

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Conley*, 2019 ONCJ 66

DATE: 2019 02 05

COURT FILE No.: Ottawa 16-A12529

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

STEVEN BRUCE CONLEY

Before Justice David A. Berg
Reasons for Judgment

Mr. J. Ramsay counsel for the Crown
Mr. D. Lamb counsel for the defendant
Mr. F. Mansour counsel for the defendant

BERG J.:

Introduction

[1] Steven Bruce Conley is charged with criminal negligence causing death and dangerous driving causing death. The two charges refer to a single event namely, that on September 1, 2016, Mr. Conley was driving a large truck in downtown Ottawa at the intersection of Laurier Avenue and Lyon Street and there caused the death of a young female cyclist, Nusrat Jahan.

[2] The evidentiary portion of this trial was held over a period of nine days. This includes the time required to hear various applications, motions, and *voir dires*. I heard from a total of fourteen witnesses.

[3] That Mr. Conley caused Ms. Jahan's tragic death is not in dispute. As was stated in the formal admission that became Exhibit 17 in this trial, "[t]he cause of death of Nusrat Jahan, as determined by pathologist Dr. Alfredo E. Walker, was determined to be multiple blunt force injuries of the neck, head and chest." Mr.

Conley's vehicle first struck Ms. Jahan while she was on her bicycle and then ran over her. The issue for me to decide was whether in doing so, Mr. Conley was criminally negligent or operating his motor vehicle in a manner dangerous to the public.

[4] I will first review the evidence relevant to this issue and then go over the pertinent sections of the *Criminal Code*. I will also review the appellate case law dealing with these sections.

[5] However, I would first like to address the family of Ms. Jahan. You have been present during most of the trial. I have no doubt that this has been very difficult for you. I know it must seem to you that during the course of this trial, Nusrat was hardly mentioned as a person. To a large extent, this is true. But that is because this trial is not about her life, but rather, is about her tragic death. I wish to assure you that we all recognize your loss and your grief.

The Evidence relevant to the Issue

[6] I will turn first to the civilian witnesses whose evidence about the events of September 1, 2016 I heard at this trial. I will only review the evidence of those witnesses relevant to the issue in this trial.

[7] Brett Hogan was walking on Lyon Street around 8:00 a.m. Suddenly, he heard the sound of metal on metal followed by people screaming and yelling. He turned his head and looked towards the north and saw a truck that was turning from Laurier Avenue onto Lyon. When he first saw the truck, it was stopped or stopping. He noticed that there was someone underneath the truck between the first and second axles. That person was moving and yelling. Less than five seconds after he turned and saw the truck, he heard what sounded to him like the release of airbrakes and the truck moved slowly forward, a foot at most. But unfortunately, that was sufficient for it to roll over the person lying underneath. He then ran over to the truck and attempted to assess the vital signs of Ms. Jahan and perform first aid. Ms. Jahan was now between the second and third axles of the truck. A mangled bicycle was pinned underneath the drive shaft and her legs were still intertwined with it.

[8] The next civilian witness was Laura Brundia. She was driving just before 8:00 a.m. in her black Jeep Compass eastbound on Laurier. She came up behind the truck driven by Mr. Conley at the intersection where it was stopped for a red

light. The truck was the first vehicle at the stop line for eastbound traffic on Laurier. She stopped her vehicle about one car length behind the truck. She observed the traffic light change from red to a green arrow and saw the truck start to move into a turn. She was surprised because the truck's turn signal had not been activated. The truck moved first slowly out into the intersection, creeping forward. The first time she noticed Ms. Jahan was as she was being hit by the truck. She saw Ms. Jahan look up towards the windshield of the truck about a second or two before she was struck and went under it, ending up under the rear wheels.

[9] I next heard the evidence of John Strickland. He was cycling to work at around 8:00 a.m. He was westbound on Laurier when he came to the intersection in question. He was stopped for the red light and observed the truck driven by Mr. Conley making a wide turn southbound onto Lyon from eastbound Laurier. It was his evidence *viva voce* that he noticed movement between the trucks wheels and seconds later, he heard a loud scream. He testified that the truck came to a stop seconds later. During cross-examination, it was suggested to him that he had told the police during their investigation that the truck had stopped immediately after the scream. However, when he responded that he did not remember saying that to police, he was not asked to adopt that statement.

[10] Robert Potvin was driving a small school bus on Lyon. He was stopped southbound about ten feet south of the intersection with his hazard lights activated as he waited for a child. He was facing south, in other words, looking away from the spot where Ms. Jahan was killed. He heard a commotion and looked to his left. He could see that something was going on and opened his door (this school bus was equipped with a driver's side door) to get a better look and observed that there was someone under the truck. He got out, heard the person under the truck yell "Stop. Stop." He observed that the truck was not completely stopped at that point, but it was not in "full movement" either. The truck moved forward and stopped on the person. He described the motion as a jerk forward followed by a complete stop. Mr. Potvin had the opportunity to observe the driver of the truck before it jerked forward and it seemed to him that Mr. Conley was completely unaware that Ms. Jahan was under his vehicle.

[11] The next witness was Lorne Derrick. He worked for the company that employed Mr. Conley. He attended the scene of the police investigation and retrieved the truck when the police were done. He did not observe any mechanical issues with that vehicle. I note on this point that the defence admitted the evidence of Constable Stephane Fournier of the Ottawa Police Service without the need to have him testify. Constable Fournier is a commercial vehicle

mechanical inspector. It is his evidence that on September 1, 2016, he inspected the truck driven by Mr. Conley. He concluded that it had no mechanical issues and that its signal lights were operating properly.

[12] Mr. Derrick testified that in his (lay) opinion, it is prudent for a driver of a large truck to take a wide right hand turn (*i.e.*, by not moving immediately into the turn but advancing into the intersection first). The Crown takes no exception to this opinion.

[13] The Crown called Mohamed Jama to provide me with evidence concerning the traffic lights at the intersection of Laurier and Lyon. Mr. Jama is employed by the City of Ottawa Traffic Operations Unit and is responsible for most of the traffic signals in the downtown area. He described the traffic signals that were controlling Mr. Conley's movement in that intersection as having a four-head signal display. Going from bottom to top of the vertical display, we have the green straight-through arrow, then above it, the green ball, then the amber, and at the top, the red light. The functioning sequence and duration of the lights is green arrow (five seconds), full green (sixteen seconds), amber (slightly more than three seconds), then red (slightly less than thirty-six seconds)

[14] The Crown adduced two video recordings from cameras that were positioned so as to be able to record parts of this tragic event. The first was a traffic camera operated by the City of Ottawa and placed at light-standard height above the roadway of Laurier Avenue. The camera is slightly to the south of the roadway and is about a city block to the west of the intersection of Laurier and Lyon. We first see Ms. Jahan as she cycles eastwards in the bicycle lane. She is seen arriving at the intersection some twenty seconds later and stops there as the light is red for eastbound traffic. Two seconds later, we first observe the truck driven by Mr. Conley completing a right-hand turn into the eastbound lane of Laurier; his right turn signal is activated. He proceeds at a moderate speed to the intersection where he comes to a stop. The evidence at this trial establishes that right hand turns onto Lyon Street southbound are not allowed when the light is red for eastbound traffic. We observe Ms. Jahan also stopped in her lane just to the south of the truck (*i.e.*, to the right of the truck). We can observe Ms. Brundia's car coming up behind the truck and followed by three other vehicles.

[15] From the time Ms. Jahan stops at the intersection to the time that Mr. Conley pulls up beside her, no other motor vehicle or bicycle can be observed in this video recording proceeding eastbound on Laurier Avenue. It is clear that Mr. Conley should have been able to see Ms. Jahan from the time he turned onto Laurier until he stopped for the red traffic signal. I find that while the view in the

video recording of Ms. Jahan at the intersection is partially blocked by the branches of a tree, this is due to the steep angle caused by the height of the placement of the traffic camera. The tree branches would not have had any appreciable effect on Mr. Conley's ability to see Ms. Jahan.

[16] That being said, I do find that the same tree branches are quite likely to have blocked Mr. Conley's view of the sign warning drivers to yield to cyclists when making right hand turns at that intersection. This sign faces westwards and can be seen in the photographs taken on September 1, 2016 located slightly to the west of the stop line for eastbound vehicular traffic. From two photographs taken that day (Exhibit 16), it becomes clear that a driver's view of the sign, and especially the view of a truck driver from his or her higher vantage point, would be obscured significantly. I note that Exhibit 20A, the Collision Analysis Report (see below) includes a document entitled "Roadway Description" that was prepared by one of the investigators. It includes the observation "Sign obscured on approach by trees". Thus, I find that the presence of this yield sign at the intersection is not a factor to be given any weight in my analysis.

[17] Mr. Lamb pointed out certain events that occurred as Mr. Conley was driving up to the intersection. For example, a vehicle turns from southbound Lyon Street to westbound Laurier Avenue and, in making that turn, comes very close to (or even crosses over) the centre line. Mr. Lamb pointed out as well that there was both vehicular and pedestrian traffic moving through the intersection on Lyon Street while Mr. Conley's truck was coming up to the intersection and as he is stopped. As Mr. Conley did not testify, I have no idea what, if any, effect this other traffic had on his ability to observe Ms. Jahan as he came up to Lyon Street.

[18] In the video, we observe the light for eastbound traffic change to a green arrow. Mr. Conley has been stopped for about ten seconds by that point. Approximately two seconds later, we observe Mr. Conley's truck slowly move into the intersection in a easterly direction. About a second later, it seems that Ms. Jahan moves in her lane in the same direction. We then lose sight of her due to the tree branches. At that point, the light switches to a solid green for eastbound traffic. Mr. Conley's truck then seems to enter the bicycle lane approximately a second later. He has not activated his turn signal. I note that the branches of the tree to which I have made earlier reference blocked the camera's view of Ms. Jahan being struck.

[19] The other video recording comes from a security camera located at a restaurant located on the northeast corner of the intersection. It is located much

closer to the intersection than the City of Ottawa traffic camera. Its line of sight is at more or less a diagonal angle to where Ms. Jahan had stopped. The view from this camera provides some details that are not evident from the traffic video recording. We observe Ms. Jahan stopped in her lane. We observe Mr. Conley's truck come to a complete halt behind the stop line for eastbound traffic. It remains stationary until the traffic light changes. The truck moves into the intersection and then begins to make a right-hand turn into the bicycle lane. Ms. Jahan has apparently moved eastwards as we no longer see her where she had been stopped. We do not see the collision due to the fact that it occurred to the south of the truck.

[20] I turn now to the evidence of Jean-Sebastien Rousseau. While Mr. Rousseau is not a police officer, he had an active role in their investigation. He was asked to assist the police investigators in conducting re-enactments of the events leading up to the death of Ms. Jahan. The videos (Go Pro) taken during the course of those re-enactments are exhibits at this trial.

[21] Mr. Rousseau is a supervisor of landfill operations for the City of Ottawa. He has significant experience in the operation of large trucks such as the one driven by Mr. Conley on September 1, 2016. He conducted the re-enactments in November 2016 and those efforts led to five Go Pro recordings. Basically, he was equipped with a Go Pro camera that he wore on his forehead and asked to drive a truck that was similar but not identical to the one that had been driven by Mr. Conley along Laurier eastbound to Lyon and then move into that intersection. The police controlled traffic in the area while the re-enactments were being conducted. They indicated on the roadway with pylons where the stop line for eastbound motor vehicle traffic was located. A person participating in the reenactments was placed on a bicycle at the stop line for eastbound bicycle traffic. The idea was clearly twofold. First of all, a viewer of the Go Pro recordings would be able to observe that a cyclist stopped at the intersection would be clearly visible for a significant distance to a driver coming up behind them. Secondly, the re-enactment attempted to reconstruct Mr. Conley's view of the bike lane from the cab of the truck as he stopped at the intersection prior to making his right-hand turn.

[22] While the reenactments were useful to me in the sense that they provided me with a general idea of what the driver of the truck could see as he approached that intersection, I did not derive any substantive benefit from viewing them. While it is clear to me that Mr. Conley would have been able to see Ms. Jahan stopped on her bicycle for the red light as he drove up to the intersection, I am able to come to that conclusion on the basis of the City of

Ottawa traffic camera video alone. In regards to the attempt by the investigators to reconstruct Mr. Conley's view of Ms. Jahan at the red light, there was no real attempt made to replicate the situation of Mr. Conley in the cab of his truck. For example, given the steep view angle from the driver's seat down to the bicycle lane immediately to the truck's right hand side, the exact placement of the Go Pro camera was crucial: the presence of a blind spot from the driver's perspective to the right of the vehicle is not controversial in this trial. Yet no care was taken to ascertain whether the vantage point of the camera worn by Mr. Rousseau during the re-enactment was the same as the vantage point of Mr. Conley. The placement of the Go Pro camera was predicated on Mr. Conley's height being five feet nine inches; Mr. Conley is five foot four inches. It is unclear whether the truck used in the reenactment is of the same dimensions as that driven by Mr. Conley on September 1, 2016. Mr. Rousseau was not provided with any instructions as to how to set the driver's seat height. The top of the head of the person who was placed in the position of Ms. Jahan may not have been at the same height as that of Ms. Jahan. The placement of that person at the intersection during the re-enactment was in error as the police investigators had not realized that in the interim between September 1, 2016 and the day of the re-enactment, the City of Ottawa had changed the placement of the bicycle lane stop line. Respectfully, I am unable to give these reenactments much weight in my analysis.

[23] Inherent in the operation of a motor vehicle is the existence of a driver's blind spot. A driver cannot see what is occurring at certain points close to their vehicle due to the configuration of its physical structure. For example, while the driver can look out the passenger side door window, he or she cannot look through the passenger side door itself. Thus, he or she would not be able to see an object close to that door but beneath the level of the window. This is not a subject requiring expertise. This is readily inferable using common sense.

[24] Significant effort was expended by both the Crown and the defence in regards to the existence and dimensions of a blind spot that possibly could have effected Mr. Conley while he was driving the truck in question on September 1, 2016. Both sides requested that I qualify their respective witness as an expert to that end. I denied both applications (see 2018 ONCJ 511 and 2018 ONCJ 523). Nonetheless, the non-expert evidence of the two witnesses in question here clearly supports the common-sense proposition that there was a blind spot. Their evidence provides me with its rough outlines. However, there is no positive evidence that Mr. Conley was effected by it. This leads me to my next point.

[25] The Crown sought a ruling on the voluntariness of a audio-recorded statement made by Mr. Conley on September 1, 2016 to the officer in charge of the investigation, Detective Gendron. The Crown advised me that they sought the ruling only to determine whether they would have that statement available for the purposes of cross-examination should Mr. Conley chose to testify in his own defence. I found that the statement was made voluntarily (see 2018 ONCJ 498). However, as Mr. Conley did not testify, the Crown did not seek to rely at all on that statement.

[26] As we have seen, Ms. Jahan was struck by the truck driven by Mr. Conley at approximately 7:48 a.m. Constable Chabine Tucker was the third police officer to arrive on scene. His arrival had been preceded by that of Constables Abid Nasim and George Mansour. Constable Nasim was uncertain about the exact time that he arrived on scene. However, Constable Monsour testified that he arrived on scene at 7:51 a.m. and that Nasim was already there. The officers referred to the need for crowd control and I heard from some of the people who were at the scene of the collision. Soon after his arrival, Tucker went over to the truck within which Mr. Conley was sitting. It was his evidence in chief that he asked Mr. Conley “Hey, are you okay?” to which he replied that he needed a cigarette and then uttered words to the effect that he had triple checked, that he had the right to go, and he had then proceeded into the intersection. The defence submits to me that this utterance is admissible as a spontaneous declaration/*res gestae* for the truth of its contents.

[27] In regards to the qualification of the utterance as admissible due to having been a spontaneous utterance, the defence referred me to *R. v. Nguyen*, 2015 ONCA 278 at paragraph 145:

Hearsay statements are generally inadmissible for the truth of their contents. Spontaneous declarations are an established exception to the hearsay rule and are presumptively admissible in evidence. Statements made under pressure or emotional intensity give the guarantee of reliability upon which the spontaneous declaration rule has traditionally rested: *R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531, at p. 540.

While I agree that this is general restatement of the law concerning this exception to the hearsay rule, the facts in *Nguyen* render it to be of no specific assistance to me in the case at bar. In that case, the spontaneous utterance in question was of a Crown witness who did testify at the trial and was thus available to be cross-examined. I further note that the facts reflecting the spontaneous nature of the utterance in question in *Nguyen* were case specific.

[28] The defence also referred me to the Manitoba Court of Appeal decision in *R. v. Head*, 2014 MBCA 59, where it was found that the trial judge had erred in finding that utterances Mr. Head had made to another person soon after the shooting were not spontaneous utterances; Mr. Head had attempted to adduce them through the testimony of a co-accused (*i.e.*, Spence). The examination of the spontaneity is fact driven. Once again, I note that the person whose utterance was being tendered as evidence: to wit, Mr. Head, did testify at the trial albeit after Mr. Spence (see at paragraph 19 of that decision).

[29] I am of the opinion that the utterances made by Mr. Conley to Constable Tucker are not admissible for the truth of their contents. Given the circumstances referred to above, by the time that he spoke to Constable Tucker, Mr. Conley would have had time to consider his potential legal jeopardy. He was clearly aware by that point that there was someone under his truck. He had seen the spectators. He had observed the police officers arriving. There would have been ample opportunity such that the possibility of concoction or distortion would be sufficient to render the utterances unreliable, (see, *e.g.*, *R. v. Beaulieu*, 2018 MBCA 120, *R. v. Schwartz* (1978), 40 C.C.C. (2d) 161 (N.S.C.A.), *R. v. Clark* 1983 CanLII (ON CA), *Ratten v. R.* (1972), 56 Cr. App. R. 18 (P.C.)). Furthermore, the importance of the author of the utterances submitting themselves to scrutiny through cross-examination is a much stressed policy consideration (*R. v. Campbell*, [1977] O.J. No. 1684 (C.A.), *R. v. Edgar*, 2010 ONCA 529). Thus, even if the utterances had been made in a context where the Court could assume reliability, I would still have excluded them unless Mr. Conley had testified.

[30] The Crown had a police accident reconstructionist testify: Detective Constable Alain Boucher. He testified as a lay witness. His collision analysis report was entered as an exhibit. It is a compilation of his efforts and those of other members of the investigative team. During the course of his testimony, both in-chief and while under cross-examination, various problems with the analysis became evident. Those problems have been mentioned above (*e.g.*, the problems with the re-enactment). It is interesting that the detective came to the ultimate conclusion that Mr. Conley may not have been able to see Ms. Jahan when they were both at their respective stop lines.

Relevant Statutes and the Law

[31] The statutory definition of criminal negligence is found in section 219(1) *Criminal Code*:

Every one is criminally negligent who

- (a) in doing anything, or
- (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

Mr. Conley is charged pursuant to section 220 *Criminal Code*:

Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

...

- (b) ... to life imprisonment.

[32] Mr. Conley is also charged with dangerous driving pursuant to section 249(1)(a) *Criminal Code*:

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

The maximum penalty for this offence where the dangerous driving causes death is fourteen years (section 249(4) *Criminal Code*).

[33] The relationship of the offence of dangerous driving to that of criminal negligence is that of a lesser and included offence (see, e.g., *R. v. Al-Kassem*, 2015 ONCA 320 at paragraph 8). Should I find that Mr. Conley is not guilty of dangerous driving causing death, he would also be not guilty of the more serious offence of criminal negligence causing death. Therefore, I will only turn to that more serious charge if I find that the Crown has proven the lesser offence beyond a reasonable doubt.

[34] The leading authority with respect to section 249(1) (a) *Criminal Code* is the Supreme Court of Canada decision in *R. v. Roy*, 2012 SCC 26. Cromwell J. provided guidance as to how trial courts are to approach such cases.

[1] Dangerous driving causing death is a serious criminal offence punishable by up to 14 years in prison. Like all criminal offences, it consists of two components: prohibited conduct — operating a motor vehicle in a dangerous manner resulting in death — and a required degree of fault — a marked departure from the standard of care that a reasonable person would observe in all the circumstances. The fault component is critical, as it ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. While a mere departure from the standard of care justifies imposing civil liability, only a marked departure justifies the fault requirement for this serious criminal offence.

[2] Defining and applying this fault element is important, but also challenging, given the inherently dangerous nature of driving. Even simple carelessness may result in tragic consequences which may tempt judges and juries to unduly extend the reach of the criminal law to those responsible. Yet, as the Court put it in *R. v. Beatty*, 2008 SCC 5 (CanLII), [2008] 1 S.C.R. 49, at para. 34, “If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy”. Giving careful attention to the fault element of the offence is essential if we are to avoid making criminals out of the merely careless.

...

[28] In *Beatty*, the majority of the Court spoke through the reasons of Charron J. which of course are the authoritative statement of the relevant principles. In brief, the Court decided as follows. The *actus reus* of the offence is driving in a manner dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably have been expected to be at that place (s. 249(1)(a) of the *Criminal Code*). The *mens rea* is that the degree of care exercised by the accused was a *marked* departure from the standard of care that a reasonable person would observe in the accused’s circumstances (*Beatty*, at para. 43). The care exhibited by the accused is assessed against the standard of care expected of a

reasonably prudent driver in the circumstances. The offence will only be made out if the care exhibited by the accused constitutes a *marked* departure from that norm. While the distinction between a mere departure from the standard of care, which would justify civil liability, and a *marked* departure justifying criminal punishment is a matter of degree, the lack of care must be serious enough to merit punishment (para. 48).

[29] It will be helpful to reiterate the main elements of the majority reasons in *Beatty*.

(2) The Importance of the Fault Requirement for Dangerous Driving

[30] A fundamental point in *Beatty* is that dangerous driving is a serious criminal offence. It is, therefore, critically important to ensure that the fault requirement for dangerous driving has been established. Failing to do so unduly extends the reach of the criminal law and wrongly brands as criminals those who are not morally blameworthy. The distinction between a *mere* departure, which may support civil liability, and the *marked* departure required for criminal fault is a matter of degree. The trier of fact must identify how and in what way the departure from the standard goes *markedly* beyond mere carelessness.

[31] From at least the 1940s, the Court has distinguished between, on the one hand, simple negligence that is required to establish civil liability or guilt of provincial careless driving offences and, on the other hand, the significantly greater fault required for the criminal offence of dangerous driving (*American Automobile Insurance Co. v. Dickson*, 1943 CanLII 34 (SCC), [1943] S.C.R. 143). This distinction took on added importance for constitutional purposes. It became the basis for differentiating, for division of powers purposes, between the permissible scope of provincial and federal legislative competence as well as meeting the minimum fault requirements for crimes under the *Canadian Charter of Rights and Freedoms* (*O’Grady v. Sparling*, 1960 CanLII 70 (SCC), [1960] S.C.R. 804; *Mann v. The Queen*, 1966 CanLII 5 (SCC), [1966] S.C.R. 238; *Hundal*). Thus, the “marked departure” standard underlines the seriousness of the criminal offence of dangerous driving, separates federal criminal law from provincial regulatory law and ensures that there is an appropriate fault requirement for *Charter* purposes.

[32] *Beatty* consolidated and clarified this line of jurisprudence. The Court was unanimous with respect to the importance of insisting on a significant fault element in order to distinguish between negligence for the purposes of imposing civil liability and that necessary for the imposition of criminal punishment. As Charron J. put it on behalf of the majority, at paras. 34-35:

If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty.

In a civil setting, it does not matter how far the driver fell short of the standard of reasonable care required by law. The extent of the driver's liability depends not on the degree of negligence, but on the amount of damage done. Also, the mental state (or lack thereof) of the tortfeasor is immaterial, except in respect of punitive damages. In a criminal setting, the driver's mental state does matter because the punishment of an innocent person is contrary to fundamental principles of criminal justice. The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment. [Emphasis in original]

[35] Cromwell J. went on to review the *actus reus* required by this offence. Referring to the Supreme Court's earlier decision in *R. v. Beatty*, 2008 SCC 5, and as he had remarked earlier in the decision, section 249(1)(a) *Criminal Code* itself provides a clear definition of the prohibited conduct: driving in a manner dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably have been expected to be at that place. He continued:

[34] In considering whether the *actus reus* has been established, the question is whether the driving, viewed objectively, was dangerous to the public in all of the circumstances. The focus of this inquiry must be on the risks created by the accused's manner of driving, not the consequences, such as an accident in which he or she was involved. As Charron J. put it, at para. 46 of *Beatty*, "The court must

not leap to its conclusion about the manner of driving based on the consequence. There must be a meaningful inquiry into the manner of driving”. A manner of driving can rightly be qualified as dangerous when it endangers the public. It is the risk of damage or injury created by the manner of driving that is relevant, not the consequences of a subsequent accident. In conducting this inquiry into the manner of driving, it must be borne in mind that driving is an inherently dangerous activity, but one that is both legal and of social value (*Beatty*, at paras. 31 and 34). Accidents caused by these inherent risks materializing should generally not result in criminal convictions.

[35] To summarize, the focus of the analysis in relation to the *actus reus* of the offence is the manner of operation of the motor vehicle. The trier of fact must not simply leap from the consequences of the driving to a conclusion about dangerousness. There must be a meaningful inquiry into the manner of driving.

[36] Cromwell J. in *Roy* then discussed the fault element of dangerous driving followed by the necessary examination of what is meant by a ‘marked departure’.

[36] The focus of the *mens rea* analysis is on whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances (*Beatty*, at para. 48). It is helpful to approach the issue by asking two questions. The first is whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the second question is whether the accused’s failure to foresee the risk and take steps to avoid it, if possible, was a *marked departure* from the standard of care expected of a reasonable person in the accused’s circumstances.

[37] Simple carelessness, to which even the most prudent drivers may occasionally succumb, is generally not criminal. As noted earlier, Charron J., for the majority in *Beatty*, put it this way: “If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy” (para. 34). The Chief Justice expressed a similar view: “Even good drivers are occasionally subject to momentary lapses of attention. These may, depending on the circumstances, give rise to civil liability, or to a

conviction for careless driving. But they generally will not rise to the level of a marked departure required for a conviction for dangerous driving” (para. 71).

[38] The marked departure from the standard expected of a reasonable person in the same circumstances — a modified objective standard — is the minimum fault requirement. The modified objective standard means that, while the reasonable person is placed in the accused’s circumstances, evidence of the accused’s personal attributes (such as age, experience and education) is irrelevant unless it goes to the accused’s incapacity to appreciate or to avoid the risk (para. 40). Of course, proof of subjective *mens rea* — that is, deliberately dangerous driving — would support a conviction for dangerous driving, but proof of that is not required (Charron J., at para. 47; see also McLachlin C.J., at paras. 74-75, and Fish J., at para. 86).

(5) Proof of the “Marked Departure” Fault Element

[39] Determining whether the required objective fault element has been proved will generally be a matter of drawing inferences from all of the circumstances. As Charron J. put it, the trier of fact must examine all of the evidence, including any evidence about the accused’s actual state of mind (para. 43).

[40] Generally, the existence of the required objective *mens rea* may be inferred from the fact that the accused drove in a manner that constituted a *marked departure* from the norm. However, even where the manner of driving is a marked departure from normal driving, the trier of fact must examine all of the circumstances to determine whether it is appropriate to draw the inference of fault from the manner of driving. The evidence may raise a doubt about whether, in the particular case, it is appropriate to draw the inference of a marked departure from the standard of care from the manner of driving. The underlying premise for finding fault based on objectively dangerous conduct that constitutes a marked departure from the norm is that a reasonable person in the position of the accused would have been aware of the risk posed by the manner of driving and would not have undertaken the activity: *Beatty*, at para. 37.

[41] In other words, the question is whether the manner of driving which is a marked departure from the norm viewed in all of the circumstances, supports the inference that the driving was the result of a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited.

[42] Driving which, objectively viewed, is simply dangerous, will not on its own support the inference that the accused departed markedly from the standard of care of a reasonable person in the circumstances (Charron J., at para. 49; see also McLachlin C.J., at para. 66, and Fish J., at para. 88). In other words, proof of the *actus reus* of the offence, without more, does not support a reasonable inference that the required fault element was present. Only driving that constitutes a marked departure from the norm may reasonably support that inference.

Analysis

[37] My analysis is obviously informed by the judgment of the Supreme Court of Canada in *Roy* (see above) wherein there was an explicit discussion of the two elements of the this criminal offence: the *actus reus*, in other words the actual actions; and the *mens rea*, in other words, the intent behind the actions. As indicated in that decision, the *actus reus* of dangerous driving is determined by analyzing whether the accused was

driving in a manner dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably have been expected to be at that place

while keeping in mind that a trial judge “must not simply leap from the consequences of the driving to a conclusion about dangerousness.” The *mens rea* is ascertained by examining whether the degree of care that he or she exercised in performing the *actus reus*

was a *marked* departure from the standard of care that a reasonable person would observe in the accused’s circumstances ... [that care to be] assessed against the standard of care expected of a reasonably prudent driver in the circumstances.

I feel it important to reiterate the passage from *Roy* where the Supreme Court stressed that

[t]he offence will only be made out if the care exhibited by the accused constitutes a *marked* departure from that norm. While the distinction between a mere departure from the standard of care, which would justify civil liability, and a *marked* departure justifying criminal punishment is a matter of degree, the lack of care must be serious enough to merit punishment.

[38] I turn now to the evidence related to the *actus reus* of the offence of dangerous driving in Mr. Conley's case. The Crown has submitted to me that Mr. Conley's driving at the intersection that day was dangerous at two discrete points. First of all, Mr. Ramsay submits that by not signaling his intention to make a right hand turn and then proceeding into the intersection as a prelude to that turn while faced with a green arrow traffic signal, Mr. Conley was engaged in dangerous driving. Secondly, it is submitted, the movement forward after the truck had initially stopped with Ms. Jahan now underneath it was also driving that should be characterized as dangerous.

[39] The first point: fail to signal and proceed to turn on a green arrow. These actions are both governed by the *Highway Traffic Act*. Obviously, it would be wrong to say that a failure to respect the *HTA* automatically renders a driver's actions as dangerous in the sense that it is meant by s. 249(1)(a) *Criminal Code*. But clearly such a failure can be an element leading to a finding of 'dangerousness' (see, for example, *R. v. Degoe*, CanLII 17772 (ON CA). *R. v. Beatty*, 2008 SCC 5 at paragraph 65 per McLachlin C.J.C.).

[40] The evidence here is that Mr. Conley turned onto Laurier Avenue after properly signaling his intention. He then drove eastwards at an appropriate speed to the intersection with Lyon Street. He stopped for approximately ten seconds at the red light behind the stop line. He waited for the light to turn green. It did so, albeit not a full green signal. He slowly moved into the intersection without signaling his intention and then made the right hand turn. He stopped his truck immediately upon realizing that something had happened.

[41] The defence and the Crown take different positions about the significance of Mr. Conley having moved into the intersection on a green arrow as a prelude to making his turn. The defence submits that it is allowed so long as the actual turn is not effectuated before the light has turned to a full green. The Crown's position is that a driver who has the intention to make a turn and is faced by a green arrow must not move until the signal turns to a full green. Without deciding this issue, I am going to assume for the purposes of this judgment that the Crown

is correct, that Mr. Conley was prohibited by s. 144(14) *HTA* from proceeding into the intersection on the green arrow.

[42] From the time that we first observe Mr. Conley's truck turn onto Laurier Avenue until he makes the turn and strikes Ms. Jahan, he can be faulted for only two things: not signaling that he was going to turn and pre-empting the full green by moving into the intersection preliminary to turning. The combination of these two faults along with the presence of Ms. Jahan in the bicycle lane waiting for the green arrow to proceed eastwards is to my mind sufficient to establish the *actus reus* of the offence, in other words, that the driving was dangerous to the public. The importance of signaling when about to make any turn is obvious. That importance is the greater when a driver anticipates the traffic light as any person potentially in the path of the turning vehicle would not alerted to the driver's intention.

[43] Yet, I do not find that the combination of these two faults in the context of the totality of Mr. Conley's driving represent a marked departure from the standard of care that a reasonable person would exercise in the circumstances of this case. Mr. Conley's driving on Laurier Avenue was seemingly faultless. He signaled to turn onto Laurier. He was not speeding. He stopped behind the stop line at Lyon Street for the red light. He did not move into the intersection until the light had turned green. Once he became aware that something had occurred, he stopped his truck. I accept the Crown's submission that Mr. Conley must have seen Ms. Jahan as she waited for the light to turn green as he drove up to the intersection. But seeing is different than noticing at a busy intersection and once stopped beside her at the stop line, I infer that the blind spot in all likelihood shielded her from his view. Given the careful way in which Mr. Conley had been driving, I find that the evidence with respect to this first point has failed to convince me that the manner in which he made the turn was a marked departure from the norm.

[44] I turn now to the Crown's second point. Mr. Ramsay submitted that Mr. Conley's "decision to inch his dump truck forward after Ms. Jahan was pinned under his vehicle despite the obvious and auditory cues and their implications of Mr. Strickland [sic] in and of itself is a marked departure from the standards of a reasonably prudent driver." The context of this submission is that at the point that Ms. Jahan went under the truck, various bystanders tried to signal to Mr. Conley that he should stop. Mr. Hogan described the truck coming to a stop. He then heard a sound that he believed was the sound of airbrakes releasing and the truck moved slowly forward a foot at most. Tragically, this was sufficient to cause Ms. Jahan's death. The school bus driver, Mr. Potvin, testified in a similar

fashion. He described the truck jerking forward and onto Ms. Jahan. He testified that he could see the face of Mr. Conley at that point and it seemed to him that the driver was completely unaware that there was someone under the truck.

[45] There is no evidence before me as how air brakes function; this is assuming that the sound testified to by Mr. Hogan was indeed the sound of airbrakes. Furthermore, if Mr. Conley did decide to move the truck forward at that point, given that he clearly was not aware of the nature of the problem, I find that that action, while leading to tragic consequences, would not have been a marked departure from the norm.

Conclusion

[46] In a respected scholarly legal text, Manning, Mewitt and Sankoff Criminal Law (4th) at 1079-80 we find the following observation:

“Driving is an ordinary activity with potential to cause considerable harm, and road accidents occur every hour of every day across the country. For the most part, the people involved live otherwise crime-free lives, and find themselves in front of the courts responding to events of a highly tragic nature. While most accidents are preventable, this does not mean that every collision involves criminal conduct, even where a member of the public has died or is seriously harmed in the process.”

[47] Mr. Conley, I find you not guilty of the offence of dangerous driving causing death and dismiss that count. As a result, I also find you not guilty of the count of criminal negligence causing death and dismiss that count as well.

Released: February 5th, 2019

Signed: Justice David A. Berg