his life, not really knowing what he had hit. He then said he did not know what he was scared of.

[36] Mr. Foley said from the scene of the accident to his home was usually a ten minute drive, but he had no idea how long it took that night. When he arrived home, the car stalled in the driveway. He said he tried to park where he usually parked but the power steering was not working and he ended up parking under an apple tree. He obtained some tarps from a wood pile, by the side of the house, and proceeded to at least partially cover the vehicle. He said he did this because he did not want his parents and younger brother to see the state of his car.

[37] Mr. Foley entered the house and changed his clothes, although he said he did not know why; he just wanted to wear different clothes. His mother apparently received a phone call, also from his girlfriend's mother, in which she was informed about the accident. She suggested they go and see what was happening. On the way, he called Jeremy Smith and asked him to meet him on the other side of the accident scene. Jeremy said he was on his way and would meet him. Mr. Foley said his intention was to go to town and tell his girlfriend what had happened and then to turn himself in. He said he did not tell his mother what had happened because of all the things he had done in the past. He could not tell her that he had been in an accident and a person had been seriously hurt.

[38] Mr. Foley said he left his mother's car at the accident scene to ask a fireman if he could walk around the accident scene to meet a friend on the other side. After the fireman spoke to someone by phone, he was told it was okay but was instructed on where he should walk. When he arrived on the other side of the accident scene, he got into the back seat of Mr. Smith's vehicle. While they were driving to town, he told Jeremy what had happened. Jeremy did not say very much and they were then both quiet.

[39] When they arrived at an Irving station, Jeremy parked and Mr. Foley went inside to speak to his girlfriend. He told her that he had hit Mr. Hebb and that he was probably going away for life and that he loved her. He went outside and, as he walked past the RCMP car parked there, Corporal Vincent rolled down the window on the passenger side and asked if he had anything to say. He said he was James Foley and he put his hands on the trunk of the car and began crying. Eventually, he was put into the police car and was told he was being charged with manslaughter.

[40] Mr. Foley said it had been his intention, after visiting his girlfriend and telling her what had happened, to turn himself in at the police station, but noticing the police car outside the service station, he decided to turn himself in there. He said he had made his mind up when he was at his home. This was right after he entered the house following the phone call from his girlfriend's mother telling him about the accident with Mr. Hebb and the horse. He said the only reason he did not turn himself in when his mother drove to the accident scene was because he wanted to tell his girlfriend first. He said he was not trying to get away. When he parked his car, he said, he was not trying to hide, but only to cover it, so his parents would not see what had happened to it. He said he was not trying to hide the car forever, as he was aware that they would eventually have seen it.

[41] Following his arrest at approximately 7:30 in the evening, about an hour and a half after the accident, Mr. Foley was taken to the RCMP detachment where, commencing around midnight, and after receiving the appropriate warnings and cautions, he made a video statement.

[42] On cross-examination, Mr. Foley said he could see the road fine. He stated that, following the boost, his headlights would not have been bright for long, but would be for one or two minutes. He said prior to the accident they were dimmer than usual, but he could see fine. He said that, if they had been on high beam, it would be like they were on low beam. He could not recall whether his lights were on high or low beam at the time. He denied that he had told Jeremy Smith that he had no headlights at the time.

[43] Mr. Foley said, on cross-examination, that he decided to turn himself in because it was the right thing to do. He said he wanted to turn himself in, but he also wanted to first speak to his girlfriend. He said he did not tell his mother about his involvement because he did not want to cause her any more headaches than he had in the past.

[44] Mr. Foley agreed with the Crown that, when he spoke to the fireman at the scene, he did not tell the fireman of his involvement in the accident. He said he probably did not want to do it then because he still wanted to tell his girlfriend what had happened. He later added that he wanted to do so because he thought he was going to jail.

[45] On cross-examination, Mr. Foley said that he thought he told Jeremy what had happened pretty well as soon as he got in the car. He said he started bawling. Jeremy asked what was wrong and he began crying and told him. After he told him and when they were close to town, Jeremy suggested that he turn himself in. Mr. Foley said he knew that he would never be able to get away with it, and that he only covered the car so his parents and brother would not see it. In his statement, he said:

> And then I just drove all the way home and parked the car in the (inaudible) the yard and covered it over with tarps because I didn't . . . well I didn't really know. I was just really scared, that's all I can say. I was just really scared, and I didn't really know what to do, like I just . . . I don't even know. I just hit him and drove home and met a couple of cars on the way home and just drove home and parked the car in the (inaudibile) and never told nobody until I seen Jeremy.

[46] In response to Cst. Corkum asking him why he covered up his car with the tarp, he replied:

> I don't know. I guess I just didn't want anybody to see it. But, I don't know, I was just really scared and didn't really know what to do and like, I was just really in a state of shock, I guess.

[47] When asked about the comments Mr. Smith attributed to him to the effect that he had considered disposing of the car at the "merry pizzer," the accused said it "wasn't at that time, it was at a way later date that I told him that." This is consistent with Mr. Smith's evidence that the conversation took place "a couple of months" after the accident. In response to the suggestion that he had considered sending the car over the "merry pizzer," the accused said "you'd never be able to get your car down through there anyway," as it was only a walking trail, "and then you gotta clear bushes, duck under bushes while you're walking ..." As to the suggestion that he considered getting rid of the car, he said, "I didn't - it's not that I considered it, it's just because I'd been under so much stress that it's just all but drive me insane ..."

[48] Mr. Foley denied that, when he came out of the garage, intention was to return to Jeremy's car to leave the area. He said his intention was to tell his girlfriend what had happened and then to turn himself in. He said he walked to the driver's side where Corporal Vincent had rolled down the window and asked him if he had anything to say and he had replied that he was James Foley.

[49] Mr. Foley denied, on cross-examination, that it was his intention to hide his car and to get away. He agreed that Jeremy Smith had suggested to him that he turn himself in, adding he had thought about doing it earlier. In his statement, however, he said to Cst. Corkum: " . . . well I told Jeremy that I hit him and I don't know what I should do and I just started crying." However, later, in his statement, after referring to telling everything to Jeremy and saying he had not really believed him, he continued, ". . . I got to turn myself in, because if I don't, it's going to look worse on me."

[50] On cross-examination, Mr. Foley said he told Jeremy that the first thing he saw was a "black wall" and that he did not have time to do anything about it. He said he had been telling the same story for two years. He agreed that he heard Jeremy say in court that he had said that, just before the accident, he had pretty much no headlights because his alternator was not working. Mr. Foley disagreed that he had said that. He said the only thing he thought of, when he hit, was to wrap his brain over what he had hit. Having no insurance or registration was one the least of his problems, he replied to counsel. He said he knew he had to turn himself in.

[51] Mr. Foley agreed that when his girlfriend's mother called and asked if he had been out driving, he told her he had not. He said he did this because he did not want her to know he had been out driving in his Ford Mustang. In his statement he told Cst. Corkum:

> Like I just hit that and I don't really know even how really like, quite how he went, like all is I remember is I hit the back of him and man, I was so scared, like well I've never ever been in an accident before and it just shocked me so bad and didn't really know what to do that I just kept driving and I drove home and I was like thinking about it the whole time. And my girlfriend's mother called and asked me where I was and I said home and she asked me if I hit anybody or anything and I said no, because I didn't want her to know.

[52] In his statement, Mr. Foley described how everything happened so fast and that, if he had seen him, even at the last second, he could have pulled his wheel and went across the road into the ditch or something.

[53] At no time did either of the officers involved in taking the statement suggest to him that he could have avoided the accident or that it was intentional. The focus of the questioning was on why he left the scene and what he did following the accident.

[54] Cst. Corkum asked him:

> **Q.** So after you hit him there, did you figure he was hurt pretty bad or ...?
>
> **A.** Well, yeah. I kind of figured that I imagined he'd be kind of hurting. But I don't know why I didn't stop, I just ... I don't even know. I was just so scared, like as soon as I hit him, like I was really scared and I didn't really know what to do.

[55] Later, on being referenced to this passage again, he said he "kind of assumed" he had hit something from the damage to his car. He said it could not have been a deer to have done that amount of damage. He said from the damage to the windshield and roof he knew he had hit something.

[56] In his statement he said:

> Yeah. I, I don't know why. I was just so scared that I smashed into him and well really at first I didn't even really know what I smashed into. Like, I was going down the road and didn't really see nothing and then all of a sudden bam and so then I, I knew I smashed into something, but I didn't really know what.

[57] In response to questioning as to what he was scared of, he said:

> Well just knowing the fact that I smashed into something on the road and not really knowing what it was . . .

[58] On being pressed by Cst. Corkum that earlier he had acknowledged knowing that he had hit Mr. Hebb, Mr. Foley stated:

> Well, it seemed like ... well when I smashed into him no, I didn't really ... well, I kind of figured it him, but like when I hit him, it was ... like, I don't really ... like, I don't even really remember, because I come down the road and I didn't see nothing until I was like right on him and I smashed into him, into the back of him, and like I told you, I didn't really see anything after that. And well yeah I was scared, because knowing that he was probably laying back there and like probably hurt quite bad and me not stopping, but I was scared, like really scared because well, I smashed up my car, I didn't really know if he was alright or not and well not stopping and kind of wondering what was going to happen to me, because of me running into him and everything, you know. Like I just think of everything, everything at once.

[59] Upon being referred to this passage, in cross-examination, he replied that it was not true; that was not what he was thinking. His statement, however, continues:

> **A.** Like and well, it's kind of scary really. Like, well it is scary, like, when you smash into somebody and not even see him when you do it and then think to yourself, well you know, like geez, what's going to happen and is the guy alright and like what the hell is going to happen. And I just kept on driving and went home and I should have stopped and turned around and seen if he was alright or something. But instead I just ... but I was scared about what everything was going to happen and everything and just kept driving home.
>
> **Q.** So did you know if he was hurt?
>
> **A.** Well I didn't really know if he was hurt, but I kind of assumed that he'd probably be hurt if I smashed into the back of him.
>
> **Q.** Yeah.
>
> **A.** But I was really scared.

[60] Responding to Crown counsel, he agreed he did not go back to see what he had hit. He said he had no clue what it was. All he had seen was a "black wall", until his girlfriend's mother had called him, he told counsel.

[61] Cst. Corkum, during the taking of the statement, asked him if there was anything he was thinking, other than being scared, as to why he left. He replied:

> A. Not really. Like, the only thing that was running through my mind is, like, holy fuck, excuse my language, but, like holy fuck, I just smashed into something. And I think to myself, well fuck, is buddy okay, like what the hell just happened? Like, it just happened so fast that I didn't even really know myself what happened, really. And yeah, I should have stopped and I would have went back and seen if he was okay or what was going on, but I don't know why I didn't. I just kept going and went home. because I was just so scared and well I just smashed up my car that I just got and I fucking killed buddy, that ... man.

[62] In responding to this passage from his statement, he said that, after his girlfriend's mother told him what had happened, he knew he had hit a human being. He said the police officer gave him a hard time and his mind was messed up during

the statement. He said the officer tried to put words in his mouth. He said he was in a state of shock and had no idea what was going on.

[63] In his statement, he agreed that one of the things going through his mind was the fact he did not have any insurance on his car. He had the following exchange with Cst. Corkum:

> **Q.** So well I guess when you left the scene there, one of the things you were thinking about too then, was that you didn't have insurance on the car, so ...
>
> **A.** Hum. yeah, that was one of the ones I was thinking about. I was just really scared and like, well knowing that I hit buddy and knowing I didn't have no insurance and the car wasn't legal and I was screwed for hitting him and I didn't stop, which I should have, and I just kept going. ...

[64] He then replied to counsel that, although he agreed he told this to Cst. Corkum, he disagreed that this was the reason why he left.

[65] Again, this time in response to a question by Cst. Goss that he knew he had hit Mr. Hebb, Mr. Foley replied, "Yeah". In responding to Crown counsel, he said he does not remember saying this to the police but agreed he must have said it. He said he did not understand how the RCMP could expect him to give full details in a statement considering how bad a state of shock he was in at the time. He said his mind was not focussed. After this passage was replayed to him from the video, he confirmed he had said, "Yeah", adding that he did not know he had hit Mr. Hebb. He said he did not know this until his girlfriend's mother called. All he saw was a "black wall". He did not see a horse.

[66] In reference to another passage in his statement that suggested he knew he had hit a human being and a horse, he replied that he didn't know he had hit a man on a horse until his girlfriend's mother called. All he knew was that he had hit something, a "black wall", and, from the amount of damage, figured it was bigger than a deer.

[67] Again, in his statement, in response to Constable Goss suggesting that when he hit him he knew he had hit him, Mr. Foley again replied, "Yeah". Then, when Constable Goss asked him whether he thought he might be hurt, Mr. Foley responded, "Well yeah, I would say he would be."

[68] Mr. Foley, in the statement, after acknowledging he should have stopped the first time, referencing the accident itself, noted that he had not stopped the second time, when he walked by the accident scene on his way to Jeremy's car. The following exchange occurred with Cst. Corkum:

> ... Okay. The, the, the roof is like this on that car, the windshield.
>
> **A.** Yeah.
>
> **Q.** Okay. That means that someone was on there.
>
> **A.** I think it was from the bottom of his trailer.
>
> **Q.** Okay, what makes you think that?
>
> **A.** Well, because I mean, when I hit him, he was like this.

[69] In response, he said all he remembers seeing was the "black wall" and he did not remember seeing what was in the statement. He said he must have been in a state of shock. He said he has a clearer recollection now because he is no longer in a state of shock. In his statement, in response to Cst. Corkum, he said he knew he hit a wagon. He responded to Crown counsel denying that he knew he had hit a wagon, saying it was a "black wall".

[70] Later, he said to Cst. Corkum:

> Well yeah, I told you that I hit the wagon. But then I was like, well I wasn't too sure what it was after that.

[71] He then added:

> **A.** Well no, what I'm saying is that, I knew that it was the wagon, but I didn't know how I hit him, because it happened so fast. But when you look at the car and the way that I hit him, if I hit him from the back, there is no way that his trailer or my car went like this, because you would have seen black marks from my tires. If I hit him from behind, there's no way that he would land on my roof or my hood, because he was on the trailer and I hit him like this. So I would have had to have gone under his trailer or *(sic)* his trailer to go off like that.

[72] After being referred to this passage, he said the only thing he remembers is seeing the “black wall”.

[73] He was then referred to the following exchange with Cst. Corkum:

> **Q.** ... But to say that you didn’t know what it was for sure that you had hit and to waiver on that at all, clearly you knew 100% what you had hit and you knew that you had hit him pretty hard, and you knew that he was hurt.
>
> **A.** Yes.
>
> **Q.** Okay. And knowing that he was hurt, you still left.
>
> **A.** I should ... yeah.
>
> **Q.** Right?
>
> **A.** (shakes head yes)
>
> **Q.** And knowing that you had hit him that hard and he was likely hurt pretty bad and that he could even be dying, you left. Right?
>
> **A.** Right.
>
> **Q.** Okay. And you did that because one, you didn’t have insurance, right?
>
> **A.** Right
>
> **Q.** Two, you didn’t know what would happen to you, because you had hit him and he was likely very seriously injured or dying and you didn’t know what would happen as a result to you, right?
>
> **A.** Well yeah, I should have been, I should have been more worried ...
>
> **Q.** Now ...
>
> **A.** ... about him and ...
>
> **Q.** ... come back over here, man, okay. It’s just me and you here.

> **A.** I should have been worried ... more worried about him than anything else. But I just... I don't know, I was just so scared that when it happened, I didn't ... you know, like I didn't really know. Like if you was driving down the road and didn't see nothing and then all of a sudden smash, right into your car, then you'd probably be pretty freaked out too.

[74] Mr. Foley then stated in court that he denied leaving because he knew he had no insurance. He said he did not know why he left. He said he was not afraid of the consequences.

[75] On re-direct by defence counsel, Mr. Foley said there were some things in his statement he remembered and some things he did not remember saying. He said the statement is worded differently than he talks.

[76] On further re-direct, Mr. Foley said he may have spoken to Jeremy Smith about the merry pizzer. He said, however, it would not have worked, because you could not get a car down there. He did not think the comment was made. On further examination by Crown counsel, he said he told him he should have done it, that he should have gotten rid of the car, but he had driven it straight home.

THE LAW

[77] Section 252 of the *Criminal Code* provides, in part:

> Failure to stop at scene of accident
>
> 252. (1) Every person commits an offence who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with
>
> (a) another person,
>
> (b) a vehicle, vessel or aircraft, or
>
> (c) in the case of a vehicle, cattle in the charge of another person, and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, if possible, the aircraft, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.
>
> ...

> Evidence
>
> (2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle, vessel or, where possible, his aircraft, as the case may be, offer assistance where any person has been injured or appears to require assistance and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.

[78] Describing the requirements of ss. 252(1) and (2), the Alberta Court of Appeal said in *R. v. Mazur*, 2009 ABCA 263, [2009] A.J. No. 1490, at para. 12:

> The *actus reus* of the offence is established by proof that the accused had control of the vehicle, that the vehicle was involved in an accident, that the accident involved another person, and that the appellant failed to stop and provide his name or offer assistance. Upon proof of these elements, the *mens rea* of intent to escape liability is presumed, in the absence of evidence to the contrary: *R. v. Roche*,[1983] 1 S.C.R. 491 at 497,[1983] 5 W.W.R. 289.

[79] The elements and the burden under s. 252 are described in *R. v. Hatcher*, [2005] O.T.C. 425, [2005] O.J. No. 1968 (Ont. Sup. Ct. J.), at para. 33:

> In this case, the Crown has the burden of proving beyond a reasonable doubt the following elements of the offence:
>
> 1. The accused had care or control of the vehicle.
>
> 2. The vehicle was involved in an accident.
>
> 3. The accident was with another person.
>
> 4. The accused failed to stop, give his name and address and render assistance if required and,
>
> 5. The accused did so with intent to escape civil or criminal liability. With respect to the *actus reas* and *mens rea* aspects of the offence, the court added, at paras. 35-37:
>
> The offence under s. 252(1) is a specific intent offence requiring proof of *mens rea* at two stages. In this case:
>
> 1. Proof that Mr. Hatcher knew that he had hit a person.

> 2. Proof that he failed to stop with the intent to escape civil or criminal liability.
>
> If the Crown is able to prove beyond a reasonable doubt not only that the accused knew that he had hit a person, but in addition:
>
> 1. He knew that bodily harm had been caused to the person or
>
> 2. He knew that the other person was dead or;
>
> 3. He knew that bodily harm had been caused to the other person and was reckless as to whether the death of the other person resulted from that bodily harm, then more severe penalties are provided under subsections 252(1.2) and (1.3).
>
> The accused's knowledge of the nature of the accident, i.e. that it was with another person or another vehicle, vessel or aircraft, is central to the criminality of the act. It is different from the intent to escape civil or criminal liability. Not all accidents generate the legal obligation to remain at the scene. Accidents with dogs do not result in any such obligation. If the Crown can prove beyond a reasonable doubt that the accident was with another person then the *actus reus* of that element of the offence has been proven. The *mens rea*, however, is the accused's knowledge that he struck another person which must also be proved beyond a reasonable doubt.

[80] The court in *Mazur, supra,* took the view that "[t]he dual *mens rea* inquiry advocated in *Hatcher, supra,* is redundant because one cannot separate the subjective knowledge that the accused was in an accident with another person from the intention to escape criminal or civil liability" (para. 17).

[81] The evidentiary burden on the accused is to raise a reasonable doubt, in order to rebut the presumption. The accused is not required to prove on a balance of probabilities that there was no intent; rather, "it is sufficient if the evidence as a whole raises a reasonable doubt as to his guilt": *R. v. Rampersad*, 2006 ONCJ 182, [2006] O.J. No. 2027 (Ont. Ct. J.), at para. 17. The court in *Rampersad* went on to consider the "evidence to the contrary" offered by the accused, at paras. 19-20:

> In this case, Mr. Rampersad had a duty to stop, offer assistance and provide his name and address. He did not do so but rather, left the scene. Consequently, he is presumed to have intended to escape civil or criminal liability. However, there is evidence to the contrary. Mr. Rampersad took an anxious, upset youngster, Vinny DaSilva, some

> distance to a Shell gas station on Weston Road and then sent the 14-year-old youth home in a taxi. There is credible evidence that Knolly Rampersad had caused the youth to be late for a family function and was worried about upsetting the youth's mother, a family friend. Mr. Rampersad returned to the scene of the accident within a half hour and immediately identified himself to the first officer he encountered, Police Constable Camara, and volunteered that he had been involved in the accident.
>
> This constitutes evidence to the contrary. I would have to have a reasonable doubt as to whether Knolly Rampersad intended to escape from civil or criminal liability on the basis of his evidence. Even if he panicked and fled the scene, he abandoned his flight in short order and returned to the scene of the accident to face any possible liability. There is a considerable body of case law to the effect that the presumption in s. 252(3) can be rebutted by evidence to the contrary of "later" compliance with the statutory duties, even to the extend of reporting the accident the next morning: See, for example, *R. v. Smaggus* (1973) 5 N.S.R. (2d) 409 (N.S.S.C., App. Div.). Accordingly, a half hour delay in reporting the accident would appear to create a sufficient doubt to satisfy the evidence to the contrary test and the Crown is therefore required to prove an intent to escape liability beyond a reasonable doubt. No such evidence has been offered in this case.

[82] The court noted "the troubling perception" that the purpose of ensuring assistance to the injured could "be readily defeated by driving away from the scene of the accident and returning at some later convenient moment when the injured no longer are in need of assistance at the scene (often because they have been removed for medical treatment)" (para. 20). The court continued, at paras. 22-24:

> Notwithstanding those concerns, the fail to stop provisions of the Code relate the specific intent (*mens rea*) of escaping liability to the double barrelled *actus reus* composed of an act (knowingly becoming involved in an accident) and an omission (failing to do one of the statutory duties). The offence of "fail to stop" requires both an *actus reus* and a mens rea, in other words, an offending act with a corresponding offending intent.
>
> The law is well settled that failure to comply with any one of the statutory duties in combination with the specific intent will constitute an offence. In other words, the failure to perform any statutory duty is part of the *actus reus* but also an evidentiary trigger that creates a presumption of intent to escape liability. Where there is evidence to the contrary and no other proof of the intent to escape liability, the failure to perform a statutory duty will not by itself support a conviction because the *mens rea* element of the offence remains unproven. There is no *mens rea* in the offence under s. 252 of the Code that might be described as ‘intent to avoid rendering assistance’....

> In conclusion, the offence in s. 252(2) of the Code is mainly about ensuring that individuals do not avoid liability for accidents whether or not there is any intent to assist the injured. Remarkably, the latter statutory duty seems like an important legislative purpose but where there is no evidence of an intent to escape liability, any failure to assist the injured, as in Mr. Rampersad's case, attracts no criminal liability at all. This is quite disturbing because, the average person, in possession of all relevant facts, would consider Mr. Rampersad's conduct, in abandoning fatally injured individuals in the accident he caused, to drive a youth who was late for a family function, shocking in the extreme.

[83] The defence submits that *R. v. MacLean* (1982), 40 Nfld. & P.E.I.R. 297, 1982 CarswellPEI 10 (P.E.I.S.C.) supports the view that the accused has rebutted the presumption under s. 252(2). In *MacLean*, the accused's vehicle hit another vehicle. Both vehicles stopped, and the accused admitted liability to the other driver. While the other driver was gone to call the police, as agreed, the accused left, in order to escape liability, as he was driving while suspended. The trial judge dismissed the charge of failing to remain at the scene, taking the view that it was necessary to establish that the accused failed to stop and that he failed to give his name and address. On appeal, the Crown argued that the trial judge failed to apply the presumption. The Court of Appeal held that the offence is made out and the presumption applies upon proof of any of the duties required by the *Criminal Code* not being performed. In this case, the court concluded, the presumption did not apply. Liability under s. 233(3) must be incidental to, and arising out of, the accident. However, the accused had left the scene to avoid liability for driving while suspended, which did not contribute to the accident.

[84] The Crown argues that the accused has not rebutted the presumption. The accused, the Crown says, knew he had been in an accident; knew that his headlights were not working to full power; and insisted he could nevertheless see the road clearly. If that is the case, the Crown says, he should have seen the horse-drawn buggy that he hit. As to the presumption that the accused left the scene in order to avoid civil or criminal liability, the Crown submits that he knew, or ought to have known, that he had been in an accident involving a vehicle or a person, and failed to stop, failed to provide his name and address and failed to offer assistance. Even if his evidence that he did not know that a person was involved is accepted, the Crown submits, he was nonetheless “wilfully blind” as to whether a person was involved.

[85] The concept of wilful blindness was considered in *R. v. Wile* (1988), 86 N.S.R. (2d) 241, [1988] N.S.J. No. 318 (Co. Ct.), where the trial judge found that it was not

possible to infer actual knowledge by the accused that he had struck a vehicle. Freeman Co. Ct. J. (as he then was) said, at p. 6 (QL):

> On the facts proven by the Crown I draw the further inference that if Wile did not know he had been in an accident with another vehicle, it was only because he did not want to know. Therefore I must consider the doctrine of wilful blindness.
>
> That is set forth in the decision of McIntyre, J., in *Sansregret v. R.* (1985) 18 C.C.C. (3d) 223 at 235 as follows:
>
> > . . . where wilful blindness is shown, the law presumes knowledge on the part of the accused, in this case knowledge that the consent had been induced by threats.
> >
> > Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry....

[86] The trial judge concluded that the doctrine of wilful blindness applied in the circumstances.

[87] Wilful blindness was also considered in *Hatcher*, where the court said, at paras. 40-43:

> In *R. v. Duong* 124 C.C.C. (3d) 392, Doherty J.A. reviews the authorities with respect to wilful blindness. He states at para 21:
>
> > Wilful blindness is explained in *R. v. Sansregret* (1985), 18 C.C.C. (3d) 223 (S.C.C.) at 235 ... wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquiry when he knows there is reason for inquiry.

Doherty J.A. goes on to consider *R. v. Jorgensen* (1995), 102 C.C.C. (3d) 97, [1995] 4 S.C.R. 55 (S.C.C.), where Sopinka J. described wilful blindness as:

> Deliberately choosing not to know something when given reason to believe further inquiry is necessary can satisfy the mental element of the offence ... A finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?

Doherty J.A. concludes:

> These authorities make it clear that where the Crown proves the existence of a fact in issue and knowledge of that fact is a component of the fault requirement of the crime charged, wilful blindness as to the existence of that fact is sufficient to establish a culpable state of mind. Liability based on wilful blindness is subjective. Wilful blindness refers to a state of mind which is aptly described as "deliberate ignorance" (d. Stuart, Canadian Criminal Law, 3rd ed. (1995) at p. 209). Actual suspicion, combined with a conscious decision not to make inquiries which could confirm that suspicion is equated in the eyes of the criminal law with actual knowledge. Both are subjective and both are sufficiently blameworthy to justify the imposition of criminal liability.

> In this case the Crown may prove the requisite intent by showing that Mr. Hatcher suspected the truth, knew that he should have inquired further and deliberately refrained from doing so.

[88] The Crown also submits that the accused knew that his vehicle was not roadworthy and that his headlights were not illuminating properly, while he was driving too fast in relation to the distance he could see ahead of him. It is also submitted that the accused knew that he was at risk of liability as a result of having no insurance. I am not convinced that the distinction between driving without insurance and driving without a license (as in *MacLean*) is a relevant one merely because (as the Crown submits) "having no insurance can have significant criminal and civil consequences, as compared to driving without a license where the penalty is simply a fine and/or a license suspension."

[89] In *R. v. McLeod* (1995), 142 N.S.R. (2d) 294, 1995 CarswellNS 249 (S.C.), the respondent initially stopped at the scene of the collision. He then ran away from the scene on foot. He was eventually located and arrested. He told the police that he panicked and fled the scene because he was scared. At trial, he testified that he had panicked, and acknowledged telling the father of the

driver of the vehicle he hit that he would come back. At trial, the defence submitted that the evidence of panic supported the conclusion that the respondent was "confused and scared." On appeal, after considering *R. v. Proudlock*, [1979] 1 S.C.R. 525, (1978), 5 C.R. (3d) 21, MacLellan J. said, at paras. 27-28:

> I interpret this case to mean that on the issue of a statutory presumption, such as the one under s. 252(2), an accused must only present evidence to the contrary on the issue of intent which is capable of belief and if not rejected by the trier of fact this would rebut the presumption.
>
> It is not necessary that this evidence to the contrary be believed by the trier of fact to rebut the presumption. If, however, the evidence on intent is believed, then the trial judge must decide if the evidence raises a reasonable doubt in light of all the Crown evidence.

[90] Holding that "credible" meant "worthy of belief," and finding that the trial judge had found the respondent's evidence to be credible, MacLellan J. held that "there clearly was evidence to the contrary which rebutted the presumption under s. 252(2)" (para. 33). This led to a discussion of how the court should proceed when there is evidence to the contrary adduced, at paras. 37-40:

> The trial judge made it clear in his decision that he was looking at all the circumstances including, as he said, "the factors that are established by objective outside corroboration, aside from the evidence of the accused himself" (transcript p. 92).
>
> I therefore reject the suggestion by the Crown that the trial judge confused the evidentiary burden arising out of the operation of the statutory presumption of intent as opposed to the ultimate burden of proof.
>
> A man's intention is best derived from what he says he intended unless that is rejected in light of other inconsistent evidence. Generally, the best evidence of intention is what a witness says himself or herself.
>
> Where credibility is a central issue in a case, and it is contended that an accused should not be believed, it is up to the judge to decide whether or not to believe him. That decision involves looking at the person's testimony and how it is presented in the witness box, and also considering that testimony in light of the circumstances of the case including the testimony of other witnesses. However, once that is done and the judge believes the evidence of the accused, in which he testifies that he did not intend to commit the offence charged, that raises a reasonable doubt about his guilt and he should be acquitted. The doctrine of reasonable doubt applies to credibility....

[91] After considering *R. v. W.(D.)*, [1991] 1 S.C.R. 742, MacLellan J. found no reason to displace the trial judge's conclusion that the respondent's evidence was credible. He said, "[t]he respondent testified that he did not leave the scene to avoid civil or criminal liability. He said he left to make a call and get advice and because he panicked" (para. 41). As such, the finding that he lacked the requisite intent was reasonable (para. 45).

[92] On the evidence, it is clear that on November 29, 2008, the accused, James Gregory Foley, while driving westerly on the Granville Road in Annapolis County, struck a horse drawn wagon being driven by Bertram Hayden Hebb, resulting in the death of Mr. Hebb. Also clear on the evidence is that Mr. Foley did not stop at the scene of the accident but continued driving to his home in Victoria Beach, also in Annapolis County. As such, it is clear that he failed to stop his vehicle, failed to give his name and address and offer assistance to Mr. Hebb, a person who, in the circumstances, would have appeared to have required assistance.

[93] At issue, therefore, is whether Mr. Foley knew, or should have known, that he had been involved in an accident involving another person and whether he left the scene of the accident "with intent to escape civil or criminal liability."

[94] As noted earlier, there is the reference in his statement that "when I hit him, he was like this" which clearly suggests that he knew he struck Mr. Hebb and saw him following the impact.

[95] In respect to whether Mr. Foley knew or should have known he had been involved in an accident with another person, I am satisfied on the evidence, and particularly the evidence of Mr. Foley himself, that the answer is in the affirmative. In his statement, made some six hours after the accident, he at times acknowledged that he knew he had hit someone while at other times he said he knew he had hit something. In responding to Crown counsel, on cross-examination, at times he stated that he was aware he had hit something. At one point, he indicated that the only thing he thought of, when the accident occurred, was to wrap his brain over what he had hit. Admittedly, on a number of occasions, he referred to only seeing a "black wall" and that this was what he struck. Nevertheless, by his own admission he knew he had struck something and he continued on his way without stopping. Even if he did not know he had hit someone, which at times he appeared to suggest, he knew he had hit something and was "wilfully blind" as to what it was or who it was. He

acknowledged on a number of occasions that he should have stopped. The fact he may have, to use his words, “freaked out” or “panicked”, does not alter the fact that he knew he struck something and was “wilfully blind” as to what it was, as he continued to his home.

[96] As such, the Crown has established, beyond any reasonable doubt, that Mr. Foley at least knew he had struck something and was wilfully blind as to what it was.

[97] The second, and perhaps more contentious, issue is whether he left “with intent to escape civil or criminal liability.”

[98] As noted in his statement to Cst. Corkum and Corporal Goss, Mr. Foley made no real explanation for why he left, other than he “panicked” or “freaked out”or was “scared.” Although at times he referred to having “blanked out,” it is clear that, shortly after the impact, he knew that he was continuing down the road, having struck something. He said he did not know why he left.

[99] Mr. Foley said on a number of occasions that, as he approached a corner in the road, he saw a “wall of black”or “black wall,” and did not have sufficient time to do anything to avoid it. The next thing he recalled was going around the corner. He said, although he was aware his car had suffered damage, he was not aware what he had hit. At one point, he acknowledged that, from the damage his car had sustained, he knew it was pretty serious.

[100] On the authorities, it appears that, where an explanation is provided as to why a person leaves the scene of an accident, the presumption in subsection (3) is no longer applicable and the burden then rests on the Crown to prove, beyond a reasonable doubt, that the person left “with intent to escape civil or criminal liability.” Counsel for the defence suggests that, in the present circumstances, the presumption is not applicable. On the authorities, this submission appears to have merit. Leaving because of being “freaked out,” being “panicked” or being “scared” is not necessarily leaving with “intent to escape civil or criminal liability.” However, it is, or can be, an explanation for leaving.

[101] However, there is also evidence as to what Mr. Foley was thinking, immediately following the accident. Mr. Smith testified that, when Mr. Foley told him what had happened, he said he did not really know why he did not stop; he just freaked out and

was nervous and did not really know what to do, so he just went home. He also stated Mr. Foley said, just after telling him about the accident, that it was "vehicular manslaughter and he was scared that he was going to end up doing five years in jail." Obviously, he was concerned about the possible legal consequences, to him, from the accident.

[102] In testifying, Mr. Foley said that, when his car stalled after he arrived home, he parked it under an apple tree and obtained tarps from a wood pile to cover the car. He said he did this because he did not want his parents or his younger brother to see the state of his car. However, in responding to Crown counsel as to why he covered up his car with the tarp, he responded:

> I don't know. I guess I just didn't want anybody to see it. But, I don't know, I was just really scared and didn't really know what to do and like, I was just really in a state of shock, I guess.

[103] Clearly, it was not just his parents and younger brother that he did not want to see his car.

[104] A couple of months later, as Mr. Smith testified, Mr. Foley told him he had thought about getting rid of the car at the merry pizzer. Although Mr. Foley initially said to defence counsel he did not think he made the comment, on further examination by Crown counsel, he appears to agree that he did, when he said to Crown counsel that he said he should have gotten rid of the car but he had driven it straight home. In considering getting rid of the car, whether his idea was practical or not, he was clearly seeking "to escape civil or criminal liability."

[105] Although, on a number of occasions, he denied it was his intention to hide his car and seek to get away with it, his acknowledgement that he thought about getting rid of the car at the merry pizzer waterfall, speaks otherwise.

[106] In fact, in responding to defence counsel, he said it was when he was at his home, after the phone call from his girlfriend's mother telling him about the accident, that he had made his mind up to turn himself in. He said the only reason he did not turn himself in when his mother drove him to the accident scene was because he first wanted to tell his girlfriend. On his own evidence, it would therefore appear he had no intention of turning himself in, when he left the scene or when he covered his car with the tarps. His denial to his girlfriend's mother that he had been driving his Ford

Mustang that evening suggests, at that point, he was still not intending to turn himself in.

[107] In another instance, as to why he left, in his statement, as earlier noted, he said to Cst. Corkum:

> Well knowing that I hit buddy and knowing I didn't have no insurance and the car wasn't legal and I was screwed for hitting him and I didn't stop, which I should have, I just kept going.

His reference to being 'screwed for hitting him,' is an expression of concern, by Mr. Foley, for the potential criminal consequences of the accident. Admittedly he testified that he disagreed this was the reason why he left.

[108] Even with the contradictions between his evidence at trial and his earlier statement, by his own evidence, Mr. Foley acknowledged that he had struck something and left the scene and it was only after his girlfriend's mother called him and asked him whether he had been driving his Ford Mustang, that he decided to turn himself in. There is nothing in the offence that stipulates a period of time, a so-called grace period, during which persons involved in an accident such as this one, are permitted to consider whether to attempt to escape civil or criminal liability, and, subsequently deciding otherwise, are then permitted to turn themselves in, without consequences. This offence was committed by Mr. Foley before he decided to turn himself in, even if that decision was made as early as at his home before his mother drove him to the accident scene.

[109] Unlike in *R. v. Rampersad, supra*, Mr. Foley, initially and at least while his girlfriend's mother called, had the requisite element of "intending to escape civil or criminal liability." His change of heart will, no doubt, be advanced as a factor on his sentencing. It does not, however, change the reality that he had already committed the offence charged. When he left the scene, he had the requisite "intention to escape civil and/or criminal liability" for the accident. At times, in his evidence, he admitted as much.

[110] In the circumstances, his other evidence, denying any such intention, not only lacks credibility but does not raise any doubt, reasonable or otherwise, as to whether he committed the offence as charged.

A. David MacAdam