Citation: *R. v. McCluskey*, 2019 YKTC 10

Date: 20190304
Docket: 17-00348
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

MARK MCCLUSKEY

Appearances:
Leo Lane — Counsel for the Crown
Joni Ellerton — Counsel for the Defence

REASONS FOR JUDGMENT

[1] Mark McCluskey has been charged with having committed offences contrary to ss. 255(2) and (2.1) of the *Criminal Code*.

[2] At the outset of the trial an Agreed Statement of Facts was filed.

[3] Mr. McCluskey has admitted that on January 20, 2017 he was operating a motor vehicle while he had a blood alcohol level in the range of 186 to 225 mg%, and while his ability to do so was impaired by his consumption of alcohol.

[4] He has further admitted that as a result of the accident he was involved in, Ms. Naomi Blindheim and Ms. Kimberly Johnnie suffered bodily harm.

[5] He contests, however, that he caused the accident that resulted in the injuries to Ms. Blindheim and Ms. Johnnie. He further denies that his impairment by alcohol was a contributing factor to the cause of the accident.

[6] It is undisputed that Mr. McCluskey was driving a motor vehicle from the Alaska Highway in a westbound direction, (also referred to as northbound in the evidence), on the South Access/Hamilton extension (the "Extension") when his vehicle went out of control and crossed the median (comprised of a shallow ditch), striking head-on the eastbound (also referred to as southbound) vehicle being driven by Ms. Blindheim. Ms. Johnnie was a passenger in Mr. McCluskey's vehicle. The bodily harm suffered by Ms. Blindheim and Ms. Johnnie was a direct result of this collision.

Testimony of Witnesses

Naomi Blindheim

[7] Ms. Blindheim testified that as she was driving eastbound on the Extension she noted a lot of traffic behind her, but only Mr. McCluskey's vehicle coming towards her. She saw his vehicle start to swerve from side to side, losing control. She slowed down and saw his vehicle cross the median, flipping up and rolling towards her. It landed on the hood of her vehicle.

[8] Ms. Blindheim stated that at the time of the accident, approximately 9:30 a.m., it was daylight, as the sun was coming up. There was snow and ice on the road. She was travelling at approximately the posted speed limit of 70 km/h.

[9] Ms. Blindheim was unable to say whether Mr. McCluskey's vehicle struck snow or ice on the road.

[10] Ms. Blindheim was flown to Vancouver where she spent several days in hospital. She suffered fractured ribs, nose and cheekbone, facial lacerations and scarring, a lost front tooth, a concussion, and a torn rotator cuff. She continues to require therapy for her shoulder. She has ongoing breathing issues from the broken nose. She required a second reconstructive surgery in April 2018.

Cst. Leslie

[11] Cst. Leslie testified that it was daylight and clear skies at the time that she responded to the accident. There was snow on the road.

[12] Mr. McCluskey was lying on the road being treated. He was obviously in considerable pain, upset and swearing. She accompanied him on transport to the hospital. He exhibited indicia of impairment, including a strong odour of liquor, slurred speech and glossy bloodshot eyes.

Cst. Kidd

[13] Cst. Kidd was qualified as an expert in the field of motor vehicle collision analysis. He filed a report as well as testifying at trial.

[14] He attended at the scene of the accident at approximately 10:09 a.m.

[15] The sky was clear and the temperature was -28 Celsius. There was no precipitation. It was windy. There was no sunlight on the area of the road where the accident occurred.

[16] Cst. Kidd described the surface of the roadway as being exposed asphalt with loose gravel and icy patches. He did not recall the size of the icy patches, but he did not believe that these icy patches were enough to explain the skidding of Mr. McCluskey's vehicle. He described the conditions as being normal winter driving conditions with nothing surprising on the stretch of road relevant to the accident. The driving portion of the road had been regularly plowed and travelled.

[17] He testified that there was an approximate 2.1 degree downhill grade in the northbound lane leading up to the scene of the accident. There was a slight counterclockwise bend in the road at the start of this gradual downhill grade. He believed that the loose gravel had been spread by city work crews.

[18] Cst. Kidd was unable to determine the speed at which Mr. McCluskey's vehicle had been travelling. No usable data was able to be obtained from the data recorder in Mr. McCluskey's vehicle. A mechanical inspection of Mr. McCluskey's vehicle revealed no mechanical or other defects that could have contributed to the collision. While the tire pressure on his vehicle was lower than recommended, Cst. Kidd did not believe this to have resulted in any significant difference in the operation of the vehicle. He was also unable to determine at what point the brakes of the vehicle were applied.

[19] Cst. Kidd noted no evidence of swerving once the vehicle began to slide towards the median. He noted the sliding marks to be very straight.

[20] Cst. Kidd concluded that Mr. McCluskey lost control of his vehicle, which then went into a counterclockwise spin, passed through the median and then flipped onto its roof, where it continued sliding until it struck Ms. Blindheim's vehicle head-on. The collision "...was caused by [Mr. McCluskey's] vehicle encroaching upon [Ms. Blindheim's] vehicle's path of travel".

[21] Cst. Kidd was unable to come to a conclusion as to why Mr. McCluskey's vehicle went out of control. He also noted that there was no evidence to show that there had been any problems in how the vehicle was being driven before the vehicle went out of control.

[22] Photographs were provided which showed the location of the accident and the road surfaces in the immediate area. These photographs are consistent with Cst. Kidd's testimony, including that the road conditions were normal for winter.

Clifton Ho

[23] Clifton Ho was qualified as an expert in the areas of providing interpretive evidence with respect to the physiology of alcohol including absorption, distribution, and elimination of alcohol, and pharmacology of alcohol, including the effects of alcohol on mental and motor function and how it relates to the operation of a motor vehicle.

[24] His expert report was filed as an Exhibit. He also testified at trial.

[25] His report is divided into two primary areas; the first area related to calculating Mr. McCluskey's blood alcohol level at the time of driving, and the second area to the impacts of alcohol consumption on the human body. As it is agreed by counsel that Mr.

McCluskey's blood alcohol level was between 186 and 225 mg% at the time of driving, I will only focus on Mr. Ho's evidence on the latter area.

[26] Mr. Ho states in his report that:

> Alcohol is a central nervous system depressant, meaning it slows down brain activity. The intensity of the effect is directly proportional to the concentration of alcohol in the blood. The first functions affected are the complex processes, such as divided attention tasks, followed by more basic processes such as the coordination of body movement. The following is a list of the expected symptoms of an average social drinker at various blood alcohol concentrations.
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> ...
>
> > d. A BAC in the range of 150 to 300 mg% is generally associated with moderate to severe intoxication. As the BAC increases, the symptoms of intoxication become more intense, creating marked problems with gross motor control and coordination, leading to balance problems, staggering gait and notably slurred speech. The performance of physical tasks is likely to be adversely affected due to loss of both fine and gross motor control and coordination. A heavily intoxicated person may display significant mental and sensory impairment, exaggerated emotional states, rapid changes in emotional state, impaired memory and mental confusion.

[27] Mr. Ho writes that the more accustomed an individual is to consuming alcohol, the higher the BAC required to display these symptoms, and vice-versa.

[28] Mr. Ho further states that:

> 6. …As the BAC rises, the number of driving skills which become impaired increases as does the severity of the impairment such that at 80 mg% an individual will exhibit impairment in some or all of the skills necessary to safely operate a motor vehicle. …
>
> 7. Driving is a complex divided attention task, meaning an individual must split their attention between multiple tasks while operating a motor vehicle. A driver must maintain the vehicle in a lane at an appropriate speed while

> being vigilant for potential hazards, other vehicles, pedestrians and traffic signals and signs. Alcohol affects both the motor skills and the ability to use sensory information when operating a motor vehicle, including:
>
> …
>
> c. Fine Motor Control and Coordination – Alcohol can make it difficult to keep the vehicle in a proper lane, cause weaving within the lane, weaving outside of the lane, crossing the centre line into the oncoming lane, over compensation during corrections, taking corners too narrow or too wide, and problems with acceleration and braking.
>
> d. Reaction Time – Alcohol decreases the rate at which information is processed in the brain. This results in increasing the time it takes to recognize a potentially hazardous situation, determine a course of action and execute the action. It may also cause an individual to take no action at all when faced with a hazardous situation.

[29] Mr. Ho's in-court testimony expanded on what he stated in his report, noting in particular that as the blood alcohol level of a driver increases from 100 to 150 and 200 mg% there is a significant increase in the likelihood of the driver being involved in a motor vehicle accident.

Analysis

[30] I have recently reviewed the law with respect to s. 255(2) and (2.1) offences in the cases of ***R.*** v. ***Kuhl****,* 2018 YKTC 11 and ***R.*** v. ***Marshall***, 2018 YKTC 25.

Over 80 mg% causing bodily harm (255(2.1))

[31] In order to secure a conviction under s. 255(2.1) the Crown is required to prove beyond a reasonable doubt that Mr. McCluskey was operating the motor vehicle with a blood alcohol level exceeding 80 mg%, and that he caused the accident in which Ms. Blindheim and Ms. Johnnie suffered bodily harm.

[32] The Crown is not required to prove a causative link between Mr. McCluskey's elevated blood alcohol level and this being a contributing factor to the accident.

[33] Given Mr. McCluskey's conceded blood alcohol level and the admissions that Ms. Blindheim and Ms. Johnnie suffered bodily harm, a conviction will result if I am satisfied beyond a reasonable doubt that Mr. McCluskey caused the accident. If I have a reasonable doubt in this regard, then despite Mr. McCluskey's blood alcohol level and the resultant bodily harm suffered by the victims, he can only be convicted of the lesser s. 253(1)(b) offence.

[34] In paras. 56 and 57 of ***Kuhl*** I stated:

> 56 I am in agreement with the reasoning in ***R***. v. ***Koma***, 2015 SKCA 92 in paras. 25-32.
>
> 57 As stated in paras. 31 and 32:
>
> > The absence from s. 255(2.1) of a causal connection similar to that found in s. 255(2) reflects the difficulty of requiring the Crown to prove an individual has caused an accident *because* he or she was over .08, without the Crown leading some form of expert evidence as to the effect of blood alcohol concentrations in excess of .08 on *that* individual's ability to operate a motor vehicle that is causally tied to the accident in question. However, this kind of evidentiary difficulty does not arise in cases of impaired driving or dangerous driving where objective indicia of an individual's impairment or recklessness provide an evidentiary basis for a court to conclude the causes of an accident might include an inability to operate a motor vehicle brought on by impairment, negligence or recklessness. For this reason, the causation element of the offence of impaired driving causing bodily harm (s. 255(2)) is different. There, the Crown has to prove a causal link between an individual's impaired operation of a motor vehicle and bodily harm to another person.
> >
> > Thus, for a conviction to lie under s. 255(2.1) of the *Criminal Code*, I conclude the Crown must prove beyond a reasonable

> doubt that an individual, while operating a motor vehicle or in care or control of a motor vehicle, had a blood alcohol concentration exceeding 80 mg of alcohol in 100 mL of blood and the individual caused an accident that resulted in bodily harm to another; but, s. 255(2.1) does not require the Crown to prove the individual's over .08 blood alcohol concentration caused the accident…

[35] Despite it being obvious that the collision resulted entirely from Mr. McCluskey's vehicle leaving its lane and crossing the median, striking Ms. Blindheim's vehicle head-on, with no fault to be found in Ms. Blindheim's actions, it is open to Mr. McCluskey to raise a reasonable doubt that he caused the accident by pointing to evidence which may be seen as providing alternative causes of the collision other than his actions.

[36] The causation requirement was considered in ***R.*** v. ***Phan***, 2015 ONSC 2088 in para. 69:

> 69 The law recognizes, and as this case demonstrates, events or consequences may have more than one cause. In *Smithers v. The Queen*, [1978] 1 S.C.R. 506, the Supreme Court held that liability may attach when it is proved that the accused is a *contributing* cause "beyond the *de minimis* range." The Court's decisions in *Nette* and *Maybin* favour the use of more straightforward language -- the Crown must prove that the accused was a "significant contributing cause" of the relevant consequence. This new formulation is meant to envelope both factual and legal causation: see *R. v. Talbot* (2007), 217 C.C.C. (3d) 415 (Ont. C.A.), at p. 437.

[37] In ***Phan*** the Court was satisfied that factual causation had been established, however, the Court moved on to consider whether the additional element of legal causation was established. In para. 73 the Court stated:

> Legal causation is a more difficult matter. While factual causation seeks to determine what brought about an event or consequence in the physical world, legal causation focuses on whether the conduct that gave rise to

> that result is blameworthy. Again, the Crown is not required to prove that Mr. Phan was the only cause of Ms. Williams' death. The question is whether Mr. Phan was blameworthy in Ms. Williams' death, *i.e.* whether he was a significant contributing cause of her death: see Stuart, *supra*, at p. 157.

[38] In paras. 78 - 82 of ***Phan*** the Court provided examples where legal causation was not established, notwithstanding the finding of factual causation, noting circumstances where it was found that the accident resulted from the actions of another driver forcing evasive manoeuvres, and of pedestrians by moving into the path of a vehicle.

[39] Other examples could include a sudden whiteout, unforeseen black ice, an animal jumping unexpectedly onto the roadway, or a mechanical failure. These are all circumstances that may result in an accident such that it cannot be said that the accused driver of the vehicle "caused" the accident.

[40] If the accident is unavoidable, then legal causation is not proved (See ***R.*** v. ***Gentles***, 2016 BCCA 68 at para. 8).

[41] In this case, there is little in the evidence to point to there being a reason outside of the control of Mr. McCluskey for the accident. While there were icy patches on the road surface, there is no indication in the evidence that these icy patches were particularly hazardous. The driving conditions were normal for winter and the visibility was clear. There was gravel on the road.

[42] There were a number of vehicles traveling on the road, albeit at the time noted to be primarily travelling in an eastbound direction on the roadway. There is no evidence

that any of these vehicles were going at a reduced rate of speed due to unusual or treacherous road conditions. Ms. Blindheim testified that she was going at approximately the posted speed limit of 70 km/h with a number of vehicles behind her.

[43] There is no evidence before me that Mr. McCluskey's vehicle struck an icy patch on the roadway and that doing so caused him to lose control of the vehicle. I am not prepared to speculate, to the extent that it is capable of creating a reasonable doubt in my mind, that this is what occurred. A "possibility" in the absence of any evidence, direct or circumstantial, that is capable of raising that possibility beyond mere speculation is not capable of raising a reasonable doubt.

[44] On the evidence, I am satisfied that Mr. McCluskey's failure to maintain control of the vehicle he was driving is for reasons attributable to his actions or inactions, notwithstanding that I cannot point to any particular action or inaction that, in and of itself, can be shown to have been the reason for him to lose control.

[45] Mr. McCluskey had a responsibility to maintain control of the vehicle and he failed to do so, thus causing the accident. I find that there was no other factor outside of his control that raises a reasonable doubt in this regard.

[46] I am satisfied that the Crown has proven, beyond a reasonable doubt, that Mr. McCluskey caused the accident, both factually and legally, and, as such he is convicted of the s. 255(2.1) offences.

Impairment causing bodily harm (255(2))

[47] In order to be convicted of this offence, the evidence must satisfy me beyond a reasonable doubt, that Mr. McCluskey's level of impairment through the consumption of alcohol was a contributing factor, more than *de minimus*, to the cause of the accident.

[48] As stated in ***R.*** v. ***Zotich***, 2018 BCSC 1735 at paras. 56, 57, and 58:

> 56 As stated by Madam Justice Humphries in *R. v. Stump*, 2011 BCSC 660 at para. 74:
>
> > The law on causation is clear. If the impaired driving is a contributing cause beyond *de minimus*, to the bodily injuries, then causation is proven.
>
> 57 One must remember that the fact of an accident itself does not prove that it was caused by impairment (*Stump* at para. 75). If the accident was unavoidable, then causation has not been proven (*R. v. Phan*, 2015 ONSC 2088 at para. 77; *R. v. Gentles*, 2016 BCCA 68 at para. 8).
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> 58 The law related to the test for causation in the context of drinking and driving causing death was specified in *Gentles* at paras. 14-16 as arising from *R. v. Andrew* (1991), 91 C.C.C. (3d) 97 at 120 and clarified in *R. v. Cabral*, 2001 MBCA 10. The pertinent portions from *Gentles* state:
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> > [14] ... :
> >
> > > I am satisfied that, so long as one bears in mind the distinction between a motorist driving in an impaired condition who is involved in an accident, and the motorist driving in an impaired condition whose impaired driving ability (as evidence by driving conduct, or failure to react or to make a certain judgment) comprises a contributing cause outside of the de minimis range to the victim's bodily harm or death, the Smithers test is appropriate to apply to the offences under s. 255(2) and (3).
> >
> > [Emphasis in original]
> >
> > [15] In *Andrew*, the Court concluded that the expert evidence of the effect of alcohol on a driver, along with the pattern of

> irrational driving, was sufficient to sustain the trial judge's finding of causation.
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> [16] ... :
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> ...
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> [13] The law does not provide that if you are impaired and involved in an accident you are automatically guilty of impaired driving causing death or bodily harm. It must be proven that the impairment was a contributing cause of the accident. Some fault on the part of the driver must be found, aside from the fact of impairment alone.
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> [14] As well, the law does not provide that if you drive while impaired, you are automatically guilty of dangerous driving. It must still be proven that the manner of driving was a marked departure from the norm.
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> [15] On the facts as found by the trial judge, the Crown failed to prove beyond a reasonable doubt that the death and the injuries came about because of the impairment or manner of driving of the respondent.

[49] An example where impairment was not proven as a contributing factor to an accident is found in ***Zotich***. The Court stated in para 60:

> While Chan testified as to the effect of alcohol generally on a driver, there is no evidence here, apart from the accident itself, of a pattern of irrational driving that could establish causation. There is no evidence that Zotich was driving at an excessive speed, or that he was in the wrong lane, or that he failed to react to a danger on the road. From Zotich's statements to police, it is concluded that he saw Gush's vehicle and swerved to avoid it. He didn't know why Gush was outside his vehicle or why he was stopped on the road. There was no reason for Zotich to have expected Gush to be there: there had been no radio contact. Gush's presence in the driving lane on the driver's side of his vehicle, just past the crest of the bridge where the paved section of the bridge met the gravel of the road, created a hazard that was particularly acute given that it was dusk and that the mud colour of his vehicle matched the colour of the road. There was no evidence from the accident scene that established that Zotich's

> reaction time was abnormal. It is reasonable to conclude that Zotich did not have enough distance to avoid the collision or to stop. A reasonable and sober driver, driving in the same circumstances, might well have struck Gush. The Crown has not proven that Zotich failed to take more effective evasive action because he was impaired.

[50] In ***R.*** v. ***White***, 1994 NSCA 77, the Court of Appeal overturned a trial judge's acquittal on a s. 255(2) charge. The Court stated:

> 48 Returning to this case, the trial judge correctly identified the proper test as being the de minimis test. However, in my view, he in fact applied the test which would be applicable to a sober driver. In suggesting that the improper movements of the respondent's vehicle leading up to the accident were consistent with the fatigue, confusion or excessive speed or inattention rather than impairment or rather than those factors caused by impairment, he was engaging in speculation which as a matter of law was not warranted on the basis of the facts found on the undisputed evidence. When a driver who has been found to be impaired loses control of the vehicle with no innocent explanation other than conjecture not grounded in the evidence, the causative link between the impaired driving and a death flowing from the resulting collision emerges in my opinion beyond a reasonable doubt.
>
> …
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> 51 …in the face of the trial judge's finding of impairment, one can take judicial notice that such a condition brings on exactly the kind of errors that occurred here and exactly the various conditions that the trial judge speculated upon as being consistent with the error of a sober driver.
>
> 52 Returning then to the final paragraph of the trial judge's decision which shows the basis on which he acquitted the respondent:
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> > In the absence of any direct evidence as to why the vehicle went to the shoulder of the road, I am unable to find that the only reasonable inference is that this error was caused by the fact that the driver's ability to operate the vehicle was impaired by alcohol. The movement is consistent with the driver suffering from fatigue, from a confusion as the result of a sudden appearance of light from oncoming headlights or from excessive speed or inattention. As I have reasonable doubt on this element of the offence, I must find the accused not guilty.

> 53 In my respectful opinion, these explanations for the respondent's driving consistent with other than a causal relationship between the impairment and the mishap are not rational conclusions. They are not based on evidence but based on conjecture and speculation totally inappropriate to the evidence and the finding of impairment. In acquitting on the basis of these conjectures, the trial judge made an error of law.

[51] I have found that Mr. McCluskey caused the accident. The question for me here is whether Mr. McCluskey's level of impairment was a contributing factor beyond *de minimus* to him causing the accident. If I have a reasonable doubt that his impairment was a contributing factor to the accident beyond the level of *de minimus*, I must acquit him of this charge, notwithstanding that I have convicted him on the s. 255(2.1) offence.

[52] In ***Phan***, at para. 64, the Court stated:

> In appropriate circumstances, impairment may be proved through expert evidence based on breath or blood test results: see *R. v. Letford* (2000), 150 C.C.C. (3d) 225 (Ont. C.A.), at p. 230, *R. v. Laprise* (1996), 113 C.C.C. (3d) 87 (Que. C.A.), at pp. 92-93 and *R. v. Hoffner* (2004), 24 M.V.R. (5th) 280 (Ont. S.C.J.), at para. 66. That is, there is no rule that prevents a trier of fact from relying on this type of evidence alone to conclude beyond a reasonable doubt that an individual's ability to operate a motor vehicle is impaired by alcohol. Moreover, the evidence need not prove profound or significant impairment. This element of the offence is satisfied if the evidence establishes any degree of impairment, from slight to great: see *R. v. Stellato* (1993), 78 C.C.C. (3d) 380 (Ont. C.A.), aff'd (1994), 90 C.C.C. (3d) 160.

[53] As noted in ***R***. v. ***Maxwell-Smith***, 2012 YKTC 76:

> 132 In *R. v. Andrews*, 1996 ABCA 23 (leave to appeal to the Supreme Court of Canada dismissed without reasons, [1996] S.C.C.A. No. 115), Conrad, J.A. for the majority stated at para. 23:
>
> > 23. Impairment is a question of fact which can be proven in different ways. On occasion, proof may consist of expert evidence, coupled with proof of the amount consumed. The driving pattern, or the deviation in conduct, may be unnecessary to prove impairment. More frequently, as suggested by Sissons

> C.J.D.C. in McKenzie, [1955] A.J. No. 38, proof consists of observations of conduct. Where the evidence indicates that an accused's ability to walk, talk, and perform basic tests of manual dexterity was impaired by alcohol, the logical inference may be drawn that the accused's ability to drive was also impaired. In most cases, if the conduct of the accused was a slight departure from normal conduct, it would be unsafe to conclude, beyond a reasonable doubt, that his or her ability to drive was impaired by alcohol. Put another way, as was done in Stellato, the conduct observed must satisfy the trier of fact beyond a reasonable doubt that the ability to drive was impaired to some degree by alcohol. McKenzie does not state a rule of law. It suggests a reasonable, common sense approach to the assessment of evidence necessary for proof. This was pointed out long ago by Kerans A.C.D.C.J. (as he then was) in R. v. Conlon (1978), 12 A.R. 267 at pp. 268-9:
>
> 'It was never the intention of McKenzie to say that impairment means marked impairment but rather to say that there must be a doubt when you are relying on physical signs alone and those signs are ambiguous.'"

[54] I do not find that such a reasonable doubt exists. I have already found that Mr. McCluskey caused the accident and that there were no other factors that contributed in order to absolve him of legal causation. He exhibited indicia consistent with impairment by alcohol and he had a significantly elevated blood alcohol level over twice the legal limit, placing him at a much greater likelihood of being involved an accident.

[55] The impacts of alcohol on the individual testified to by Mr. Ho are borne out in the actions of Mr. McCluskey which resulted in the collision. The delayed reaction time and tendency to overcorrect are entirely consistent with the level of impairment of Mr. McCluskey and the circumstances of the accident wherein he lost control of the vehicle at the beginning of a slight counterclockwise bend at the start of a slight downhill grade. I accept the evidence of Mr. Ho that Mr. McCluskey's high blood alcohol level establish

beyond a reasonable doubt that his ability to operate a motor vehicle was impaired by the consumption of alcohol.

[56] Even if Mr. McCluskey's loss of control of the vehicle were in conjunction with his vehicle simply striking an icy patch associated with normal driving conditions, a finding that I reiterate I was unable to make on the evidence, I would still have come to this conclusion. There are expectations on drivers in normal winter driving conditions to drive in a manner that takes into account these conditions while operating a motor vehicle. Impairment by alcohol to the extent that Mr. McCluskey was, 186 mg%, interfered with his ability to do so.

[57] I find that there is nothing in the circumstances that existed as adduced in the evidence before me that would raise a reasonable doubt in my mind as to Mr. McCluskey's impairment being a contributing factor to the cause of the accident beyond the *de minimus* range.

[58] As such, I find Mr. McCluskey guilty of the s. 255(2) offences as well.

[59] Pursuant to the principle in ***R.*** v. ***Kienapple***, [1975] 1 S.C.R. 729, these charges are conditionally stayed.

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COZENS T.C.J.