

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Fogarty*, 2013 NSSC 222

Date: 20130710

Docket: SP 390826

Registry: Antigonish

Between:

Her Majesty the Queen

Plaintiff

V.

William Lionel Edmund Fogarty

Defendant

Judge: The Honourable Justice N.M. Scaravelli

Heard: June 3, 5, 6, 7, 10, 12, 13, 14, 2013 in Antigonish, Nova Scotia

Counsel: Darlene Oko and Allen Murray, for the Crown

Luke Craggs, for the Defendant

BY THE COURT (orally)

[1] On November 24, 2011 shortly after 3 o'clock in the afternoon, William Fogarty was involved in a motor vehicle collision with an oncoming vehicle on Highway 4 near Tracadie, Nova Scotia resulting in the tragic death of the two young occupants of the other vehicle.

[2] Mr. Fogarty stands charged with two counts each of dangerous driving causing death contrary to **Section 249 (4) of the *Criminal Code*** and impaired driving by drug causing death pursuant to **Section 255 (3) of the *Code***.

[3] **Section 249** sets out the offence of dangerous operation of a motor vehicle.

It provides in part:

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; ...

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

[4] **Section 253 (1) (a)** creates the offence of driving while impaired by alcohol or drugs and **Section 255 (3)** sets out the penalty when that impaired driving causes death. The relevant portions of the sections that relate to this case provide:

253 (1) Every one commits an offence who operates a motor vehicle or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug;

255(3) Everyone who commits an offence under paragraph 253 (1) (a) and causes the death of another person as a result is guilty of an indictable offence and liable to imprisonment for life.

[5] The burden of proof is on the Crown to prove all the elements of the offences beyond a reasonable doubt. The Crown called fifteen witnesses at trial and introduced two video police statements given by Mr. Fogarty. Mr. Fogarty elected not to call evidence. There is no issue as to the voluntariness of Mr. Fogarty's statements made to persons in authority. Spontaneous statements made to police at the scene of the collision were admitted, not for the truth of what was said but for possible relevance to issues of credibility. Prior to trial, Mr. Fogarty's charter application to exclude evidence of his blood sample and its analysis was dismissed following a voir dire hearing.

[6] Prior to the collision two motorists operating their vehicles in different directions on Highway 104 reported observing Mr. Fogarty's vehicle being operated in an erratic manner. Colin Delorey was traveling east on the two lane Highway near Lower South River, Nova Scotia. Sometime after 2 pm he observed a white Crown Victoria vehicle behind other vehicles in his rear view mirror. The white vehicle was swaying back and forth both over the yellow center line and the white shoulder line of the highway. The vehicle passed other vehicles behind Mr. Delorey in an area of a double solid no passing lane. Mr. Delorey continued to observe the white vehicle in his mirror. It appeared to drive at a normal rate of speed then both speed up and slow down. The white vehicle passed Mr. Delorey near Heatherton in a passing lane at a normal rate of speed after which it continued to speed up and slow down. The speed limit in that area was 100 km/h. At one point Mr. Delorey accelerated to 120 km/h in order to catch the vehicle and record the license plate number. He then called the RCMP to report the erratic driving assuming the driver was either tired or impaired. While traveling behind the white vehicle Mr. Delorey observed the vehicle signal a right hand turn onto the Monastery / Tracadie exit no. 37 leading to Highway 4. As this was Mr. Delorey's exit, he followed the vehicle onto the exit lane when the white vehicle moved "abruptly" back onto Highway 104 and continued in an easterly direction.

[7] Later, the second motorist, Brenda Weir was traveling west on Highway 104 having left Sydney earlier in the day traveling to her home in Shubenacadie. She came upon a white Crown Victoria also heading west. The vehicle was being operated in an erratic manner which she described as being “all over the road.” The white vehicle was swaying over the center line and back over the white shoulder line, causing vehicles approaching in the opposite direction to pull over to the shoulder. The white vehicle would repeatedly speed up to 120 km/h and slow down to 90 km/h. Ms. Weir believed the operator of the vehicle was impaired. She obtained the plate number and dialed 911 as the white vehicle was taking the Monastery / Tracadie Exit 37 to Highway 4. She followed the vehicle while providing location information to 911. Ms. Weir observed the white vehicle stopped at two different locations on Highway 4 before she continued on towards Antigonish.

[8] At approximately 3:30 pm Gary Warner and his spouse Wanda Warner were traveling west on Highway 4 when they came upon the accident scene near the Tracadie Loop area. Mr. Fogarty was observed standing next to a white vehicle talking on the cell phone. A green Mustang was in the ditch adjacent to this vehicle. The two occupants of the other vehicle were unresponsive. As Mr. Warner approached he determined that Mr. Fogarty was talking to a 911 operator.

Mr. Warner testified that Mr. Fogarty appeared to be having difficulty on the phone so he took the phone from Mr. Fogarty to speak to the 911 operator and provide a civic number reference.

[9] Mr. Warner was suspicious that Mr. Fogarty may have been impaired even though he could not detect a smell of alcohol. He described Mr. Fogarty's manner of speech as being "all over the place." Mr. Fogarty expressed no emotion or empathy for the occupants of the other vehicle. Mr. Warner overheard Mr. Fogarty state to someone on the cell phone "I suppose I'm going to get blamed for this too."

[10] Mrs. Warner testified she checked the occupants of the other vehicle and noted the driver was not breathing. She called out to her husband that she thought one was dead and the other on his way out. In response she saw Mr. Fogarty put his hands on his face and say "Oh my God I am in trouble." Mrs. Warner later heard Mr. Fogarty speaking to his mother on the cell phone. She overheard him say "Mom I just killed a kid" and "don't blame me it was not my fault." Ms. Warner testified she asked Mr. Fogarty what had happened. His response was that he never saw the car coming. As he pointed to the yellow line on the road he said "I think I went over the yellow line - the kids must have been going fast." He told

her that in only one more week he would not have had his license because of other incidents. Mrs. Warner overheard him repeat this to the RCMP when they arrived.

[11] In terms of observations Mrs. Warner was of the view that Mr. Fogarty was, in her words, “stoned.” There was no odor of alcohol. She described his eyes as being all over the place. He had trouble keeping them open. His speech would be good, then slurred. He showed no empathy for the occupants of the other vehicle nor did he try to assist. Both Mr. and Mrs. Warner described themselves as being recovering persons.

[12] John Kirby, sixteen years of age was fourteen years old at the time of the collision. He was home from school that day. His residence is located at the Tracadie Loop which loops around and connects Highway 4 on both ends. He testified that at approximately 3:00 pm he was standing at his kitchen window facing Highway 4 when he observed a white vehicle, traveling west on the wrong side of the road, encounter a bluish green vehicle traveling in the opposite direction in its proper lane. According to Mr. Kirby, just prior to the impact, the bluish green vehicle moved towards the opposite lane. The white vehicle attempted to move into its correct lane striking the passenger’s side of the other vehicle causing it to spin around. He described the vehicles as being 50 to 100 feet apart when he

first saw them and the collision occurring in a matter of seconds. Mr. Kirby later learned that the driver of the other vehicle was Kory Mattie whom he knew and who attended his same school.

[13] Mr. Kirby testified he had a clear view from his kitchen window to the area of highway where the collision occurred. He estimated his house was approximately 200 to 400 feet away but was not certain. John Kirby's father, Robert Scott, estimated the distance to be approximately 1000 feet and confirmed there was a clear view of the area of the collision from the kitchen window.

[14] Mr. Scott came upon the scene of the collision between 4:00 and 4:30 pm. He knew Mr. Fogarty as they had worked together in the past. Mr. Fogarty was talking on the cell phone as Mr. Scott approached him. Mr. Scott testified that Mr. Fogarty did not appear to recognize him when looking at him. Mr. Fogarty appeared angry on the phone. He was yelling, his eyes appeared glossy and he was sweating on his forehead. Mr. Scott overheard him say on the cell phone "I fucking killed someone." Mr. Scott also overheard Mr. Fogarty speaking to another woman at the scene telling her something to the effect that he did not know what side of the road he was on. He was speaking slowly, stuttering or slurring and appeared to be searching for words when speaking to her. Mr. Scott

acknowledged that Mr. Fogarty had no problem walking when observed and spoke clearly when talking on the cell phone.

[15] Corporal Shane Miesner was on duty in Afton close to the scene of the collision when he received a call regarding a motor vehicle accident at Tracadie. Dispatch advised the vehicle involved was the same white vehicle that two earlier reports indicated was driving in an erratic manner east of Antigonish on Highway 104. No particulars of the manner of driving were provided at that time. The call came in at 3:20 pm and they were on the scene within five minutes. Other persons were already there both talking to Mr. Fogarty and attending the Mustang adjacent to the white vehicle. Mr. Fogarty identified himself as the driver of the white vehicle. He indicated his chest hurt from the seat belt. He stated that if his license had been taken before this incident it would not have happened. He further stated that he was a recovering addict and that he did not do drugs. He stated he took his Methadone that morning at 8:00 a.m. He denied any other drug use at that time.

[16] Corporal Miesner noted Mr. Fogarty's eyes were glassy. He appeared to have stigmatism in one eye. He spoke with a slow drawl. In particular Corporal Miesner observed that Mr. Fogarty appeared disconnected with the situation. He expressed no interest in the two young men in the Mustang next to him, one

convulsing. Instead he talked about the amount of his drug use in his past and the money he had spent on drugs. He also talked about how he had repaired his car. Corporal Miesner could not detect the odor of alcohol.

[17] Mr. Fogarty was later placed in the back of the police vehicle with the door left open. Corporal Miesner testified that he was suspicious of impairment by a drug but did not feel he had reasonable grounds to demand a drug recognition evaluation (DRE) at the time. He consulted by phone with Constable Morrison, a Drug Recognition Evaluator.

[18] Mr. Fogarty was placed in an ambulance by paramedics. Corporal Miesner went in the back of the ambulance to continue to observe Mr. Fogarty.

Responding to paramedic questions Mr. Fogarty stated he was traveling towards Antigonish when a Mustang swerved in front of him. He continued to talk at length about his extensive history of drug use.

[19] Upon leaving the scene, Corporal Miesner received a call from Sergeant Rehill and was given the specifics of Mr. Fogarty's manner of driving as reported by the two motorists. Corporal Miesner testified that this information, together with his own continued observations and disclosures made by Mr. Fogarty, caused

him to determine that he had reasonable grounds to believe that Mr. Fogarty had been operating his vehicle while impaired by a drug. A demand for the DRE pursuant to **Section 254 (3.1) of the Code** was made at 4:26 pm while on route to the hospital. Mr. Fogarty responded “he understood the demand.”

[20] The hospital staff examined Mr. Fogarty upon arrival at Saint Martha’s hospital Antigonish. At 5:00 pm, following treatment, Mr. Fogarty was arrested by Corporal Miesner for impaired driving by a drug. He read Mr. Fogarty his Charter Rights and gave the police warning. At 5:45 pm Mr. Fogarty had a fifteen minute private telephone conference with a lawyer. Upon completion Mr. Fogarty volunteered that he would be unable to stand on one foot and asked if there was another physical test he could perform.

[21] Constable Chad Morrison, a drug recognition officer, as defined by **Section 254 of the Code**, was qualified to give opinion evidence regarding processes to determine whether a driver’s ability to operate a motor vehicle is impaired by drug and what category or categories of drugs are causing the impairment.

[22] Constable Morrison conducted his evaluation using a North American standardized evaluation form. There are 12 steps in the evaluation. Evaluating the

results in its entirety enables the evaluator to determine reasonable grounds to make a demand for a blood sample or a urine sample. If a sample is taken, it is sent to a forensic laboratory for analysis.

[23] Constable Morrison observed Mr. Fogarty upon his arrival at the hospital. He spoke to the attending physician and observed Mr. Fogarty while testing. Based on this information and, in particular, psychophysical test results demonstrating poor coordination and inability to follow directions, Constable Morrison determined he had reasonable grounds to demand a blood sample pursuant to **Section 254 (3.1) of the Code**. He also concluded, mainly due to horizontal gaze nystagmus and lack of convergence on Mr. Fogarty's eyes, that Mr. Fogarty's ability to operate a motor vehicle was impaired by a central nervous system depressant.

[24] Mr. Fogarty was cleared for the DRE test blood sample by Dr. Jurga, the emergency physician who treated Mr. Fogarty. Dr. Jurga had difficulty drawing blood from Mr. Fogarty as the veins in his arm were collapsed from a history of drug use. Mr. Fogarty had co-operated and gave instructions to Dr. Jurga in order to help him locate a usable vein, but after several attempts with one blood sample kit, the vacuum seal in the vile was eventually lost. With a second blood sample

kit that contained an expiry date and, using an ultra sound, Dr. Jurga was successfully able to locate a vein and draw blood from Mr. Fogarty. The blood sample was taken at 8:40 pm.

[25] I am satisfied that at the time of the demand for the DRE, Corporal Miesner had reasonable and probable grounds to believe that Mr. Fogarty, within the previous three hours, had committed an offence under **Section 253 (1) (a) of the Code** and that the demand was made as soon as was practicable under the circumstances. I also find that Constable Morrison, upon completing the DRE, had reasonable grounds to believe that Mr. Fogarty's ability to operate a motor vehicle was impaired by a drug and that the demand for a blood test was made as soon as practicable and performed as soon as practicable under the circumstances.

[26] Mr. Fogarty was taken to the RCMP detachment where he was charged with the current charges before the court and given access to legal counsel. Corporal Miesner subsequently took a voluntary video statement from Mr. Fogarty.

[27] During this statement Mr. Fogarty was informed of the complaints of erratic driving. Mr. Fogarty denied travelling towards Port Hawkesbury near Monastery as well as any erratic driving. Regarding the collision, Mr. Fogarty repeated

several times he did not know how the accident happened, other than the other vehicle crossed in front of him. He continued to repeat he did not know if he crossed the center line of the roadway. Asked how fast he was going, Mr. Fogarty responded “a maximum of 110 – more like 90 – anywhere between 70 to 110.”

[28] Mr. Fogarty disclosed his extensive knowledge of drug use and their effects. He stated his daily dose of Methadone to be 170mg. This could be taken all at once or in smaller doses during the day to manage pain. Other prescribed medications used were Seroquel, Trazodone, and Mirtazapine for sleep. He also was taking non-prescription Valium. He described Valium as the longest acting drug and Serax as the shortest acting drug.

[29] Mr. Fogarty acknowledged he had a vial of urine in his possession the evening of the collision. The purpose was to produce the urine when being tested by his doctor as Mr. Fogarty was not to consume Valium while under treatment.

[30] The following day Mr. Fogarty spoke with Constable MacPherson and indicated he wished to give a second statement correcting an untruthful comment in the statement he gave to Corporal Miesner. Constable MacPherson took a

second voluntary video statement from Mr. Fogarty after he consulted with a lawyer.

[31] Mr. Fogarty stated the purpose for his request for a second statement was to correct a lie he made in the first statement concerning the information supplied by the two motorists. Providing this information, according to Mr. Fogarty, would save the RCMP time and the two motorists from having to “show their face”.

[32] As to the first driving complaint, Mr. Fogarty acknowledged speeding up to pass a vehicle and slowing down. The passed vehicle came up to his bumper. Mr. Fogarty thought he was being followed, especially when the vehicle followed him on to the Tracadie exit. His reaction was to drive back on to the highway and drive towards Aulds Cove where he turned around heading back towards Tracadie.

There was a woman following him. He took the Tracadie exit. The reason she saw his car stopped at two locations was a stop to his friend’s house and his friends’ mother’s house. Later in a statement he stated he actually did not notice the second motorist following him. He was responding to the information supplied to him by Corporal Miesner the previous day.

[33] Mr. Fogarty stated he could not recall any erratic driving as described by either motorist following him. He explained his reason for lying in the first statement was because he was “pissed off” at the man driving close to his bumper. In this statement Mr. Fogarty estimated his speed, prior to collision, to be between 80 and 100km/h.

[34] Dr. Millan Jurga is an emergency physician at Saint Martha’s hospital Antigonish. He treated Mr. Fogarty upon his arrival by ambulance. Mr. Fogarty complained of muscular skeletal pain. His vital signs were stable and there was no indication of serious injuries as a result of his complaint. X-rays were negative. Testing for head injuries were negative.

[35] Dr. Jurga testified that Mr. Fogarty was in stable condition with no signs of shock. He observed Mr. Fogarty to be alert, co-operative and very talkative. His speech was slightly slurred, slow and deliberate. His gait and response to physical requests were slow. His pupils were dilated initially and slow to react to light. Dr. Jurga felt Mr. Fogarty could have been impaired by drugs. Mr. Fogarty reported his medication to be Methadone (170mg) daily, Valium, Trazodone, Seroquel, and Mirtazapine. Dr. Jurga testified the Methadone dosage was on the high end.

[36] Mr. Fogarty was treated with an anti-inflammatory and Tylenol without codeine. The RCMP explained to Dr. Jurga the nature of the drug recognition evaluation test and he had no concerns for Mr. Fogarty participating.

[37] Lori Campbell is a forensic toxicology specialist, she was qualified as an expert in the analysis of bodily fluids for the presence of alcohol and/or drugs; the absorption, distribution and elimination of alcohol and/or drugs in the human body; their effect on the human body including a person's ability to operate a motor vehicle; and in drug evaluation classification including that of standardized field testing.

[38] Ms. Campbell has given testimony 270 times in various levels of court throughout Canada where she was qualified as an expert in the area of alcohol and/or drugs. Specific to drug cases she has testified 30 to 40 times, 14 of which involved drug recognition evaluations.

[39] The purpose of the forensic analysis, in the present case, was to analyze Mr. Fogarty's blood sample for impairing drugs including central nervous system depressants. The sample was subjected to a qualitative analysis only and not

quantification of any confirmed drugs. The results determine the particular drugs found in Mr. Fogarty's system.

[40] Ms. Campbell testified the analysis revealed the presence of Diazepam (known as Valium) together with Nordiazepam, Temazepam and Oxazepam which are active metabolites of Valium. These metabolites indicate a regular use of Valium. Also present was the drug Mirtazapine. These drugs are central nervous system depressants. Valium and the metabolites are part of the Benzodiazepine class of drugs. Side effects can include unsteadiness, blurred vision, sedation, dizziness, mental confusion, slurred speech and poor co-ordination. If taken to induce sleep, these drugs can have impairing effects on driving that may exist the following day. The side effects associated with Mirtazapine may include dizziness and agitation. Both Valium and Mirtazapine are capable of impairing an individual's ability to operate a motor vehicle. Where these drugs are taken in combination impairment effects are more pronounced.

[41] Methadone was also found to be present in Mr. Fogarty's blood stream. Methadone is a potent narcotic analgesic used as a Morphine substitute for addicts, such as Mr. Fogarty, enrolled in a Methadone maintenance program. Methadone users like Mr. Fogarty who have been on established dosages over a period of time

should not exhibit adverse effects from the drug including the ability to operate a motor vehicle. However, according to Ms. Campbell, doses of other central nervous system impairing drugs in combination with Methadone, can produce significant degrees of impairment.

[42] Ms. Campbell testified the effects of Valium generally last four to six hours. The absence of metabolites would indicate very recent usage. However, metabolites indicating a regular user make it difficult to determine how recent the drugs were consumed. The presence of Mirtazapine in the blood indicated the use was relatively recent.

[43] Ms. Campbell testified the expired blood kit did not affect the blood sample. The expiry date refers to the vacuum when extracting blood and may result only in less blood entering the tube but does not affect the analysis.

[44] Corporal Glen Murphy is a Level IV Collision Reconstructionist which is the highest level attainable. He was qualified to give opinion evidence with respect to collision analysis and the reconstruction of motor vehicle collisions as to the cause of the collision, including the behavior of motor vehicles, both pre and post collision; through the examination and interpretation of vehicle crash

dynamics; the interpretation of roadway evidence including tire marks and speed calculations; vehicle damage evaluations and scaled diagramming; and the preparation of computer generated animations.

[45] Corporal Murphy has conducted approximately 100 collision investigations and prepared numerous reports. The standard procedure in a collision investigation involves attending the scene, speaking with investigating officers and examining all physical evidence. Corporal Murphy does not speak to civilian witnesses. A report is drafted, sent to another Level IV Collision Reconstructionist for comments after which, it is then sent to the program manager for review.

[46] Corporal Murphy arrived on the scene at approximately 4:30 pm. He observed both vehicles facing east on the north side of Highway 4. The white Crown Victoria was against the paved shoulder of the highway. The green Mustang was in the ditch adjacent to the Crown Victoria. Based on information provided by an investigating officer, Corporal Murphy was led to believe the green Mustang was travelling west and the white Crown Victoria was travelling east at the time of the collision. Corporal Murphy was eventually able to conclude that the Mustang was travelling east and the Crown Victoria travelling west at the time. The speed limit in the area was 70 km/h.

[47] Corporal Murphy's detailed report contained photographs, diagrams and mathematical calculations. It began with the following objectives:

- A. Determine direction each vehicle was travelling.
- B. Determine the speed of the Crown Victoria.
- C. Determine the speed of the Mustang.
- D. Determine of path of Mustang.
- E. Determine angle of Crown Victoria at impact.
- F. Determine possibilities why the eastbound vehicle may have crossed over into the westbound lane under braking.

[48] Based on physical evidence at the scene including tire marks and gouging on the pavement, Corporal Murphy was able to establish the point of impact.

Subsequent examination of vehicle damage and physical placement of vehicles enabled Corporal Murphy to establish the angle of the vehicles at the time of the collision. Having analyzed and interpreted all factual information with calculations Corporal Murphy reported:

A Ford Mustang (V2) was travelling eastbound in its proper lane along a slight curve to the right. Tire marks indicate it steered to the left and locked up its brakes sliding into the westbound lane where it collided with a westbound Ford Crown Victoria (V1). The vehicles collided at an approximate angle of 116° . The front end of the V1 was forced downward on impact and was pushed toward the north shoulder.

V1 began to encroach down the side of V2 and into the passenger compartment. At maximum engagement the driver's side fender area of V1 had encroached deep into the area between the passenger door and rear wheel of V2. This resulted in the driver's

side front bonnet of V1 making contact with the C-Pillar of V2. This caused the rear of V2 to swing back towards the north ditch. At the same time, V1 rotated counter-clockwise, coming to rest over top the tire marks made by V2.

There were no marks to suggest any rotation along the road surface by V1. In addition to this, indentations on the bonnet of V1 that match a bolt above the B-Pillar and a fastener on the C-Pillar suggest that it became elevated during its rotation after impact with V2.

The road that V2 was travelling along had a slight right hand curve. The Mustang's driver had turned left and applied its brakes *prior* to reaching the center line. This indicates that the driver recognized a road hazard prior to braking and made the decision to turn left while applying the brakes.

It is my opinion that the driver of the Mustang perceived the Crown Victoria, a larger and heavier vehicle, as the "road hazard." In other words, the driver of V2 saw V1 in its lane of travel.

The Crown Victoria steered from the eastbound lane into its original lane of travel. I found no marks west of the impact site to suggest the operator of the Crown Victoria turned hard enough or was travelling fast enough to exceed the critical curve speed. In other words, the Crown Victoria was driving at a speed that allowed it to turn back toward its own lane without losing traction. That being the case, the vehicle would have been in the eastbound lane for a sufficient amount of time that the operator of the Mustang knew they were going to collide if he remained in that lane. The operator of V2 would have turned left out of inexperience or felt that the Crown Victoria was going to remain in his driving lane.

[49] In terms of his stated objectives Corporal Murphy concluded:

- A. At the time of impact, the Crown Victoria (V1) was westbound, and the Mustang (V2) was eastbound.
- B. Evidence is insufficient to determine the speed of the Crown Victoria.
- C. The Mustang was travelling at a minimum speed of 53km/h.

D. The Mustang braked commencing in its lane of travel and continued braking in to the (eastbound) oncoming lane.

E. The Crown Victoria was at an approximate angle of 30° to the westbound lane of travel at the time of impact.

[50] Corporal Murphy's calculations were input into a software program that generated a computer animated view of the accident which depicted the Mustang travelling in its proper lane; the Crown Victoria travelling in the wrong lane; the Mustang braking and moving to its opposite lane while the Crown Victoria moves to the same lane striking the Mustang; on the front right passenger side continuing down the side of the Mustang while rotating and stopping in the opposite direction.

[51] Under cross-examination Corporal Murphy acknowledged his initial report concluded the Mustang swerved to avoid a hazard prior to impact as opposed to the current report concluding the Crown Victoria as the hazard. He testified although he believed the Crown Victoria was the hazard, he was initially of the view he could not name the Crown Victoria as he could not prove it scientifically through mathematical calculations. After consultation with his program manager he determined that he was entitled to express his opinion based on the facts before him.

[52] Acknowledging the possibility of a margin of error Corporal Murphy demonstrated, and was satisfied that based on the evidence he gathered the Crown Victoria was angled to the west bound lane of travel at impact.

IMPAIRED DRIVING

[53] To prove the offence of impaired driving under **Section 253 (1) (a) of the Code**, the Crown must prove that Mr. Fogarty's ability to drive was impaired by a drug and that he operated a motor vehicle in that state. Any degree of impairment is sufficient as long as the Crown establishes beyond a reasonable doubt that it affected Mr. Fogarty's ability to drive. *R. vs. Stellato* [1994] 2 SCR 478; *R. vs. Andrews* [1996] ABCA 23. Put another way, minor mistakes in driving may not prove impairment beyond a reasonable doubt since they may be mistakes any driver could make even if sober. A marked departure from ordinary driving can therefore be of assistance to the extent it more persuasively proves that the mistakes are a result of some impairment, even though it is not strictly necessary to establish the offence.

[54] The mens rea of the offence is satisfied where a person voluntarily becomes impaired. Impairment is voluntary where a person voluntarily consumed a substance which he knew, or ought to have known, was an intoxicant and the risk of becoming intoxicated was, or should have been, contemplated. ***R. vs. Chaulk*** [2007]NSCA 84. However, where the Crown proves a person was driving while his ability was impaired by a drug, a rebuttable presumption arises that his condition was voluntarily induced. ***R. vs King*** [1962]SCR 386.

[55] I find, based on the totality of the evidence that Mr. Fogarty's ability to drive a motor vehicle was impaired by a drug at the time of the collision. The collision occurred shortly after 3 pm. Still present in his blood sample taken, at 8:40 pm, was Valium and its metabolites, as well as Mirtazapine and Methadone. I accept the evidence of Ms. Campbell as to the impairing side effects of these drugs taken in combination. Mr. Fogarty exhibited these symptoms prior to and shortly after the collision. I accept the evidence of third party witnesses as to the manner of his erratic driving. I also accept the evidence of the police and other witnesses at the scene who observed Mr. Fogarty and reported impaired indicia including erratic speech, glassy and unfocused eyes, as well as an agitated demeanor inconsistent with the situation before him. Mr. Fogarty voluntarily described his past and

present drug use and his knowledge of the effects of consuming these drugs. He disclosed having consumed non-prescription Valium the evening before the collision and prescribed Methadone the morning of the collision.

DANGEROUS DRIVING

[56] To prove the offence of dangerous driving under **Section 249 (1) (a) of the Code**, the Crown must prove that viewed objectively, Mr. Fogarty's driving was dangerous to the public having regard to all the circumstances. That is, the manner of driving must be such that it increases the risk of death or injury beyond that which is normally incidental to the act of driving.

[57] The mens rea is not subjective and does not require intention, recklessness, or willful blindness to be made out. Rather, the mens rea is assessed on a modified objective standard, and the analysis proceeds in two steps. First, the court asks whether a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the question is whether the persons failure to do so was a marked departure from the standard of care expected of a reasonable person in his circumstances. The difference between a marked departure and a mere departure is

one of degree and the essential question is whether the departure is severe enough that it merits criminal punishment. *R. vs. Beatty* [2008] SCC 5; *R. vs. Roy* [2012] SCC 26.

[58] Highway 4 is a secondary paved highway with a narrow shoulder. It leads to Monastery and beyond in one direction and Tracadie and beyond in the other. The highway is well travelled. At the time of the collision the pavement was in good condition, the road was dry and visibility was clear. The speed limit in the area of the collision was 70 km/h.

[59] Mr. Fogarty, an experienced drug user, voluntarily consumed a combination of drugs that impaired his ability to drive a motor vehicle. The manner of driving on Highway 104 prior to the collision indicates that his impairment was significant. The erratic driving included swerving of his vehicle back and forth across the centre line and the shoulder line of the highway in traffic. He passed vehicles in a no passing area, he would both accelerate beyond the speed limit and then slow down, he caused oncoming vehicles to pull over to the side of the road. Shortly thereafter he was observed driving on the wrong side of the roadway on Highway 4

seconds prior to the collision. The risk of death or injury from this manner of driving was significant. I am satisfied all of the circumstances, viewed objectively, prove Mr. Fogarty was operating his vehicle in a manner dangerous to the public.

[60] The voluntary consumption of the drugs demonstrated a recklessness in creating a risk to other motorists on the highway. This together with his manner of driving on the highway established a pattern of disregard for the safety of others and amounts to a marked departure from the standard of care from a reasonably prudent driver.

[61] Regarding Mr. Fogarty's credibility, as it relates to reasonable doubt, most of his statement responses to relevant questioning were that he didn't know, couldn't recall or didn't think so. His second statement to police to correct a lie gives the impression of an attempt to rehabilitate a denial that would have been contradicted by third parties. His explanation for lying because he was upset with the driver behind him, lacks plausibility. His statement of only remembering the Mustang crossing in front of him, suggests selective memory. Statements he made in the presence of civilians at the scene, that he never saw the Mustang coming and

that he thought he went over the yellow line, is inconsistent with his police statements. Mr. Fogarty acknowledged consuming non-prescription Valium although he stated it was the night before the collision. Blood evidence showed presence of Valium the following evening. He acknowledged consuming prescribed Methadone the morning of the collision but did not acknowledge or disclose consuming Mirtazapine found in his system.

CAUSATION

[62] For Mr. Fogarty to be found guilty of any of the charges before the court the Crown must prove that his impairment and / or his manner of driving caused the collision and the resulting deaths. A finding that Mr. Fogarty was impaired at the time of the collision does not necessarily mean that his impairment caused the collision. The Crown does not have to prove Mr. Fogarty's acts of impairment and / or manner of driving was the sole or principal cause of the deaths. It is sufficient, if the Crown proves beyond a reasonable doubt, that his impairment / driving was a contributing cause of death outside the de minimus range *R. vs. Smithers* 1971 [1 SCR 506]. Causing death outside the de minimus range means the acts were a significant contributing cause to the deaths. *R. vs. Nette* [2001] SCC 78.

[63] The Crown produced an eye witness to the collision. I am satisfied that John Kirby had an unobstructed view of the highway where the collision occurred. I have accepted his evidence that he observed the two vehicles approach, with the Mustang in its proper lane and the Crown Victoria in the wrong lane, seconds before the collision and that the Mustang swerved to the opposite lane to avoid collision, whereupon, the Crown Victoria moved to the same lane causing impact. I am aware Mr. Kirby believed the collision caused the Mustang to spin around although he stated he was unsure about that part. The physical evidence indicates the Mustang did not spin around.

[64] I accept Corporal Murphy's expert opinion as to the cause of the collision. He did not interview John Kirby and indeed was initially provided information by the police that the vehicles were heading in a different direction than he ultimately determined. His factual foundation for his opinion was not undermined during extensive cross-examination and in my view supports the opinion expressed. Mr. Fogarty's vehicle was travelling in the wrong lane prior to impact. The Mustang took evasive action by heavy braking in its own lane and moving left to avoid a

collision while Mr. Fogarty without braking veered back onto his proper lane colliding with the Mustang.

[65] There was no evidence before the court providing an alternative explanation for the collision. Driving his vehicle while impaired by a combination of drugs caused Mr. Fogarty to drive his vehicle in a dangerous manner on the wrong side of the highway immediately prior to impact. The inference to be drawn from all the evidence is that his judgment was impaired by drugs and that he had no appreciation for the situation he was in. His manner of driving was the significant cause, if not the sole cause, of the collision and deaths of the young men. This accident would not have happened had Mr. Fogarty's vehicle been travelling on its proper side of the highway.

[66] The deaths were culpable in that they were caused by the unlawful acts of dangerous driving and impaired driving by drugs.

[67] Having considered the totality of the evidence I am satisfied that the Crown proved the charges beyond a reasonable doubt and find Mr. Fogarty guilty of all four counts charged in the indictment.