

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** R. v. Delorey, 2011 NSSC 234

**Date:** 20110613

**Docket:** CR Ant 312887

**Registry:** Antigonish

**Between:**

Her Majesty the Queen

v.

Kyle Anthony Delorey

**Judge:** The Honourable Justice Glen G. McDougall

**Heard:** February 21, 22 and 23, 2011, in Antigonish, Nova Scotia

**Written Decision:** June 15, 2011

**Counsel:** Allen Murray, for the Provincial Crown  
Adam Rodgers, for the Accused

**By the Court:**

[1] Kyle Anthony Delorey stands charged:

THAT on or about the 4<sup>th</sup> day of June A.D. 2008 at, or near Cape George, Antigonish County, Nova Scotia, did operate a motor vehicle on a highway to wit: Highway 337, Cape George, Antigonish County, Nova Scotia, in a manner that was dangerous to the public and thereby caused bodily harm to Robert Michael MacEachern contrary to Section 249(3) of the Criminal Code

AND FURTHERMORE THAT on the same date and place did operate a motor vehicle on a highway to wit: Highway 337, Cape George, Antigonish County, Nova Scotia, in a manner that was dangerous to the public and thereby caused death to Patrick Derek MacEachern contrary to Section 249(4) of the Criminal Code

[2] This is the second trial on these charges. Mr. Delorey was earlier convicted on both counts but in a unanimous decision the Nova Scotia Court of Appeal over-turned the convictions and sent the matter back for re-trial.

[3] The second trial got underway on Monday, February 21, 2011 and concluded on Wednesday, February 23, 2011. The Crown called 14 witnesses of whom four were qualified as experts. Their expertise and opinions will be reviewed in detail later in my decision.

[4] The Defence, as is their right, elected not to call evidence.

[5] In addition to the evidence of the prosecution witnesses there were certain factual admissions agreed to by Crown and Defence as follows:

- (1) The accused, Kyle Delorey, was the driver of the vehicle at the time the accident occurred late on the evening of June 4, 2008;
- (2) Patrick Derek MacEachern died as a result of the injuries he sustained in that accident;
- (3) Robert Michael MacEachern suffered bodily harm as a result of the injuries he sustained in that same accident;
- (4) Mr. Delorey's blood / alcohol concentration from a blood sample taken at 1:50 a.m. on June 5, 2008 measured 10.86 millimoles of alcohol per litre of blood serum;
- (5) Robert MacEachern's blood / alcohol concentration from a blood sample taken at 2:00 a.m. on June 5, 2008 measured 29.88 millimoles of alcohol per litre of blood serum.

[6] I will discuss these last two admissions in more detail when I go through the evidence of the Forensic Alcohol Specialist, Heather Marie Copley, later in my decision.

**CROWN EVIDENCE:**

**(1) Royal Canadian Mounted Police Constable Lyle Reid:**

[7] RCMP Cst. Lyle Reid testified that he was dispatched to the scene of a single vehicle accident at approximately 10:47 p.m. on the night of June 4, 2008. He arrived at the scene at approximately 11:10 p.m.

[8] The location of the accident was approximately 20 to 25 minutes by motor vehicle north of the Town of Antigonish on Provincial Highway # 337 in the County of Antigonish. Emergency responders were already at the scene when Cst. Reid arrived along with RCMP Cst. Gallant.

[9] The vehicle, which he identified as a newer model Chevrolet Cobalt, had come to rest on its wheels. The rear of the vehicle was in the right-hand ditch with its front wheels located near the side of the paved highway.

[10] Four individuals – two males and two females – were being treated by EHS personnel. Cst. Reid recognized Kyle Delorey as one of the persons receiving emergency medical treatment. He was lying in the ditch near the accident vehicle.

[11] Using a series of photographs and a map of the area, Cst. Reid described the accident scene. He estimated the vehicle travelled approximately 150 yards or metres from where it first left the paved portion of the highway to where it finally came to rest after striking and breaking off a power pole located near the side of the road. Based on marks found in the grass the vehicle had apparently rolled gouging out dirt as it made its way to its final resting place.

[12] The series of photographs entered as Exhibit # 2 show these gouges. It is apparent from the photographs of the vehicle taken shortly after the accident that it had sustained considerable damage, some attributable to the collision with the power pole and the rest likely the result of the tumbling motion of the vehicle as it bounced and rolled after leaving the highway.

[13] Cst. Reid testified that it had been raining on and off that evening and the roads were wet. At times that evening he indicated that the rain was heavy. When he was on scene he could not recall if it was raining. He thinks it could have been misty but

he was not certain. He stated the road surface on Highway # 337 was in “decent shape.”

[14] On cross-examination Cst. Reid testified that there were some patches on the road. He also indicated that after receiving the call to go to the accident scene he might possibly have reached speeds of 120 kilometres per hour. His police vehicle was equipped with Eagle RSA high-performance tires which enabled him to get to the scene quickly and safely. He could not recall meeting any traffic on the way to the scene.

[15] In answer to a question put to him by Defence counsel, Cst. Reid indicated that the Marsh Road was for the most part straight with some curves and hills but it was not as hilly as Highway # 337.

**(2) Bernie Falkenham:**

[16] Mr. Bernie Falkenham was the second witness called by the prosecution. Mr. Falkenham has lived at Ballantynes Cove all his life. He is an auto-mechanic by training and has worked for the past 25 years with his brother, Albie, who is the owner and operator of Albie’s Auto Centre.

[17] Mr. Falkenham is a volunteer fireman and has been so for approximately 19 years. On the evening of June 4, 2008 he was at home with his family when he received a call from his dispatcher to respond to the scene of a motor vehicle accident on Highway # 337. He arrived at the scene at approximately 10:56 p.m.

[18] When he first arrived there were four victims: two females and two males. The two females did not appear to be injured but were visibly upset. One of the male victims was lying in the ditch and the other, more seriously injured, was lying on the shoulder of the road. Mr. Falkenham knew this person to be Patrick MacEachern. He was able to detect a shallow pulse and having concluded that Patrick was the most seriously injured he made sure EHS personnel attended to him first upon their arrival. Patrick MacEachern was the first injured person transported to hospital by ambulance followed by Kyle Delorey in a second ambulance.

[19] Mr. Falkenham made sure that no one touched the accident vehicle until the RCMP arrived. He assisted the police in prying open the vehicle’s trunk in which was found a case of beer.

[20] Using the photographs entered as Exhibit # 2, Mr. Falkenham described the condition of the accident vehicle as he found it that night. He also testified on the generally good condition and nature of Highway # 337 in the vicinity of the accident scene.

[21] On cross-examination Mr. Falkenham testified that the speed limit on that stretch of highway is 80 kilometres per hour. He has never had a problem driving his half-ton truck on that road.

[22] He also testified that the lobster fishing season in that area is during May and June and generally there is not a lot of traffic at that time of the evening.

**(3) Robert Michael MacEachern:**

[23] Robert Michael MacEachern was next to testify. Mr. MacEachern was a passenger in the vehicle. As previously indicated it is admitted that Robert MacEachern suffered bodily harm from injuries sustained in the motor vehicle accident that also claimed the life of his brother, Patrick.

[24] Robert MacEachern testified that he was 28 years old at the time of the accident. He owns a bungalow in Lakevale where he currently resides along with his girlfriend. At the time of the accident his brother, Patrick, who was then 20 years old, also lived with him.

[25] Both Robert and Patrick worked with their uncle in the lobster fishery in 2008. On the morning of the accident they left to haul their fishing gear around 4 or 4:30 a.m. After hauling their gear and some nets they returned home. They were back by around 11 o'clock in the morning. Robert and Patrick drank some beer and also smoked several joints of marijuana. Andrea Delorey – sister to the accused Kyle Delorey – was also present at Robert MacEachern's house. She had been there since the night before.

[26] Robert MacEachern estimated that he had consumed seven or eight beer and shared two to three joints of marijuana with his brother over a three to five hour period that day.

[27] Later that day – sometime in the afternoon – Kyle Delorey, accompanied by Kai-lee Walsh, showed up at Robert MacEachern’s residence driving what Robert MacEachern described as a “tan coloured or beige Chev Cobalt.” He had never seen Kyle Delorey drive this particular vehicle before. Normally he saw him driving a black Cobalt.

[28] Robert could not recall anyone else drinking while they were at his house. He recalled them all getting into the tan coloured or beige Cobalt with Kyle Delorey driving. Kai-lee Walsh was seated in the front passenger’s seat. He sat directly behind her in the back seat. Andrea Delorey sat in the middle and Robert’s brother, Patrick, sat next to her directly behind the driver.

[29] After departing Robert MacEachern’s house they took Highway # 337 north, turning left on the Marsh Road to where it connects again to Highway # 337. From there they went on to the Arisaig Wharf where, as Robert MacEachern testified, Kyle performed a few donuts in the gravel parking lot.

[30] Mr. MacEachern also testified that on the way over the vehicle skidded through the intersection of the Marsh Road and Highway # 337. He attributed this to the speed at which Mr. Delorey was operating the vehicle. On several occasions Mr. MacEachern stated that Mr. Delorey was driving either too fast or in excess of the speed limit. He also indicated that Mr. Delorey was trying to get the tires to squeal by spinning the tires from the gravel onto the pavement. He also stated that he recalled Mr. Delorey going fast and breaking hard for turns.

[31] After leaving the Arisaig Wharf they proceeded along Highway # 337 towards Malignant Cove. They paid a visit to the home of Danny MacLellan. While there, Robert MacEachern indicated he might have had another beer or beer and a half. For a while he fell asleep at the table. He recalled that Kyle Delorey had also fallen asleep on a couch. He remembered that it was only him and his brother, Patrick, and Danny MacLellan who drank beer in the estimated hour to an hour and a half that they were there.

[32] He recalled being awakened so they could leave. He thought this might have been around 9 or 10 p.m. He remembered a hockey game involving Pittsburgh having been on television. It was dark when they left. Kyle Delorey was driving. The other four passengers took the same seating positions they had had on the way over. He does not recall anyone drinking in the car on the way back.

[33] Robert MacEachern does recall Kyle driving fast. He stated: “he was driving it hard – a rental car – he didn’t care.” Although he recalls glancing at the speedometer a couple of times he could not say what it was reading. He did say however: “it was over the speed limit.”

[34] On the way back they once again took the Marsh Road. After connecting with Highway # 337 they proceeded south towards Robert MacEachern’s place. Robert recalled “going fast down past Albie Falkenham’s place.” He recalled his brother, Patrick, saying: “watch this fucking turn.” It was then, according to Robert, “that he lost her.” He then said: “everything happened so fast.” He recalls hearing gravel and then finding himself on the ground outside the vehicle. He went over to where his brother was lying on the ground. He knew he needed help and went to a near-by home to have someone call 9-1-1. He was later taken by ambulance to the hospital. He apparently had fractured some vertebrae in his back. He also had a broken collarbone. He spent three days in the hospital and took physiotherapy for three to four months. He also took painkillers to help with the pain.

[35] On direct examination Robert MacEachern admitted to being slightly or moderately intoxicated. On cross-examination he admitted that his memory of the events that happened that night was not great. He thought he would have consumed nine or ten beer and at least five marijuana joints but he was not sure. He indicated he did not use a seatbelt that night and could not say why. He said he sometimes puts one on if its snowing or if someone is not driving properly.

[36] In a statement given to RCMP’s Cpl. Reddy on June 18, 2008, Robert MacEachern failed to mention anything about Kyle Delorey spinning the tires or taking the Marsh Road. He explained that after taking a drive with Cpl. Reddy on August 8, 2008 he then recalled going to Danny MacLellan’s house by way of the Marsh Road. He said “it just came back to me.”

[37] The incident at the Arisaig Wharf was not mentioned by him at the Preliminary Inquiry. This first came out at trial. It was also brought out by Defence counsel that Mr. MacEachern is suing Mr. Delorey for damages for the injuries he sustained as a result of the accident.

[38] The Court is not persuaded that Mr. MacEachern lacks credibility. The reliability of some of his testimony may be weakened by his state of intoxication but

his assessment of speed and the manner in which Mr. Delorey operated the vehicle is consistent with the evidence of some other Crown witnesses. Also the fact that certain events were only recalled later is not that uncommon. I do not accept that the ongoing civil suit has flavoured Mr. MacEachern's evidence in an effort to increase the odds of a conviction.

**(4) Kai-lee Breen Walsh:**

[39] The next witness for the prosecution was Kai-lee Walsh. Ms. Walsh is presently 21 years-of-age. She had been in a relationship with Kyle Delorey for about a year or a little more. When the accident happened they were together.

[40] She was at her mother's house on June 4, 2008. While waiting for Kyle to pick her up she drank a few beers. Kyle showed up driving a beige Cobalt. It was a four-door vehicle. Kyle's own Cobalt is two-door and black in colour.

[41] After leaving her mother's home they proceeded to Kyle's mother's house. The beer was placed in the vehicle's trunk. After arriving at Kyle's mother's house she had another beer or two. She could not recall how long they remained there. They eventually left and went to Robert MacEachern's house. Kyle was driving.

[42] Robert and Patrick MacEachern and Kyle's sister, Andrea, were at Robert's place. She remembers having a couple of more beers and recalls the odour of marijuana. She testified that she did not smoke any marijuana.

[43] Sometime later they all piled into the Cobalt. Kyle drove. She occupied the front passenger's seat next to Kyle. Patrick, Robert and Andrea were all in the back seat. She recalls that Patrick was sitting behind Kyle but cannot remember where Andrea and Robert sat except that they were in the rear seat. Her beer was placed in the trunk. While at Robert MacEachern's place she recalls drinking beer but she cannot recall if anyone else was drinking.

[44] They proceeded to go to Danny MacLellan's house. She could not recall the route they took only that they turned left when they first exited Robert MacEachern's driveway. She also could not remember anything about the exterior of Danny MacLellan's house, just the interior, but she did recall the presence of a bull behind the house.



[45] While at Danny MacLellan's house she stated: "we were all drinking – having a good time" although she indicated she was not sure if Andrea drank anything. She also indicated there was marijuana but she did not know who was using it. Later, she and Andrea left in the Cobalt. Andrea drove. They went to Andrea's mother's house so Andrea could take a shower. They also went to the liquor store to purchase a 2-4 of beer for Danny MacLellan.

[46] Upon returning to Danny's place they found Kyle asleep on the couch and Robert was slumped over asleep at the table. Patrick and Danny were awake. She stated "we drank some more beer." Robert and Kyle had to be awakened in order to return to Robert's place. All five piled into the Cobalt. Kyle was behind the wheel. Before leaving the property Ms. Walsh got out of the car and returned to the residence to retrieve some marijuana that had been left behind. While retrieving the package she invited Danny MacLellan to give her a call. When Danny MacLellan testified he denied that any such conversation had taken place.

[47] Ms. Walsh stated she gave Danny a hug. Kyle Delorey happened to notice this and according to Ms. Walsh he appeared to be angry with her. She recalled the drive back as being very quiet which she attributed to Kyle's anger towards her.

[48] In any event, they returned to the vehicle. She thinks the seating arrangement was the same as it was on the way over. Kyle was driving. She occupied the front passenger's seat and Patrick MacEachern sat in the back directly behind the driver. She recalled that: "at one point I knew he was driving really fast as I was afraid to look out the window...." She further testified: "he was driving extremely fast."

[49] Just before the accident occurred she remembers a male voice in the back urging Kyle to go faster and another male voice from the back saying "slow down" or "slow the fuck down." She does not recall anyone drinking while on the drive back.

[50] She remembers very little about the accident itself, just turning really fast and spinning. When she came to after the accident she was still in her seat. She had worn a seatbelt. She found Andrea outside and to the rear of the vehicle. Kyle and Patrick were lying on the ground near one another. Patrick was not talking – Kyle was just moaning. Andrea was up walking. Robert was nowhere to be found. She was told that she had suffered a concussion and received treatment at the hospital for an abrasion to one of her arms.

[51] On cross-examination Ms. Walsh denied lying in a statement she gave to RCMP Cpl. Reddy sometime after the accident. She indicated her memory was jogged when she had her purse and camera returned to her. When viewing the camera she came across the picture of the bull that she had seen behind Danny MacLellan's house. She was also questioned on her failure to truthfully divulge the existence of a criminal conviction in a document filed in an unrelated family matter that she is involved in.

[52] While this witness might have been selective in recalling things in the past to protect her then boyfriend, there is nothing to suggest that she is fabricating evidence now to extract vengeance for a failed relationship. Her assessment of the manner in which Kyle Delorey operated the vehicle and particularly the speed that it was being driven is consistent with the evidence of Robert MacEachern and that of one other passenger, Andrea Delorey. As such Ms. Walsh is not totally lacking in credibility as the Defence suggests. I accept her testimony particularly where it is corroborated by other prosecution witnesses.

[53] The only other interesting bit of testimony offered by this witness is a reference she says Kyle Delorey made about tires on the vehicle that day. She said "I don't recall what he said about them" but she did remember that he had mentioned them.

[54] The condition of the tires upon inspection in the aftermath of the accident that claimed Patrick MacEachern's life and caused bodily harm to Robert MacEachern was a crucial factor in over-turning the initial conviction leading to this re-trial. I will deal with this in more detail later in my decision.

**(5) Andrea Marie Delorey:**

[55] I will next review the evidence of Andrea Marie Delorey. I will then look at the testimony of the remaining Crown witnesses of fact before turning my attention to the four expert witnesses called as part of the prosecution's case.

[56] Andrea Delorey currently resides in Fort McMurray, Alberta. In June of 2008 she was living with her mother. On June 4<sup>th</sup>, 2008 she was at the home of Robert MacEachern in Lakevale, Antigonish County. Robert and Patrick returned home after being out fishing. Ms. Delorey indicated they were just hanging out. She could not recall if any one was drinking or smoking marijuana. Her brother, Kyle, and his girlfriend, Kai-lee, arrived. Kyle was driving a loaner vehicle while his own car – a

Cobalt – was in for repairs. The loaner car was also a Cobalt but a different colour. All five people hung out at Robert's place. She indicated "there might have been some alcohol.... it was a long time ago."

[57] She recalled going to Danny MacLellan's house. Kyle was driving. Kai-lee Walsh was in the front passenger's seat. Ms. Delorey sat in the middle in the back. Patrick was sitting on her left and Robert was to her right.

[58] Ms. Delorey was vague on the route they took to get to Danny MacLellan's place. She believes there was alcohol at Mr. MacLellan's but cannot say for sure who was drinking. She could also recall the smell of marijuana. She indicated that she was not drinking alcohol nor smoking marijuana.

[59] She later drove the loaner vehicle accompanied by Kai-lee Walsh when she went to her mother's house to take a shower. She also picked up some beer for Danny MacLellan. On cross-examination she agreed with Defence counsel's suggestion that it took about one and a half to two hours to drive to Antigonish to pick up the beer, then to her mother's place to shower, and finally return to the MacLellan residence.

[60] When she did arrive back to Danny MacLellan's place it was dark. She found Danny MacLellan and Patrick MacEachern talking. She said Robert was nodding off and her brother, Kyle, was asleep on the couch. She believed they had all been awake when she left to go to Antigonish en route to her mother's house.

[61] They remained at the MacLellan residence for awhile. She cannot remember just how long before they decided to get back in the car to return to Robert MacEachern's house.

[62] Kyle Delorey once again got in the driver's seat with Kai-lee in the front passenger's seat. Ms. Delorey sat in the middle in the back seat with Patrick to her left and Robert to her right.

[63] Before leaving the yard she recalled Kai-lee Walsh returning to Danny MacLellan's house. She does not know why Kai-lee went back to the house or how long she was there.

[64] She indicated that she didn't remember Kyle drinking at all that day. She could not say if he had had anything to drink while she was absent during the trip to her mother's house.

[65] She could not say if the route they took back to Robert MacEachern's house was the same as the one they earlier took to get to Danny MacLellan's place. She did remember making a turn onto a gravel road which she thought could have been the Marsh Road.

[66] She does not recall any conversation or music playing on the trip back. She indicated the speed of the vehicle "was fast." She said no one was consuming alcohol in the vehicle on the way back.

[67] She believes she heard Robert MacEachern say at one time "watch a turn" and Patrick MacEachern tapping the seat in front of him and saying "go faster." Shortly after this the accident happened. She must have been ejected from the car during the accident.

[68] When she came to she was lying on the ground behind the car. Her brother, Kyle, was in the ditch. Patrick MacEachern was lying on the shoulder of the road. Kai-lee must have been able to get out of the car on her own. Robert MacEachern had already left to summon help.

[69] On cross-examination Ms. Delorey said she generally wears a seatbelt but on that occasion she did not. When asked to indicate how the loaner car was to drive she stated that "it wasn't driving like a new car." She also thought Kyle was okay to drive the vehicle when they left Danny MacLellan's residence. Despite having earlier indicated that Kyle was driving fast she said there was nothing about the way he was driving that prompted her to put on her seatbelt.

**(6) Daniel Joseph MacLellan:**

[70] I will now review the testimony of Daniel Joseph MacLellan. Like Robert and Patrick MacEachern, Mr. MacLellan makes his living fishing lobsters. He lives alone in a house he owns in Malignant Cove.

[71] Early in the evening of June 4, 2008 he recalls receiving a visit from Robert and Patrick MacEachern, Kyle and Andrea Delorey and Kai-lee Walsh. They showed up

uninvited but not unwelcomed. Mr. MacLellan knew Robert, Patrick, Andrea and Kyle. He had not met Kai-lee before that evening. Mr. MacLellan could not remember opening beer for anyone but he usually offers some to visitors. He recalls drinking beer with Patrick MacEachern and also smoking some marijuana. Robert MacEachern and Kyle Delorey both fell asleep. He could not remember if either Andrea or Kai-lee drank or smoked anything. He asked them to pick up some more beer for him when they left to go to Antigonish. He did not see the vehicle they used to go back to Town but assumes it was the same one they arrived in. In any event they did not seek his permission to use his vehicle.

[72] While the women were gone Danny MacLellan watched the hockey game on television and had conversation with Patrick MacEachern. The other two remained asleep. He assumed they had had a little too much to drink. He also stated: "I assume they both had a buzz on."

[73] After the hockey game ended the guests all left. Mr. MacLellan did not find out until the next morning on his boat radio that there had been an accident the night before that had claimed the life of Patrick MacEachern.

[74] In cross-examination Mr. MacLellan said he could not recall Kai-lee Walsh coming back to the house to talk to him prior to finally leaving with the others. When Defence counsel suggested this did not happen he agreed with it. This is obviously contrary to Kai-lee Walsh's testimony which was corroborated by Andrea Delorey. Nothing much really turns on this. Perhaps Mr. MacLellan is mistaken. It does not convince me to discount Kai-lee Walsh's testimony and it certainly does not persuade me to totally ignore it. Nor does it diminish the evidence of this witness.

**(7) & (8) Carman Novak and Michael Novak:**

[75] I will deal with the evidence of Carman Novak and Michael Novak together.

[76] Carman Novak now resides in the Town of Antigonish. On June 4, 2008 he lived on Highway # 337 near Livingstone's Cove. His driveway is located almost directly across from where the Marsh Road connects to Highway # 337.

[77] Early in the evening on June 4, 2008, sometime between 6 and 7 o'clock, Carman Novak was out in the yard washing his car when he heard a car coming down the Marsh Road. Based on the sound coming from the vehicle he thought it was

travelling at a high rate of speed. He is able to see about 300' to 400' up the Marsh Road from where he was standing in his front yard. The speeding vehicle attempted to brake but skidded past the STOP sign and through the intersection finally coming to a complete stop with its front end on the yellow line that marks the edge of the paved highway.

[78] He identified the vehicle as a light tan Chev product. It displayed a temporary vehicle sticker. The vehicle's driver was male with short hair and there was a female passenger in the front seat. He thought there were at least a couple of passengers in the back seat. The occupants appeared to be laughing. He felt they must have thought it was a big joke based on their reaction. The driver then turned left and continued on towards Georgeville.

[79] Mr. Novak could recall one other occasion when another vehicle failed to stop at that intersection. It went across the highway and up his driveway cutting off a few trees along the way.

[80] On cross-examination Mr. Novak indicated that he has seen a number of close calls at that intersection. He said the STOP sign is not concealed. He suggested the drivers that miss it are the ones that are driving too fast.

[81] Carman Novak's brother, Michael, was also called to testify. He lives just up the Marsh Road close enough to his brother to be able to see his trailer through his living room window.

[82] Michael Novak was home on the evening of June 4, 2008. He, too, heard a car go by his house as he was resting. From the sound it made he thought it was travelling quite fast. He went to his livingroom window to look. He saw that the car had managed to stop. It was a small, tan-coloured car. There was an orange coloured sticker on one of the windows. He could not say how many occupants there were in the vehicle but from the sound he heard as it approached and went by his house he felt it was travelling at an excessive rate of speed.

[83] On cross-examination Michael Novak indicated the STOP sign is clearly visible as you approach the intersection. He also indicated the pavement protrudes in a bit on the Marsh Road and gravel finds its way onto the pavement at the intersection where the Marsh Road abuts Highway # 337.

**(9) Heidi LeRoux:**

[84] The Crown called Heidi LeRoux to testify. Ms. LeRoux (formerly Heidi Stone) is a school teacher. She resides at River Bourgeois on Cape Breton Island.

[85] Ms. LeRoux purchased a vehicle from Ron MacGillivray Chevrolet Ltd. in April, 2008. She had some problems with the vehicle and so returned it for servicing. She was provided with a courtesy car while her own vehicle was at the dealership. She had the first loaner vehicle for about five days but had concerns with a door and the presence of mould in the trunk. She called the dealership to complain of this and was offered another loaner vehicle. Instead of travelling to Antigonish to exchange vehicles she met a representative from Ron MacGillivray Chevrolet at the Tourism Bureau at Port Hastings. She had the second loaner vehicle for about a week. She drove it back and forth to work each day and once to Port Hawkesbury before returning it to the dealership when she retrieved her own vehicle. She did not experience any problems while driving this second loaner vehicle which just happened to be the same one being driven by Kyle Delorey on the night the accident occurred.

[86] Ms. LeRoux does not recall inspecting the vehicle or checking its tires while she had the use of it. She also could not recall if anyone from the dealership went over the vehicle with her or explained to her the GM loaner policy. With regard to how she drove the vehicle she simply indicated that she drove it normally. She also could not recall if she ever drove it in rainy weather conditions.

**(10) Joseph Allister Bowman:**

[87] Joseph Allister “Bucky” Bowman is the Service Manager at Ron MacGillivray Chevrolet Ltd. He has worked for the dealership for the past 33 years. He has been Service Manager since 1997. Presently he has eight automotive technicians working for him.

[88] Mr. Bowman produced the service records for a 2005 Chevy Cobalt – VIN 1G1AJ52F857548271. This was the vehicle that Kyle Delorey was driving at the time of the accident on June 4, 2008. The service records indicated that four new tires were installed on the vehicle on January 31, 2008. The vehicle was put on the Used Car lot for sale. Mr. Bowman indicated it was driven for a little while by one of the salesmen. Additional work was done on the vehicle on April 9, 2008 – a light was repaired – and again on April 16, 2008 when a right front control arm bushing was replaced.

[89] The service records for Mr. Delorey's own 2007 Cobalt SS Coupe were also tendered in evidence. Mr. Delorey's vehicle was described by Mr. Bowman as "beefier .... and with stronger suspension" than the 2005 Cobalt he received as a loaner while his vehicle was being serviced.

[90] Mr. Delorey had the loaner vehicle, later involved in the accident, from May 15 to May 28, 2008. On May 29, 2008 the records for this vehicle show that it was loaned out to Heidi Katherine Stone (now Heidi LeRoux). She had the vehicle until it was returned on June 3, 2008.

[91] Mr. Bowman indicated that loaner vehicles are inspected by someone on staff before they go out and again when they are returned.

[92] The 2005 Cobalt returned by Ms. LeRoux was loaned out by the dealership the day following its return. Sometime between 4 and 5 o'clock on the afternoon of June 4, 2008 the vehicle was once again loaned out to Kyle Delorey. Mr. Bowman happened to be present when Mr. Delorey brought in his own vehicle. He went out to the lot to inspect the loaner vehicle along with Mr. Delorey. Mr. Bowman did not note any issues with the loaner vehicle before giving the keys to Mr. Delorey.

[93] Mr. Bowman first heard of the accident when he arrived at work the next morning.

[94] On cross-examination Mr. Bowman was asked if the tires that were put on the 2005 Cobalt in January were All-Season or Winter tires. He answered that he did not know. In answer to another question he estimated the vehicle could probably do 150 to 160 kilometres per hour top speed.

**EXPERT WITNESSES:**

[95] The remaining four witnesses called by the Crown were each qualified as an expert. As such they were permitted to offer opinion evidence in their specific area of expertise.

(11) **RCMP Cpl. Glen Murphy:**



[96] The first such expert witness called was RCMP Cpl. Glen Murphy. Cpl. Murphy has been a member of the RCMP since 1990.

[97] A *voir dire* was conducted pertaining to Cpl. Murphy's qualifications as an "Accident Collision Analyst." Cpl. Murphy has completed all four levels of training offered by the RCMP pertaining to accident collision analysis. This allows him to now refer to himself as an Accident Reconstructionist. When he carried out the investigation and analysis of the accident that is now before this Court he had not yet done his level four training. That did not occur until a month or so after the accident.

[98] Cpl. Murphy received a call from his colleague, Cpl. Phil Reddy, to investigate the accident scene on the morning immediately after the crash. He arrived on the scene sometime after 11 a.m. just after a Nova Scotia Power crew had replaced the power pole that had been broken off during the accident.

[99] By the use of photographs and a computer generated diagram, Cpl. Murphy presented evidence of the skid marks and the gouge marks left by the accident vehicle from the point where it left the road and rolled to its final resting spot just beyond the point where the replacement power pole had been positioned.

[100] The distance between the point where skid marks were faintly visible on the road to the point where the vehicle came to rest was measured at 128.6 metres.

[101] From where Cpl. Murphy determined the vehicle first became airborne (based on the gouge marks found on the ground) to where it finally came to rest was measured at 54.4 metres.

[102] In feet these measurements based on my own conversion calculations are approximately 422 feet and 178 feet respectively. Cpl. Murphy theorized that the vehicle had struck the ground seven times based on the gouge marks that were clearly visible on the ground. The evidence of damage done to the vehicle as shown in a series of photographs presented to the Court were also used to support his conclusion respecting the path the vehicle followed as it rolled out of control along the side ditch.

[103] The height at which the power pole was snapped off was measured at 1.6 metres (approximately 5.2 feet) above the ground.

[104] Cpl. Murphy would normally be able to do a calculation to estimate vehicle speed based on skid marks or side-slip marks also known as “yaw marks.” He described yaw as the tendency of a moving object to drift or turn on its (vertical) axis when the force that propels it in a straight line is exceeded in a turn.

[105] He was unable to find any marks on the road from the rear tires which would be evidence of the vehicle’s rear end skidding out. He attributed this to the rainy conditions that had persisted the night before. As a result Cpl. Murphy was unable to do a speed calculation. He did offer an opinion, however, that the vehicle had been going very fast and had exceeded the posted speed limit of 80 kilometres per hour. Cpl. Murphy also provided photographs of the two front tires that had been on the vehicle when the accident occurred. The front, driver-side tire had less than 2/32" tread when measured after the accident. The passenger-side, front tire was worn down to the point where there was no visible tread showing. Neither tire met the minimum tread requirements necessary to meet vehicle safety inspection in Nova Scotia.

[106] In Cpl. Murphy’s opinion based on an inspection of the seatbelt latch plates (photographs of which were provided for all five seating positions) none of the five seatbelts had been engaged. It should be recalled that Kai-lee Walsh testified that she had been wearing a seatbelt. She was the only passenger not ejected from the vehicle during the accident.

[107] In summing up the results of his investigation, Cpl. Murphy offered the opinion that:

The vehicle had been travelling in excess of the 80 KPH speed limit for that area and that

- (i) speed;
- (ii) weather conditions; and
- (iii) the condition of the vehicle’s tires

caused the accident.

[108] When cross-examined, Cpl. Murphy could not explain some of the changes that had been made to his initial report. He did make an effort to explain why he added “excessive” to speed in stating the contributing causes for the accident.

[109] It was also pointed out through cross-examination that Cpl. Murphy did not use the weight of the vehicle or the combined weight of the five passengers in any of his calculations. Nor did he determine the “critical curve speed” of the turn where the vehicle left the road. He did say the critical curve speed is normally greater than the posted speed limit.

[110] He concluded his cross-examination by stating that bald or below minimum tread depths affects the coefficient of friction between the tires and the road surface and depending on road and weather conditions this would affect driver control of the vehicle.

**(12) David Sinclair:**

[111] David Sinclair was called to testify as to fact and as an expert in the field of auto-mechanics. Mr. Sinclair owns and operates his own auto repair and salvage business. He has been an auto mechanic for thirty years or more.

[112] Around midnight on June 4, 2008 he received a call from the RCMP to remove a Chevy Cobalt from an accident scene and to securely store it pending an inspection the following morning. He attended the scene of the accident on Highway # 337. RCMP Cpl. Phil Reddy was at the scene along with some firemen. The severely damaged automobile was situated with its rear wheels in the ditch and the front wheels on the shoulder of the road. With the aid of photograph # 7, Exhibit # 2 (previously entered through RCMP Cst. Lyle Reid), Mr. Sinclair confirmed the identity and location of the vehicle as he found it that night.

[113] Mr. Sinclair put the vehicle on a deck truck and took it to his secured facility. The next morning (June 5, 2008) he inspected it to determine if there were any mechanical problems that might have caused or contributed to the accident. He noted the very heavy body damage sustained by the vehicle. All of the vehicle’s windows with the exception of one right rear corner window had been broken. He conducted a complete mechanical inspection of the vehicle. Based on his assessment it had been in good, general working order prior to the accident. He found the accelerator pedal to be working fine. There were no problems with the vehicle’s suspension and brakes.

He noted that the front brakes and rotors were almost new and the rear brake pads about half used. He stated they were more than acceptable for use and would not prevent the vehicle from stopping properly. He found the steering shaft to have been broken. He indicated this likely occurred in the crash.

[114] He also indicated that the mirrors were pretty well broken but based on the pieces that were still attached to the vehicle and the pieces scattered on the ground near the accident site they appear to have all been in place prior to the accident. He also checked the seatbelts and found them to be intact and in working order. He stated the vehicle's airbags did not deploy during the accident.

[115] Mr. Sinclair's inspection of the vehicle's tires was another story. The front left (driver's side) tire had 3/32" of tread remaining. The right front (passenger's side) tire had between 0/32" and 1/32". The two rear tires each had between 9/32" and 10/32" of tread measurement. According to Mr. Sinclair the front tires would not pass safety inspection. The right front tire (passenger's side) was so worn down in places that he could actually see the steel belts in the canvas that formed part of the tire.

[116] In Mr. Sinclair's opinion hard braking alone would not result in this type of wear. That would cause a spot wear. In his opinion hard use from a combination of spinning the tires and hard braking could cause the front tires to be in the condition he found them to be in. He added that hard usage over a short period of a few hours would contribute to the wear exhibited.

[117] On cross-examination Mr. Sinclair indicated that he did not think that the wear on the front tires of the vehicle was caused solely by the accident. He also stated that depending on how good the tires were at the start they should not wear down this much on just five or six hard starts. He also said that tire wear would be less if spun in gravel versus asphalt.

[118] He also expressed the opinion that these tires would not be safe on wet roads. They would be susceptible to hydro-planing making the vehicle hard to steer. In one final question from Defence counsel Mr. Sinclair indicated it was hard to tell if the wear to the tires was caused by spinning or hard-cornering.

[119] On re-direct Mr. Sinclair stated that three to six hard starts on asphalt with new tires would not have the effect exhibited by the tires he inspected on the front of the accident vehicle. He said it all depends on the condition of the tires at the start.

[120] Mr. Sinclair concluded his testimony by stating on re-direct that it is possible to hydroplane on wet roads even if all the tires are new. It all depends on the amount of water on the surface of the road but with bad tires you would likely hydroplane faster by which I believe he meant quicker or sooner.

[121] The only remaining item of note in Mr. Sinclair's testimony is in regard to the accident vehicle's so-called black box. It was Mr. Sinclair who removed it and placed it in an evidence bag and gave it to either Cpl. Phil Reddy or Cpl. Glen Murphy. He was not quite sure to which officer he gave the device. This leads us to the evidence of Crown witness Mr. Dale Faulkner.

**(13) Dale Eldon Faulkner:**

[122] Dale Eldon Faulkner was qualified as an expert in the area of mechanical engineering capable of giving opinion evidence on crash data analysis.

[123] Mr. Faulkner received his Professional Engineer's Designation in 1988. Prior to that, in 1985, he obtained a Bachelor of Science in Engineering from the University of New Brunswick. He works under contract to the Federal Department of Transport as a "Collision & Defect Investigator." He successfully completed an Operator's Certification Course on Crash Data Retrieval Systems in 2008. This week-long course enables him to download and interpret data from the electronic data recorder – the so-called black box – installed in automobiles.

[124] Mr. Faulkner explained how a data recorder collects data such as:

- speed;
- throttle position;
- seatbelt usage;
- whether a foot is on the brake pedal but not the amount of pressure being applied; and
- steering angle.

[125] He has retrieved data from 10 to 15 such devices each year since receiving his certification in 2008. He performs approximately four a year at the request of various police forces throughout the Province.

[126] Mr. Faulkner explained how an automobile's computer system triggers the data recorder to begin recording pertinent information five seconds prior to deployment of the vehicle's airbags. Even if a deployment does not occur, as long as the vehicle's computer is considering a deployment it begins to record. The recorded data remains until over-ridden by another more serious event. The data can also be erased if the vehicle's ignition is turned on and off 150 times post-event. Each time the ignition is turned on and off is considered a cycle.

[127] According to the data obtained from the electronic data recorder taken from the accident vehicle and analyzed by Mr. Faulkner there were only four such cycles after the device was last activated. According to Mr. Faulkner the event that activated the data recorder was the vehicle's impact with the power pole.

[128] Mr. Faulkner downloaded data from the electronic data recorder on July 9, 2008. From the captured data he determined that:

- five seconds prior to deployment the vehicle's speed as measured not from the wheels but rather from the transmission was 119 mph or 191 kph;
- at four seconds prior to deployment vehicle speed was the same – 119 mph / 191 kph;
- at three seconds before, the speed was 117 mph / 188 kph;
- at two seconds before, the speed was 103 mph / 165 kph; and
- at one second before deployment, the speed was 91 mph / 146 kph.

Data pertaining to the throttle indicated that:

- at five seconds prior to deployment the throttle was 100% open or as wide open as it could be;
- at four seconds, it was still 100% open;
- at three seconds, it was 23% open;

- at two seconds, it was 22% open; and
- at one second, it was 20% open.

Data reflecting the extent to which the gas pedal was depressed indicated that:

- at five seconds, it was 96% depressed;
- at four seconds, it was still 96%;
- at three seconds, it was 0%; and
- at two seconds and one second it also read 0% depressed.

The last three readings are consistent with the foot being off the gas pedal.

[129] The electronic data recorder was only equipped to record the status of the driver's seatbelt. It indicated that the driver's seatbelt was unbuckled during the period when measurements were being recorded.

[130] On cross-examination Mr. Faulkner was asked about the speed measurement which comes off the transmission. He cited two examples to help explain how it works. One example was if a vehicle was dropped off the side of a building. The data recorder would not give a speed even though the vehicle was moving downward.

[131] Another example is if a vehicle was on a hoist with the accelerator fully depressed. The data recorder would provide a measurement of speed even though the vehicle itself would not be moving.

**(14) Heather Marie Copley:**

[132] The one remaining Crown witness was Heather Marie Copley. Ms. Copley was qualified as a Forensic Alcohol Specialist capable of expressing opinion evidence on:

- the analysis of bodily fluids for the presence and concentration of alcohol;

- calculations involving blood alcohol concentrations including: interpretation of hospital results, extrapolation of results from a known value to an earlier point in time and determination of blood alcohol concentrations from given drinking patterns; and
- the effect of alcohol on individuals and on their ability to operate a motor vehicle.

[133] You will recall earlier that there was an agreement with respect to the amount of alcohol found in blood serum from a sample of blood taken from the accused, Mr. Delorey, at 1:50 a.m. on June 5, 2008. It measured 10.86 millimoles per litre which is equivalent to 50 mg of alcohol per 100 ml of blood.

[134] A sample taken from Robert MacEachern at 2:00 p.m. that same morning measured 29.88 millimoles per litre which equates to 138 mg of alcohol per 100 ml of blood.

[135] Assuming an elimination rate of 10 - 20 mg per cent per hour, and that no alcohol was consumed between 10 p.m. and the approximate time of the accident at 10:40 p.m. and further that there was no alcohol consumed after the accident up to the time the sample was taken, Ms. Copley, by extrapolating backwards, determined that Mr. Delorey's alcohol to blood content was in the range of 72 to 112 mg of alcohol in 100 ml of blood when the accident happened.

[136] When asked to perform a similar calculation on Robert MacEachern's blood sample results, she came up with a range of 143 to 197 mg of alcohol per 100 ml of blood.

[137] Ms. Copley also explained the effects of the presence of alcohol on an individual's ability to operate a motor vehicle. She explained that alcohol acts as a depressant. It has a greater effect on the brain and spinal cord. It slows down the brain's ability to process information. Vision is affected. It requires more light to see clearly and it takes longer for the eyes to adjust to changing light conditions. It also takes the eyes longer to focus from close-up to greater distance. Peripheral vision is also affected by alcohol consumption. A person is not able to see as well out of the sides of the eyes. Alcohol also affects attention to surrounding things. It decreases reaction time and causes muscle coordination to deteriorate.



[138] In Ms. Copley's opinion the ability of all persons to drive is affected by blood/alcohol content of 100 mg per 100 ml of blood. She stated some experts put the level between 50 mg and 100 mg. It depends on driver experience, weather conditions and various other demands placed on the driver such as speed and darkness.

[139] In Ms. Copley's opinion many persons can be affected by alcohol concentrations between 50 mg and 100 mg and some even as low as 30 mg in 100 ml of blood.

[140] She also testified that driving a vehicle is a divided-attention task. There is a tracking component involved in steering combined with a scanning task associated with looking out for what is happening as the vehicle moves. She said that curves in the road are particularly problematic to impaired drivers. Impaired drivers fail to properly calculate their speed of approach and the curvature of the turn itself. They tend to focus on only one of these two factors.

[141] This latter opinion was given on cross-examination. She also stated that a sober person would notice things sooner than a person affected by alcohol consumption in a divided-attention task situation. She also indicated that if there are fewer distractions and a driver knows the area in which he is driving the effects of impairment would be less.

[142] She also agreed that the effects of impairment depends on the individual's driving experience as well as his personal experience with alcohol. A person can acquire a tolerance to alcohol which lessens the effects of impairment.

**DISCUSSION OF THE LAW:**

[143] I will now turn my attention to the law pertaining to the dangerous operation of a motor vehicle.

[144] Mr. Delorey has been charged with breaching section 249(3) and section 249(4) of the Criminal Code. The relevant provisions read as follows:

- 249 (1) Every one commits an offence who operates
  - (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the

place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

(3) Every one who commits an offence under subsection (1) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(4) Every one who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[145] The leading case on dangerous driving is **R. v. Beatty**, 2008 SCC 5. Charron, J. writing for five judges emphasized the important difference between civil and penal negligence. She also clearly pointed out the Crown's burden to prove both the *actus reus* and the *mens rea* of the offence beyond a reasonable doubt. Beginning at para 6 and continuing in paras 7 and 8, Justice Charron wrote:

6 In my respectful view, the approach advocated by the Crown does not accord with fundamental principles of criminal justice. Unquestionably, conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, it is important not to conflate the civil standard of negligence with the test for penal negligence. Unlike civil negligence, which is concerned with the apportionment of loss, penal negligence is aimed at punishing *blameworthy* conduct. Fundamental principles of criminal justice require that the law on penal negligence concern itself not only with conduct that deviates from the norm, which establishes the *actus reus* of the offence, but with the offender's mental state. The onus lies on the Crown to prove both the *actus reus* and the *mens rea*. Moreover, where liability for penal negligence includes potential imprisonment, as is the case under s. 249 of the *Criminal Code*, the distinction between civil and penal negligence acquires a constitutional dimension.

7 The *modified* objective test established by this Court's jurisprudence remains the appropriate test to determine the requisite *mens rea* for negligence-based criminal offences. As the label suggests, this test for penal negligence "modifies" the purely objective norm for determining civil negligence. It does so in two important respects. First, there must be "a marked departure" from the civil norm in the circumstances of the case. A mere departure from the standard expected of a reasonably prudent person will meet the threshold for civil negligence, but will not suffice to ground liability for penal negligence. The distinction between a mere departure and a marked departure from the norm is a question of degree. It is only when the conduct meets the higher threshold that the court may find, on the basis of that conduct alone, a blameworthy state of mind.

8 Second, unlike the test for civil negligence which does not concern itself with the mental state of the driver, the modified objective test for penal negligence cannot ignore the actual mental state of the accused. Objective *mens rea* is based on the premise that a reasonable person in the accused's position would have been aware of the risks arising from the conduct. The fault lies in the absence of the requisite mental state of care. Hence, the accused cannot avoid a conviction by simply stating that he or she *was not thinking* about the manner of driving. However, where the accused raises a reasonable doubt whether a reasonable person in his or her position would have been aware of the risks arising from the conduct, the premise for finding objective fault is no longer sound and there must be an acquittal. The analysis is thus contextualized, and allowances are made for defences such as incapacity and mistake of fact. This is necessary to ensure compliance with the fundamental principle of criminal justice that the innocent not be punished.

[146] At para 43 Justice Charron restated the test earlier stated in the Supreme Court of Canada case of **R. v. Hundal**, [1993] 1 S.C.R. 867 as follows:

(a) The *Actus Reus*

The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place".

(b) The *Mens Rea*

The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

**APPLICATION OF THE FACTS TO THE LAW:**

[147] The facts of this case must be considered within this legal framework.

[148] The evidence establishes that the accident occurred at approximately 10:50 p.m. on the evening of June 4, 2008. It was dark and the road was wet. It had been raining off and on all that evening.

[149] The place where the accident happened was on a curve in the road near the top of an incline at the end of a fairly long straight away. There were some patches on the asphalt surface and some centerline cracks but generally the road was in good condition. There were no street lights. Traffic was light but there were other vehicles in the vicinity as is evidenced by the fact that one came upon the accident scene shortly after it had occurred.

[150] Based on the evidence of the three passengers who survived the accident the vehicle was being driven at a fast rate of speed, if not very fast. This supports the conclusions reached by Cpl. Glen Murphy – the Accident Reconstructionist – who testified that just prior to the accident the vehicle was travelling very fast and in excess of the 80 kph speed limit on that stretch of road, in his opinion.

[151] The analysis of the vehicle's electronic data recorder – the so-called "black box" – performed by Dale Faulkner also supports Cpl. Murphy's conclusions as well as the subjective assessments of speed of the three passengers. Forgetting for a moment the speed of the vehicle as taken off the transmission, at five seconds before contact with the power pole the vehicle's accelerator was 96% depressed and the throttle was 100% open. At four seconds before, the accelerator was still 96% depressed and the throttle remained completely opened at 100%. It was only at the three second-mark prior to the time of impact with the power pole that pressure was removed from the accelerator allowing the throttle to begin closing.

[152] Then there is the evidence of alcohol consumption by the accused prior to the accident. According to Ms. Copley, Mr. Delorey's blood was estimated determined to contain alcohol in the range of 72 to 112 mg in 100 ml of blood at the time of the accident. Her calculation was based on the agreed measurement of alcohol found in the blood serum of the sample taken from Mr. Delorey at 1:50 a.m. on the morning of June 5, 2008. This was about three hours or so after the accident. His reading based on the measured 10.86 millimoles of alcohol per litre of blood serum would equate to at least 72 mg of alcohol per 100 ml of blood and perhaps as much as 112 mg per 100 ml.

[153] The Court does not have to decide if Mr. Delorey was over the legal limit or the extent to which his ability to operate a motor vehicle was impaired by alcohol. The presence of alcohol is, however, a factor which the Court can take into consideration in determining whether he was driving in an objectively dangerous manner.

[154] The poor condition of the front tires of the accident vehicle was a significant contributor to the accident. The Court of Appeal in over-turning the initial conviction stated this at para 49:

[49] The question is whether a reasonable person in his situation ought to have been aware of the risk. In my view, a reasonable person taking delivery of a loaner vehicle from a car dealership which is responsible for that vehicle would not have been aware of the risk that its tires were below minimum standards. As the appellant submits, the moment that a vehicle leaves a car dealership, after having been in the dealership's possession and under its care, should be the time when a consumer is most able to rely on the workmanship of the dealer. He should be able to presume that a loaner vehicle meets the standards for safety inspection. With respect, the judge erred in law in finding that there was a duty of care upon the appellant to inspect the condition of the loaner vehicle tires. Even if there was such a duty, he erred in finding a breach of that duty constituted a marked departure from the standard expected of a reasonable prudent person and hence blameworthy conduct amounting to dangerous driving.

[155] Clearly there was no duty on Mr. Delorey to check the condition of the vehicle's tires prior to driving it off the car dealer's lot. There is evidence however that Mr. Delorey drove the vehicle hard, not simply in the moments leading up to the accident but also earlier in the evening. We have the evidence of Robert MacEachern regarding Mr. Delorey's efforts to spin the vehicle's wheels in the gravel parking area next to the Arisaig Wharf. He also testified that Mr. Delorey attempted on occasion to spin the wheels of the front-wheel drive vehicle on gravel as he proceeded onto the pavement.

[156] The expert mechanic – Mr. David Sinclair – testified that three to six hard starts on asphalt on new tires would not result in the amount of wear and tear he found on the tires he inspected. But he did say it would contribute to the wear.

[157] Mr. Delorey must have known or at least should have known that the manner in which he drove the vehicle would cause the tires to wear. There was the evidence

of Kai-lee Walsh indicating that she recalled Mr. Delorey say something about the tires prior to the accident. She could not remember what he said just that he had said something.

[158] Further evidence of the manner in which Mr. Delorey drove the vehicle earlier in the evening was provided by Carman Novak and his brother Michael Novak. Based on their combined evidence I am satisfied that the vehicle they saw was the same vehicle that was later involved in the accident. I am also satisfied that the driver of the vehicle when Carman and Michael Novak witnessed it speeding down the Marsh Road and practically through the intersection with Highway # 337 before skidding to a stop just short of the ditch on the far side was the accused Kyle Delorey.

[159] I will not go so far as to say there was a duty on Mr. Delorey to check the tires. The Court of Appeal has clearly stated that he did not. I do, however, believe he ought to have been aware as well as concerned that his rough handling of the vehicle would add to the wear and tear on the vehicle tires. This should have influenced his decision not to operate the vehicle at rates of speed that were at times described by different witnesses, including his sister, as fast or very fast or excessive or in excess of the posted speed limit as Cpl. Murphy suggested.

**ACTEUS REUS:**

[160] To refer again to the words of Charron, J. in **Beatty**, *supra* as re-stated from **Hundal**, *supra*:

The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was “dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place.”

[161] Looking at the evidence of speed, weather, road conditions, the fact that the vehicle was fully loaded with five adult passengers, the presence of alcohol in the accused’s blood, one has to objectively conclude that the accused, Kyle Delorey, was operating the vehicle in a manner that was dangerous to the public.

[162] I am satisfied that the Crown has proved beyond a reasonable doubt the *actus reus* component of the offence.

**MENS REA**

[163] Turning to the requirement of proving *mens rea* beyond a reasonable doubt and again resorting to the words of Charron, J. in **Beatty**, *supra*:

The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

[164] The modified -objective test established by the Supreme Court of Canada is the test that must be used to determine the requisite *mens rea* for negligence-based criminal offences. (See **Beatty**, *supra*, at para 7)

[165] First, there must be a "marked departure" from the civil norm; a mere departure will not suffice.

[166] Secondly, the modified objective test must consider the accused's actual mental state if there is evidence of such presented. If the accused raises a reasonable doubt whether a reasonable person in his position would have been aware of the risks involved then he must be acquitted. There was no evidence presented of Mr. Delorey's actual state of mind in the moments prior to the accident other than that he should be able to rely on the condition of the vehicle when he took possession of it.

[167] There is no evidence that Mr. Delorey actually knew of the condition of the tires prior to the accident. Nor was there a duty upon him to check the tires when he first was given possession of it. There can be no doubt that the poor condition of the vehicle's front tires was a contributing factor in causing the accident. Some of that wear was attributable to the aggressive manner in which Mr. Delorey drove the vehicle prior to the accident.

[168] Although Mr. Delorey was entitled to have confidence in the reliability of the vehicle loaned to him by the dealer including the condition of the tires, this does not explain why he decided to drive the vehicle, after having consumed alcohol, at a rate of speed that was excessive, especially in rainy weather conditions on wet asphalt. According to Mr. Sinclair hydro-planing can occur even with new tires. All drivers would or at least, should know this. Mr. Delorey should have known this.

[169] I am satisfied that the Crown has proved beyond a reasonable doubt that the accused's operation of the vehicle was a marked departure and that a reasonable person in the position of the accused would have been aware of the risks involved. Using the modified objective test the *mens rea* component of the two offences has been proved beyond a reasonable doubt.

**VERDICT:**

[170] I will now ask Mr. Delorey to stand, please.

[171] Kyle Anthony Delorey, on the charge:

THAT on or about the 4<sup>th</sup> day of June A.D. 2008 at, or near Cape George, Antigonish County, Nova Scotia, did operate a motor vehicle on a highway to wit: Highway 337, Cape George, Antigonish County, Nova Scotia, in a manner that was dangerous to the public and thereby caused bodily harm to Robert Michael MacEachern contrary to Section 249(3) of the Criminal Code

I find you "Guilty".

[172] On the charge that:

On the same date and place did operate a motor vehicle on a highway to wit: Highway 337, Cape George, Antigonish County, Nova Scotia, in a manner that was dangerous to the public and thereby caused death to Patrick Derek MacEachern contrary to Section 249(4) of the Criminal Code

I find you "Guilty".

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McDougall, J.