COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Thomas,*
2024 BCCA 20

Date: 20240123
Docket: CA48728

Between:

Rex

Respondent

And

Anthony Leslie Jonathon Thomas

Appellant

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated March 28, 2022 (conviction) (*R. v. Thomas*, 2022 BCSC 698, Victoria Docket 187419-3).

Counsel for the Appellant:	C.J. Nowlin
Counsel for the Respondent:	M.J. Sheardown
Place and Date of Hearing:	Victoria, British Columbia November 9, 2023
Place and Date of Judgment:	Vancouver, British Columbia January 23, 2024

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Stromberg-Stein

Summary:

Appellant was convicted of six driving offences — impaired driving causing death and bodily harm respectively, dangerous driving causing death and bodily harm, and having a detectable level of methamphetamine in his blood after causing a motor vehicle accident that resulted in the death of one woman and catastrophic bodily injury to her sister. Appellant did not testify at trial. There was evidence that he had driven unremarkably for some time before suddenly losing consciousness, whereupon his car crossed the median and hit the two sisters who were walking along the shoulder of the road. He alleged trial judge erred in law by concluding appellant was culpable for consequences of his driving while unconscious; failed to ask whether appellant's driving conduct was substandard on a civil standard before considering the criminal standard; improperly applied law in reaching conclusion on impairment drawn from circumstantial evidence; and erred in refusing to apply R. v. Kienapple to stay the less serious charges.

Held: Appeal allowed only to the extent of entering a conditional stay on the dangerous driving charges pursuant to Kienapple. Trial judge properly instructed himself on mens rea for impaired driving. He was satisfied mens rea was made out on dangerous driving charges by inference from appellant's deciding to drive while impaired, or by ascribing the foreseeability of a real risk to the public when he made that decision. Appellant was not convicted for the manner of his driving while unconscious; for that short period, there was no actus reus. Trial judge was not required to consider the civil standard of a 'mere' departure from the norm before engaging in analysis on the criminal standard of 'marked departure'. While the trial judge did not negate every hypothetical alternative that could be drawn from circumstantial evidence before him, he considered the totality of the evidence and found only a single reasonable inference — that appellant's sudden loss of consciousness was the result of his consumption of drugs. This finding was one that a properly instructed jury could reasonably render and thus did not warrant CA's intervention.

Pursuant to Kienapple, conditional stays were ordered on the lesser of multiple charges that form the same criminal wrong. In this case, trial judge based the convictions for dangerous driving solely on the appellant's decision to drive while intoxicated. A reasonable person in his circumstances would have foreseen that this created a risk of danger to users of the road. There was no additional and distinguishing element that went to guilt in the particular circumstances of trial court's findings in this case. CA conditionally stayed charges for dangerous driving causing death and bodily harm, leaving convictions for impaired driving in place.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The line drawn in Canadian criminal law between negligent conduct and conduct that is sufficiently morally blameworthy to justify criminal sanction has been the subject of much judicial attention over many years. This has been particularly so

in connection with negligence-based driving offences. At one point, the Supreme Court of Canada noted with apparent agreement Professor Stuart's description of the law relating to criminal driving offences as a "mess": see *Canadian Criminal Law* (2nd ed., 1987), cited in *R. v. Hundal* [1993] 1 S.C.R. 867 at para. 19. In that case, the Court resolved some of the confusion regarding *actus reus* and *mens rea* in such cases by adopting a "modified objective" test that would require the Crown to prove objectively dangerous driving, but also required courts to consider evidence relevant to an accused's circumstances that might raise a reasonable doubt as to whether a reasonable person *in his or her position* would or should have been aware of the risks posed by his or her conduct: see paras. 37–41. As stated by Cory J. for the Court:

> … a trier of fact may convict if satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place". In making the assessment, the trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation.
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> Next, if an explanation is offered by the accused, such as a sudden and unexpected onset of illness, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused. If a jury is determining the facts, they may be instructed with regard to dangerous driving along the lines set out above. There is no necessity for a long or complex charge. ... [At paras. 43–44; emphasis added.]

[2] Despite this clarification, questions continued after *Hundal* in connection with the distinction, if any, between "objectively dangerous driving" and a "marked departure" from the standard of care; and what types of evidence could be considered regarding an accused's mental state. These were addressed in *R. v. Beatty* 2008 SCC 5, where Charron J. for the majority described the two 'modifications' of the 'objective norm' used in deciding civil negligence:

> The *modified* objective test established by this Court's jurisprudence remains the appropriate test to determine the requisite *mens rea* for negligence-based criminal offences. As the label suggests, this test for penal negligence "modifies" the purely objective norm for determining civil negligence. It does

> so in two important respects. First, there must be a "marked departure" from the civil norm in the circumstances of the case. A mere departure from the standard expected of a reasonably prudent person will meet the threshold for civil negligence, but will not suffice to ground liability for penal negligence. The distinction between a mere departure and a marked departure from the norm is a question of degree. It is only when the conduct meets the higher threshold that the court may find, on the basis of that conduct alone, a blameworthy state of mind.
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> Second, unlike the test for civil negligence which does not concern itself with the mental state of the driver, the modified objective test for penal negligence cannot ignore the actual mental state of the accused. Objective *mens rea* is based on the premise that a reasonable person in the accused's position would have been aware of the risks arising from the conduct. The fault lies in the absence of the requisite mental state of care. Hence, the accused cannot avoid a conviction by simply stating that he or she *was not thinking* about the manner of driving. However, where the accused raises a reasonable doubt whether a reasonable person in his or her position would have been aware of the risks arising from the conduct, the premise for finding objective fault is no longer sound and there must be an acquittal. The analysis is thus contextualized, and allowances are made for defences such as incapacity and mistake of fact. This is necessary to ensure compliance with the fundamental principle of criminal justice that the innocent not be punished. [At paras. 7–8; emphasis added.]

The Court also confirmed at para. 6 that the Crown bears the onus of proving both *actus reus* and *mens rea*.

[3] Later in her reasons, Charron J. offered a much-quoted summary of the requirements for the *actus reus* and *mens rea* of dangerous driving charges:

> ... Of course, conduct that is found to depart markedly from the norm remains necessary to make out the offence because nothing less will support the conclusion that the accused acted with sufficient blameworthiness, in other words with the requisite *mens rea*, to warrant conviction. In addition, it may be useful to keep in mind that while the modified objective test calls for an objective assessment of the accused's manner of driving, evidence about the accused's actual state of mind, if any, may also be relevant in determining the presence of sufficient *mens rea*. I would therefore restate the test reproduced above as follows:
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> (a) The *Actus Reus*
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> The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place".

> (b) The *Mens Rea*
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> The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused. [At para. 43; emphasis added.]

[4] A more recent decision of the Supreme Court of Canada, *R. v. Roy* 2012 SCC 26, applied *Beatty* to a situation in which the defendant had proceeded from an unpaved back road onto a highway directly into the path of a tractor-trailer. He was left with no memory of the accident or events surrounding it. The Supreme Court allowed the appeal from his conviction for dangerous driving on the basis that the trial judge had failed to conduct a "meaningful inquiry" into whether he had displayed a marked departure from the standard of care to be expected of a reasonable person *in the same circumstances* — the *mens rea*. Again, the Court summarized the required analysis of *actus reus* and *mens rea* consistent with *Beatty*. In Cromwell J.'s words:

> 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.
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> (4) The *Mens Rea*
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> 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.
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> Simple carelessness, to which even the most prudent drivers may occasionally succumb, is generally not criminal. ...

> 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).
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> (5) Proof of the "Marked Departure" Fault Element
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> 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).
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> 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 also 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. [At paras. 35–40; emphasis added.]

[5] The Court concluded on the facts in *Roy* that the appellant's decision to pull onto the highway was "consistent with simple misjudgement of speed and distance in difficult conditions and poor visibility", and that the record disclosed only a "single and momentary error in judgment with tragic consequences." The appellant's decision did not support a reasonable inference that he had shown a "marked departure from the standard of care expected of a reasonable person in the same circumstances so as to justify conviction for the serious criminal offence of dangerous driving causing death." (At para. 55.) The appellant was acquitted.

[6] For the sake of completeness, I also note *R. v. Brown* 2022 SCC 18 *("Brown 2022*".) There the Supreme Court ruled that what was then s. 33 of the *Criminal Code* was unconstitutional. Section 33 blocked the defence of automatism for certain specified 'general intent' offences (not including dangerous driving.) The appellant

had consumed alcohol and “magic mushrooms”, which contained an illegal drug that can bring about hallucinations. These caused him to experience a “substance intoxication delirium” that was described as so extreme as to be “akin to automatism”. While in this delusional state, he broke into two houses and attacked and severely injured the occupant of one of them. Expert evidence established that he had no voluntary control over his conduct at the time even though he was capable of physical movement. He was convicted at trial of breaking and entering, aggravated assault and mischief to property.

[7] The appellant challenged the constitutionality of s. 33.1 and succeeded in the Supreme Court of Canada. The Court held that since the provision did not require objective foreseeability of the risk of falling into a state of automatism, much less the risk of consequential harm, it was constitutionally unsound. In the words of Mr. Justice Kasirer:

> … [A]s I have endeavoured to show, it is not enough that s. 33.1 captures only the blameworthiness associated with extreme self-intoxication when s. 33.1 fails to consider whether the offender knew or ought to have known that there was a risk they would lose control of their actions and thereby risk causing harm to others. Because s. 33.1 does not build in a criterion of objective foreseeability, it is impossible to say who, among those who voluntarily ingest intoxicants, has the degree of blameworthiness that would justify the stigma and punishment associated with the underlying defence with which they are charged. [At para. 156; emphasis added.]

Brown 2022 is not directly relevant to dangerous driving offences, but does demonstrate the importance, in the criminal context, of something more than objectively dangerous conduct in warranting the stigma of penal negligence.

Factual Background

[8] Against this background, I turn to the facts of the case at bar. On a warm evening in August 2018, Mr. Thomas, then age 24, was driving a new Jeep south along Central Saanich Road. A few minutes prior to this, he had ‘rear-ended’ the vehicle of a Ms. Pelton at a four-way stop. However, no damage to either car or injury to the persons in the cars resulted and the two drivers did not find it necessary to exchange their names or other information. They went on their respective ways.

[9] Some minutes later, while driving along Central Saanich Road, the appellant veered across the centre line into the northbound lane, where two sisters, Ms. Kim Ward and Ms. Tracy Ward, were walking along the shoulder. The appellant's Jeep hit both of them, killing Kim Ward instantly and catastrophically injuring Tracy Ward.

[10] Emergency personnel were called to the scene of the accident. Mr. Scott, an experienced paramedic and Mr. Simpson, the captain of the firefighting unit, both found Mr. Thomas to be "alert"; Mr. Inoke, also a firefighter, testified that Mr. Thomas "responded to his assessment" and described him as "confused but alert" in the sense that he responded to Mr. Inoke's questions. Other personnel attending at the scene also found him to be "verbally responsive". A police officer, Sgt. Brailey, said he was "very emotional, crying and 'in shock'". Eventually, Mr. Thomas was taken by ambulance to hospital and assessed in the trauma room by medical personnel. (At para. 37.)

[11] At one point, Cst. Craig noticed that in walking down a hallway to a waiting room, Mr. Thomas briefly veered to his right for a foot or two, made contact with a movable partition, and then a few seconds later veered to the right again, bumping the wall with his shoulder. He continued down the hallway and according to Cst. Craig, he "appeared to be in shock and was visibly upset and shaken, but was 'responsive'". The judge continued:

> Constable Craig agreed in cross-examination that prior to entering the small waiting room, she observed nothing to suggest Mr. Thomas had consumed alcohol or illicit or prescription drugs, notwithstanding the fact that he had briefly bumped into the wall on two occasions while walking along the hallway. She added that prior to entering the interview room, she did not believe she had sufficient grounds to demand a drug recognition evaluation, nor did she believe she had sufficient suspicion to demand a standard field sobriety test from Mr. Thomas. [At para. 41.]

Blood samples were taken by hospital personnel from Mr. Thomas at 8:07 p.m. and were later seized by police.

[12] An expert in accident reconstruction, Mr. Gurzinski, opined at trial that the speed of the Jeep when it hit Kim and Tracy Ward was 61 km/h or, using a different

method, between 66 and 84 km/h. However, the trial judge found that the most reliable determination came from the vehicle's event data recorder. It indicated that the Jeep had been travelling at 76 to 78 km/h for the first 2.5 seconds of the five seconds before the final collision. The judge agreed with the Crown that it was reasonable to infer that the vehicle had been travelling at about the same speed a few seconds earlier, "well over the speed limit, and consistent with the evidence of Lucas Underwood", an eyewitness.

[13] Mr. Gurzinski opined that the cause of the accident was "driver error" as the road was dry and in good condition; it was a clear day or early evening; traffic was light; and the Jeep had no mechanical deficiencies.

[14] The Crown also adduced the evidence of Ms. Kimberly Young, a forensic toxicology specialist employed by the RCMP. Her uncontested evidence was that the blood samples taken from Mr. Thomas about an hour after the incident showed 297 nanograms per millilitre of methamphetamine, 39 nanograms of amphetamine, and 14 nanograms of alprazolam. (At para. 46.) The trial judge described her evidence concerning the effects of methamphetamine and alprazolam on the central nervous system:

> She classified methamphetamine as an illicit central nervous system stimulant that initially provides "a rapid pleasurable rush", which can increase alertness, energy, and self-confidence, "a good feeling", but this "euphoria" will eventually result in a "crash phase", a condition which Ms. Young explained is "highly associated with drowsiness". She described the crash phase as "an overwhelming sense of being tired", overwhelming sedation which could affect one's ability to operate a vehicle and produce inattentive driving, such as an inability to stay within the proper lane of travel or the correct side of the road. She testified it can also cause confusion, a symptom noted by a few of the first responders.
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> Ms. Young agreed that 297 nanograms of methamphetamine in a person's blood is a significant amount and would suggest a person would have had to take a relatively high dose at some point in time. Amphetamine is a by-product of methamphetamine and can produce both the stimulating effects and the eventual sedative or crash stage.
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> In Ms. Young's February 2019 report, she writes that during a methamphetamine crash phase "the user becomes extremely fatigued and may precipitously fall asleep."

> Alprazolam, on the other hand, is a central nervous system depressant in the benzodiazepine family which has well-known side effects of drowsiness, a decrease in motor skills, and confusion. Its brand name is Xanax, an antianxiety drug. It is similar to flubromazolam, two pills of which Mr. Thomas had on his person at the scene which, by his own admission, he handed off to someone before going to the hospital. These pills were subsequently turned over to Sergeant Brailey. Ms. Young described flubromazolam as a "potent long-lasting benzodiazepine", a fairly new street drug at the time which has "significant sedative effects" and a drug which the RCMP lab was unable to detect in blood samples in 2018.
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> During her testimony, Ms. Young was given a hypothetical set of facts consistent with the circumstances in this case, and while acknowledging hypotheticals are "difficult" due to a lot of "variables", she testified that driving over the centreline and onto the opposite shoulder are driving behaviours consistent with the ingestion of methamphetamine and alprazolam, given the significant sedative effects of methamphetamine in the crash phase and the fact that alprazolam is a sedative. Ms. Young noted alprazolam is available by prescription, but is also used "recreationally". It is prescribed for anxiety, but again has well-known side effects, primarily drowsiness, reduced or impaired motor skills, confusion, and poor judgment.
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> She agreed the amount of alprazolam in Mr. Thomas's blood was relatively modest with 40 nanograms being the standard therapeutic dose. But as she noted in her report, "The effects of alprazolam are expected to be additive with the effects of a central nervous stimulant in the crash phase." [At paras. 47–52; emphasis added.]

The expert acknowledged, however, that if a driver fell asleep at the wheel with the concentrations of drugs Mr. Thomas had in his body, she could *not* say unequivocably that the presence of those drugs was the actual cause of his loss of consciousness and any subsequent or inappropriate driving. (At para. 54.)

[15] Mr. Thomas was charged with six driving defences — impaired driving causing death and bodily harm under ss. 255(3) and (2) respectively, of the *Criminal Code* (Counts 1 and 2); dangerous driving causing death and bodily harm contrary to ss. 249(4) and (3), respectively (Counts 3 and 4); and having a detectable level of methamphetamine in his blood after causing an accident by operation of a motor vehicle that resulted in death and bodily harm, contrary to s. 255(3.1) and (2.1), respectively (Counts 5 and 6.) I have attached as a schedule to these reasons the relevant portions of all six sub-sections of the *Code*.

The Trial Judge's Reasons

Impaired Driving Charges

[16] The trial judge noted that for convictions on the impaired driving charges, the Crown was required to prove beyond reasonable doubt the *actus reus*, which has three elements — the voluntary consumption of a drug which impairs a person's ability to operate a motor vehicle; that an accident has been caused as a result of impairment; and death or bodily harm resulting from the accident. As for *mens rea*, the judge stated, the Crown was required to prove an intention to operate a motor vehicle after voluntarily consuming a drug. (At para. 56.) He noted as well that as observed in *R. v. Stellato* (1993) 12 O.R. (3d) 90 (C.A.), *aff'd* [1994] 2 S.C.R. 478, even a slight degree of impairment is enough to constitute this element of the *actus reus*. Similarly, in *R. v. Andrews* 1996 ABCA 23 it was said that "the conduct must be of such a nature that an impairment of the ability to operate a [motor] vehicle (be it slight or marked impairment) is proven beyond a reasonable doubt." (My emphasis.)

[17] The Crown argued that various facts, each of which was inconclusive in itself, could if taken in their entirety satisfy the Court that Mr. Thomas was impaired by drugs to the point of losing consciousness. In the Crown's submission, Mr. Thomas' driving was "entirely consistent with someone experiencing the crash phase of methamphetamine, possibly in combination with alprazolam," given Ms. Young's evidence that the 'crash' phase involves extreme exhaustion and fatigue. (At para. 60.)

[18] In response, the defence argued that there was insufficient evidence to establish beyond a reasonable doubt that Mr. Thomas had fallen asleep *because he was impaired by drugs*. Counsel emphasized the absence of indicia of impairment from the first responders to the accident scene, and the fact that the police officers had not inferred impairment. With respect to Ms. Young's evidence regarding the

effects of methamphetamine and alprazolam, the trial judge described the defence argument:

> As far as the expert evidence of Ms. Young is concerned, the defence points out that Ms. Young was unable to say when Mr. Thomas might have ingested these drugs or in what dose, acknowledging that methamphetamine may "persist in the blood for longer than the active effects are apparent", possibly for two or three days. The defence also notes Ms. Young's evidence that initially methamphetamine can increase a person's level of alertness and, because of this, might actually improve their driving skills until they experience the crash phase. At the same time, the defence submits that the impairing effects of alprazolam "are generally observed at the initiation of therapy" and impairment is dependent on how much was consumed, any co-ingested drugs, and naturally a person's tolerance to the drug.
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> The defence refers to Ms. Young's evidence that the impairing effect of alprazolam from a single therapeutic dose could last three to six hours, yet it too has a long "residence time" in the body.
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> As a result, the defence submits the mere presence of this drug in a person's blood does not necessarily mean they would be experiencing the sedative effect it initially produces, such that the blood sample is incapable of proving impairment beyond a reasonable doubt. In the end, the defence submits the Crown's circumstantial evidence is insufficient to establish beyond a reasonable doubt that Mr. Thomas's ability to operate a motor vehicle was impaired by a drug or a combination of drugs. [At paras. 76–78; put emphasis added.]

[19] Since Mr. Thomas did not testify at trial, the evidence relating to whether the accident was caused by the impairment of his ability to drive was circumstantial. The trial judge cited passages from *R. v. Griffin* 2009 SCC 28 and *R. v. Villaroman* 2016 SCC 33, for the principle that in order to convict, the trier of fact must be satisfied that the *only rational inference* that can be drawn from the evidence (or lack thereof) is that the accused is guilty, and that in assessing circumstantial evidence, the trier of fact should consider "other plausible theories" and "other reasonable possibilities" that are inconsistent with guilt. The Crown may be required to negate such reasonable possibilities. On the other hand, it need not negate "every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused". (*Villaroman* at para. 37, quoted by the trial judge at para. 80 of his reasons.) It followed, the judge said, that:

> ... where the Crown advances an inference of guilt based on circumstantial evidence, the trier of fact should consider other plausible theories and other

> reasonable possibilities which are inconsistent with guilt, and the Crown thus may need to negative these reasonable possibilities. [At para. 81.]

[20] Despite the argument that there were "plausible alternative inferences" available in this case as to whether the collision had been caused by impairment, the Court found that on all the evidence, it was not reasonable to infer that Mr. Thomas' state of fatigue could be explained by other "natural factors" or that the drugs in his system had not impaired his ability to operate a motor vehicle. Nor, the judge said, was it a reasonable possibility that Mr. Thomas' loss of consciousness occurred after he had intentionally consumed a significant dose of methamphetamine in order to have its initial stimulating effect "counteract the natural state of exhaustion he found himself in." This possibility was "speculative and contrary to common sense." (At para. 87.) Having rejected these theories, the judge was satisfied the Crown had proven beyond a reasonable doubt that Mr. Thomas' ability to operate a motor vehicle had been impaired by the drugs.

[21] As for causation, the Court also found a "direct and substantial causal connection between driving while his ability to do so was impaired and the collision and the death and bodily harm that resulted from it." Accordingly, the Crown had established Mr. Thomas' guilt on Counts 1 and 2 beyond a reasonable doubt.

Dangerous Driving

[22] Turning to the dangerous driving counts (3 and 4), the trial judge had no difficulty in concluding that Mr. Thomas' straddling and crossing the centre line of the road, veering into the oncoming lane onto the opposite shoulder, and then travelling for some distance before crashing, was conduct dangerous to the public. Viewed objectively, the judge said, it formed the *actus reus* for dangerous driving. (At para. 94.)

[23] The next and more difficult question was whether the Crown had proven the required *mens rea* as described in *Beatty* at para. 43, quoted above at para. 2 of these reasons. The judge stated that since there was no evidence of any *deliberate* intention to create a danger, *mens rea* would be shown only if on the basis of all the

evidence, including evidence about the accused's state of mind, the Court was satisfied the conduct "amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances." In undertaking this inquiry, the Court was not concerned with the *consequences* of Mr. Thomas' driving but with the "risk of damage or injury created by the manner of driving." (At para. 99, citing *Beatty* at para. 40.)

[24] The Crown offered two routes to conviction. First, it argued that the Court could reasonably infer from the "pattern of driving" described by the witnesses that Mr. Thomas had lapsed into "unconsciousness" as a result of being impaired by drugs. Given the particular drugs he had ingested, the risk that he would lose consciousness or fall asleep had been foreseeable and he should have taken steps to avoid it. On this point, the Court at para. 160 noted *R. v. Poisson* 2019 ONSC 1462, where it was said that "if it is established that a person was driving while impaired, they will necessarily be guilty of dangerous driving."(At para. 105.)

[25] Alternatively, if impaired driving had not been proven or if impairment did not satisfy the *mens rea* for dangerous driving, the Crown argued that Mr. Thomas' voluntary ingestion of drugs was nevertheless a relevant and significant factor in assessing the *mens rea* for dangerous driving. (At para. 107.) In support, counsel cited *R. v. Settle* 2010 BCCA 426, where it was said that evidence of an accused's voluntary consumption of alcohol may be relevant to the *mens rea* of dangerous driving. In the words of the majority:

> ... Where such conduct demonstrates a recklessness in creating a risk or danger to other users of the highway it may, when considered with the evidence of driving conduct, establish a pattern of disregard for the safety of other users of the highway that amounts to a marked departure from the standard of care of a reasonably prudent driver. [At para. 48.]

[26] The trial judge accepted both pathways to conviction formulated by the Crown. He had, of course, already concluded that Mr. Thomas had been driving while impaired due to his ingestion of a "significant amount" of methamphetamine as well as a "modest amount" of alprazolam. The fact the appellant had done so "sometime before the collision" was, the judge stated, "clearly significant" in relation

to *mens rea. R. v. Jones* 2004 ABCA 227 and *Settle, supra*, supported the conclusion that his consumption of these drugs demonstrated "a recklessness" in creating a risk or danger to other users of the highway. (At para. 111.) Once a "manner of driving that is objectively dangerous" was shown, the judge said, a conviction for dangerous driving must "necessarily follow." (At para. 112.)

[27] The judge found additional support for this reasoning in *R. v. Chung* 2019 BCCA 206, where Groberman J.A. for this court stated:

> As I read para. 42 of *Roy*, it merely reiterates that proof of dangerous driving, *per se*, is not enough to convict an accused. The driving must be so dangerous as to take it outside of the realm of mere negligence, momentary inattention, or an understandable misjudgment. Where the degree of dangerousness does take the driving beyond those types of errors, however, there is no basis for suggesting that the mental element of the crime cannot be inferred from the objectively dangerous driving. [At para. 30; emphasis added.]

This court's decision in *Chung* was upheld at 2020 SCC 8, but the reasons of the Supreme Court were concerned mainly with the issue of whether the appeal had been brought on a question of law.

[28] The judge also accepted the Crown's alternative submission that even without a formal finding of impairment, the facts that Mr. Thomas had previously ingested methamphetamine and alprazolam and had a significant concentration of the former in his blood when the collision occurred, combined with the earlier accident involving Ms. Pelton, should have led him to see the "warning signs that he was not in any condition to drive and should have stopped doing so."

[29] In response, the defence argued that the eyewitness evidence suggested Mr. Thomas had been driving normally, albeit somewhat over the speed limit, until just prior to the collision. In his submission, there was no evidence of swerving or other erratic behaviour and no direct evidence that Mr. Thomas himself knew or ought to have known of any danger involved in continuing to drive. Nor, the defence contended, was there evidence that the Pelton accident had been caused by fatigue or impairment. Counsel argued that the notion that Mr. Thomas ought to have seen

the warning signs and stopped driving would require *every* driver involved in a minor mishap to immediately stop driving or risk being found guilty of dangerous driving for ignoring the warning signs. (At para. 118.)

[30] The Crown responded that the defence had misconstrued its argument. In the judge's words:

> ... What the Crown does say is that if you have methamphetamine and/or a benzodiazepine drug in your body and rear-end a stopped vehicle, a reasonably prudent driver would recognize the risk in continuing to drive. As such, the Crown says given these particular circumstances, Mr. Thomas's failure to heed the warning signs in light of his drug ingestion is sufficient to ground a finding of criminal conduct as opposed to mere carelessness or negligence. [At para. 119; emphasis added.]

[31] In addition, counsel for Mr. Thomas emphasized the Crown's acknowledgement that in all likelihood, the appellant had been "unconscious" when he veered across the centre line and into the oncoming lane of traffic. In the appellant's submission, his driving behaviour while he was unconscious, seconds prior to the fatal collision, could not constitute dangerous driving because such acts were involuntary and could not form the *actus reus* of the offence. On this point, the defence relied on a passage from *R. v. Jiang* 2007 BCCA 270, in which the Court seemed to equate a sleeping driver with one in an "automatic state of mind" and observed that that state of mind cannot form the *actus reus* of dangerous driving. (At para. 17, quoted by the trial judge at para. 121 of his reasons.)

[32] The trial judge did not comment on this statement in *Jiang,* but noted that the Court in that case had continued:

> ... That is not to say that a sleeping driver can never be convicted of dangerous driving. The *actus reus* of the offence may consist not of driving while in a state of sleep, but of embarking on driving or in continuing to drive in the face of a real risk of falling asleep. As McLachlin J. ... explained in *R. v. Creighton* ... the *actus reus* of crimes of penal negligence "may consist in carrying out the activity in a dangerous fashion, or in embarking on the activity when in all the circumstances it is dangerous to do so." Thus, Cory J. said in *Hundal* ... in a passage I will repeat for convenience,
>
> > . . . if an explanation is offered by the accused, such as a sudden and unexpected onset of illness, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances

> ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused. [At para. 17; emphasis added.]

In *Jiang* itself, the accused adduced expert evidence that she had been suffering from an undiagnosed chronic insomnia condition at the time of the accident and experienced an "intrusive sleep episode" that had never happened to her before. This evidence was accepted by the trial judge, as was the conclusion that there was nothing unusual about Ms. Jiang's driving that would have put her on notice that she was at risk of falling asleep while driving. Nor was there any suggestion of impairment.

[33] The trial judge in the case at bar did not agree with Mr. Thomas' argument that this case was similar to *Jiang*. In particular, he did not accept that the appellant's sudden 'passing out at the wheel' was "unexpected". In his words:

> While I accept Mr. Thomas suddenly passed out at the wheel, I do not accept that it was unexpected, given his consumption of methamphetamine and alprazolam, as well as being involved in the prior accident a short time earlier. Nor do I accept that the only timeframe that is relevant is the quarter second from allegedly regaining consciousness when he hit the first large rock to hitting Kim and Tracy Ward.
>
> To the contrary, I am satisfied that the evidence of the eyewitnesses in this case, confirmed by the expert evidence of Mr. Gurzinski, establishes that Mr. Thomas was unconscious at the wheel for a relatively significant period of time before striking the rocks just past the entrance to the mobile home. All in all, I am satisfied Mr. Thomas's dangerous driving was over a significant stretch of road in the vicinity of a hundred metres, as noted by Mr. Gurzinski, or for about 10 seconds, as suggested by the defence. [At paras. 126–27; emphasis added.]

[34] On the totality of the evidence, the judge was satisfied that Mr. Thomas' voluntary consumption of drugs had had a "dramatic sedative effect" that rendered him unconscious and incapable of keeping the vehicle in its proper lane of travel. Since he was by that point unconscious, however, it was not his crossing the centre line and coming to rest on the shoulder that constituted dangerous driving for purposes of the *Code*. Rather, it was his decision to drive, especially after the Pelton accident should have provided a clear warning, that constituted a marked departure from the standard of care of a reasonable person in the same circumstances. (At

para. 128.) To put it another way, and adopting the words of this court in *Chung*, Mr. Thomas' decision to drive while under the influence of the drugs was "so seriously deficient as to justify a criminal sanction."

[35] In the result, the judge convicted Mr. Thomas of the dangerous driving offences comprising Counts 3 and 4.

Remaining Counts

[36] Turning to Counts 5 and 6, the defence made no submission on those counts. Mr. Thomas had admitted that samples of his blood were taken at 8:07 p.m. on the night of the accident, well within two hours of the accident. Again, considering the totality of the evidence, the judge was satisfied that Mr. Thomas had had, within the two hours after causing the collision, a detectable amount of methamphetamine in his blood. He was therefore convicted on Counts 5 and 6 as well. (At para. 133.)

[37] Mr. Thomas now appeals to this court.

On Appeal

[38] Mr. Thomas asserts five grounds of appeal. One concerns the possible application of *R. v. Kienapple* [1975] 1 S.C.R. 729 to the impaired driving counts (1 and 2.) Another ground, also based on *Kienapple*, concerns Counts 5 and 6, but it need not be considered, since the judge did, at the time of sentencing, grant conditional stays of those counts on the basis of *Kienapple*. I shall return to the applicability of *Kienapple* to Counts 1 and 2 near the end of these reasons. Another ground of appeal concerns whether the trial judge properly applied the law in reaching his findings on circumstantial evidence in connection with Mr. Thomas' alleged impairment.

[39] I turn first, however, to the second and third grounds raised in the appellant's factum with respect to the dangerous driving offences, namely:

> b. Did the learned trial judge err in law by concluding that the appellant was culpable for the consequences of his driving while unconscious because the appellant had embarked on driving in circumstances in which he knew or ought to have known that it was dangerous to do so?

c. Did the learned trial judge err in law by failing to ask whether the appellant's driving conduct was substandard on a civil standard before concluding that it was criminally substandard?

The 'Test' for Dangerous Driving

[40] The crux of the first of these two grounds seems to be that the trial judge applied an erroneous "test" for dangerous driving by relying on this court's decision in *Jiang*, the facts of which I have already described. In *Jiang,* Mr. Justice K. Smith for the Court reviewed *Beatty* and *Roy* and other cases, including *R. v. Théroux* [1993] 2 S.C.R. 5, *R. v. Parks* [1992] 2 S.C.R. 871 and the decision of the Australian High Court in *R. v. Jiminez* (1992) 173 C.L.R. 572. From these, he drew the following:

> … a sleeping driver is in a state of non-insane automatism and cannot be convicted of dangerous driving on the basis of acts of driving committed while in that state, since such acts are involuntary and cannot form the *actus reus* of the offence. However, such a driver may be convicted of dangerous driving if the trier of fact is satisfied beyond a reasonable doubt that the driver embarked on driving or continued to drive in circumstances in which he knew or ought to have known that it was dangerous to do so because there was a real risk that he would fall asleep at the wheel. [At para. 22; emphasis added.]

Smith J.A. described the driver's undiagnosed chronic insomnia in *Jiang* as "the kind of infirmity, or human frailty" that Cory J. had had in mind in his reasons in *Hundal, supra*. He continued:

> ... It was a physiological condition that made her susceptible to intrusive sleep episodes. Accordingly, I would reject the Crown's submission that the respondent's insomnia could not, as a matter of law, provide an exculpatory explanation for the manner of her driving after she fell asleep. And since the trial judge found as a fact that the cause of the accident was the intrusive sleep episode, the respondent's actions after she fell asleep were not voluntary and that segment of her driving could not be the *actus reus* of the offence.
>
> However, as I have explained, the *actus reus* of dangerous driving may also consist of embarking on driving or in continuing to drive when, in all the circumstances, it was dangerous to do so. The consideration of this question in this case requires an examination of the conduct of the respondent before she fell asleep in order to determine whether the Crown established beyond a reasonable doubt that she ought to have been aware of the risk and of the danger involved in embarking on driving or in continuing to drive when she knew or ought to have known that there was a real risk that she would fall asleep at the wheel. [At paras. 51–52; emphasis added.]

In the result, the Court affirmed the acquittal of the accused.

[41] The trial judge in the case at bar referred to *Jiang* near the end of his reasons, beginning at para. 121. He noted this court's comment (presaging para. 36 of *Roy* concerning *mens rea* rather than *actus reus*) that:

> ... a driver may be convicted of dangerous driving if the trier of fact is satisfied beyond a reasonable doubt that the driver embarked on driving or continued to drive in circumstances in which he knew or ought to have known that it was dangerous to do so because there was a real risk that he would fall asleep at the wheel. [At para. 22; emphasis added.]

Mr. Thomas argues that the trial judge's treatment of *Jiang* is inconsistent or "difficult to reconcile" with *Beatty* and *Roy.* In particular, he says the trial judge based his conclusion of guilt on the fact that Mr. Thomas had ingested the "sedative drugs" *before* getting behind the wheel of the Jeep. In so doing, he suggests, the judge made an error similar to that articulated in *Roy*, where the Court observed that the end result, or consequence, of an accused's conduct cannot determine his or her guilt for dangerous driving. In this case, the appellant contends, the judge allowed the "starting point of the chain" of his conduct — by which I infer he means the "embarking" on driving — *in and of itself*, to determine his culpability. According to the appellant, the judge thus failed to adhere to the admonition at para. 35 of *Beatty* to the effect that "the driver's mental state does matter because the punishment of an innocent person is contrary to the fundamental principles of justice."

[42] Mr. Thomas also emphasizes a passage in *Brown 2022* in which the Court observed that dangerous driving must not be simply inferred from a marked departure from the standard of care. Rather, it said, "it must still be asked whether, first, a reasonable person would have foreseen the risk and taken steps to avoid it, and second, whether the failure to do so, amounted to a marked departure from the standard of care expected of a reasonable person in the circumstances." (At para. 94.)

[43] With respect, I am not persuaded that the trial judge in this case erred in his analysis of *mens rea* in the manner suggested by Mr. Thomas or otherwise. As the

Crown notes in its factum, *Jiang* was referred to by the court below only in the context of summarizing the defence argument in favour of the 'alternate' route to convictions for dangerous driving. The first basis given by the trial judge for Mr. Thomas' conviction on the dangerous driving counts was that he was operating his vehicle *while impaired* due to his ingestion of methamphetamine and alprazolam. The judge was satisfied that the Crown had proven *recklessness on his part in creating a "risk or danger to other users of the highway or the public in general*." (My emphasis.) The requisite *mens rea* for the dangerous driving charges was inferred from "Mr. Thomas's objectively dangerous manner of driving whilst his ability to operate a motor vehicle was impaired by drugs." (At para. 114.)

[44] Again as an alternative route to the convictions for dangerous driving, the judge also adopted the "foreseeability approach" (see para. 115) from *Roy* to find that on the totality of the evidence — in particular, the appellant's voluntary consumption of the drugs and his involvement in the earlier accident — a reasonable person in his position would have been aware of the risks posed by continuing to drive and that doing so was a marked departure from the standard of care of a reasonable person in the same circumstances. (At para. 128.)

[45] With respect, then, the judge clearly considered the *mens rea* element of dangerous driving which the defence now argues he ignored. His reasons are consistent with *Beatty* and *Roy*. Those cases were decided after *Jiang*, but the Court in *Jiang* noted (citing *R. v. Creighton* [1993] S.C.R. 3 at 73) with respect to sleeping drivers that the *actus reus* of the offence may consist of "*not of driving while in a state of sleep, but of embarking on driving or in continuing to drive in the face of the real risk of falling asleep*." (As I read *Beatty* and *Roy*, this ultimately became part of the analysis of *mens rea* rather than of the *actus reus*.) As we have seen, the judge in the case at bar found that that risk was "not unexpected" and indeed that a reasonable person in Mr. Thomas' position would have recognized the risk and elected not to drive. In this case, then, the *mens rea* of the offence did not relate to his driving *while unconscious*, but to his decision to continue on his errand when he

ought to have been aware that he would be creating a foreseeable risk due to his impairment.

[46] I would not accede to this ground of appeal.

Civil Negligence

[47] The second ground of appeal concerning the line between negligence and the criminal offence of dangerous driving is, in essence, a repetition of the first ground discussed above. Here it is said the trial judge erred "by failing to ask whether the appellant's driving conduct was substandard *on a civil standard* before concluding that it was criminally substandard." (My emphasis.) In particular, the appellant takes issue with para. 112 of the trial judge's reasons, where he stated:

> …. I am satisfied that once the Crown has proven beyond a reasonable doubt that a person's ability to operate a motor vehicle is impaired, in combination with a manner of driving that is objectively dangerous, that a conviction for dangerous driving must necessarily follow.

[48] Importantly, this followed immediately after the trial judge had concluded that in heading out on the road sometime after ingesting methamphetamine and alprazolam and after having a 'warning' accident, the appellant had shown "a recklessness in creating a risk or danger to other uses of the highway or the public in general." (At para. 111.) The judge found support for this conclusion in this court's comments in *Chung*, *supra*, that:

> As I read para. 42 of *Roy*, it merely reiterates that proof of dangerous driving, *per se*, is not enough to convict an accused. The driving must be so dangerous as to take it outside of the realm of mere negligence, momentary inattention, or an understandable misjudgment. Where the degree of dangerousness does take the driving beyond those types of errors, however, there is no basis for suggesting that the mental element of the crime cannot be inferred from the objectively dangerous driving. [At para. 112; emphasis added.]

[49] In the appellant's submission, the judge here failed to ensure that the 'fault' requirement for dangerous driving was also established, contrary to *Roy* and cases following it. In the words of his factum:

> 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 circumstances the departure from the standard goes *markedly* beyond mere carelessness.

[50] Again, and with respect, I cannot agree that the judge erred as the appellant asserts. The judge made the statement at para. 112 only after finding that Mr. Thomas' ability to drive was impaired by the drugs he had consumed, "in combination with a manner of driving that is objectively dangerous." He found that the evidence demonstrated recklessness on the appellant's part in creating the risk he did to users of the road. He acknowledged the statement made by this court in *Chung* to the effect that "proof of dangerous driving *per se* is not enough to convict an accused." He had already cited *Beatty* and *Roy* and correctly stated the *actus reus* and *mens rea* components of dangerous driving under the *Criminal Code*. He found a marked departure from the standard of care owed by Mr. Thomas, which he described as recklessness on his part. Finally, he found that even without a finding of impairment:

> … in light of all the circumstances, knowing that he had previously ingested methamphetamine and alprazolam, and that he had a significant concentration of the former in his blood when the collision occurred, combined with the first accident involving Ms. Pelton, Mr. Thomas ought to have seen the warning signs that he was not in any condition to drive and should have stopped doing so. [At para. 115.]

(See also para. 128.)

[51] The appellant submits further that even where a foreseeable risk exists, a trial court must engage in a two-step process of reasoning — determining first whether a "mere departure" from the standard of care justifies imposing *civil* liability, and second concluding that an accused's failure to act (or to refrain from acting) in a way that would prevent a foreseeable harm constitutes a marked departure from the applicable standard.

[52] Again, with respect, I cannot agree that a trial judge in a dangerous driving case is required to address whether the accused's conduct met a civil standard of negligence before turning to the criminal standard. The cases discussed above have made it clear that the *actus reus* and *mens rea* for dangerous driving, including a *marked* departure from the standard of reasonableness, must both be proven by the Crown. Nothing would be served by requiring criminal courts to determine whether the civil standard was met or not. Indeed in *Beatty*, the Court noted the importance of not conflating the civil standard of negligence (which is concerned with the apportionment of loss) with the test for penal negligence (which is concerned with "punishing blameworthy conduct"): see *Beatty* at para. 6.

[53] I would not accede to this ground of appeal.

Circumstantial Evidence

[54] I turn next to Mr. Thomas' first ground of appeal, which is that the trial judge erred "by concluding that impairment [was] the only reasonable inference to be drawn from the evidence". It may be useful to begin by confirming the role of an appellate court in reviewing a conviction based wholly or in part on circumstantial evidence. On this point, there is fairly recent authority in the form of this court's decision in *R. v. Robinson* 2017 BCCA 6, ***aff'd*** 2017 SCC 52, which involved a charge of perjury. At para. 21 of our reasons, we reviewed the evolution of the law from *Hodge's Case* (1838) 168 E.R. 1136 to the more "relaxed" view confirmed in *Villaroman* that circumstantial cases do not import a different standard of proof and do not require specific wording in jury instructions, "provided the charge conveys to the jury in a clear fashion the central point, namely, the necessity to find the guilt of the accused beyond a reasonable doubt." *Per* Sharpe J.A. in *R. v. Tombran* (2000) 47 O.R. (3d) 182 (C.A.) at para. 29; see also *R. v. Griffin* 2009 SCC 28 and *R. v. Mayuran* 2012 SCC 31.

[55] In *Villaroman*, the Court cited the well-known decisions of *R. v. Yebes* [1987] 2 S.C.R. 168 and *R. v. Biniaris* 2000 SCC 15 as correctly reflecting the task of appellate courts in circumstantial cases:

> A verdict is reasonable if it is one that a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*… Applying this standard requires the appellate court to re-examine and to some extent re-weigh and consider the effect of the evidence: *R. v. Yebes*… p. 186. This limited weighing of the evidence on appeal must be done in light of the standard of proof in a criminal case. Where a Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence: *Yebes* p. 186 … [At para. 55; emphasis added.]

[56] In *Robinson*, this court also noted:

> While contemplating a "limited weighing" of the evidence on appeal, the Court in *Yebes* and *Biniaris* also cautioned that the appellate court is not acting as a "thirteenth juror" or "usurping the function" of the finder of fact. A court of appeal may not interfere with a verdict simply because of a "lurking doubt" or uneasy feeling. The court must, Arbour J. stated in *Biniaris*, identify a defect in the analysis of the judge (assuming no jury) that led to an unreasonable conclusion; or be satisfied that the judge was not alive to an applicable legal principle or that he or she reached a verdict inconsistent with his or her own factual findings. (At para. 37.) [At para. 33.]

[57] In *Villaroman* itself, the Alberta Court of Appeal was found to have erred in finding the accused's conviction to be unreasonable, in that it had focused on "hypothetical alternative theories and, at times, [engaged] in speculation rather than on the question of whether the inferences drawn by the trial judge, having regard to the standard of proof, were reasonably open to him." (At para. 67.) Indeed the Court of Appeal was found to have effectively re-tried the case because it had attempted to fill in certain 'gaps' in the Crown's evidence. (See paras. 69–71 of Cromwell J.'s analysis; see also *R. v. Grover* 2007 SCC 51 and *R. v. Damin* 2012 BCCA 504 at paras. 40–42.)

[58] As in *Robinson*, then, I approach this ground of appeal on the basis that our task is to determine "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable inference available on the totality of the evidence": *Villaroman*, at para. 55. In circumstantial cases as in

non-circumstantial cases, an appellate court may not interfere if the verdict is one that a properly instructed jury could reasonably have rendered. (*Yebes* at 186.) If an appellant is to succeed, an inference other than guilt must be "reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense." (*Villaroman*, at para. 36.)

[59] Mr. Thomas submits that the Crown failed to negate the possibilities that he had been "naturally exhausted" when he continued on his errand; or that he had consumed a high dose of methamphetamine more than eight hours or perhaps even one or two days prior to the accident, that the physical and behavioural effects of the drug had worn off by the time he drove and that "passing out" was the result of a "natural state of extreme fatigue." The defence relied strongly on Ms. Young's testimony that she could not opine unequivocably that Mr. Thomas had been in a methamphetamine-induced dysphoric or "crash" phase or had actually been experiencing the sedative effect of alprazolam at the time he was driving.

[60] The judge noted correctly, however, that this fact did not prevent the Court from considering the totality of the evidence and drawing rational inferences from it. (At para. 85.) He also observed that in circumstantial cases, reasonable doubt can arise where the evidence supports inferences that are reasonable, "but only if those inferences are reasonable, given the evidence assessed logically and in light of human experience and common sense." A "reasonable" inference, he said, is one that is "more than just conceivable or possible." He rejected the alternate possibilities raised by the appellant (who did not testify), finding them to be "speculative and contrary to common sense." In short, he found that the "only rational and reasonable inference" that could be drawn from the totality of the evidence was that Mr. Thomas had lost consciousness because of the drugs he ingested prior to the collision. (See paras. 88–91.)

[61] In my opinion, the judge's conclusion on this point was one that a properly instructed jury could reasonably have rendered. It was for the judge to weigh the alternative inferences or possible explanations offered to him for Mr. Thomas' very

sudden loss of consciousness and it is not the function of this court to substitute a different view of the evidence for that of the finder of fact. Viewed through the "lens of judicial experience" I am not persuaded that the judge's conclusion was unreasonable.

[62] I would dismiss this ground of appeal.

Kienapple

[63] For reasons indexed as 2022 BCSC 2279, Mr. Thomas was sentenced on December 7, 2022 to the following (concurrent) periods of imprisonment, namely:

- Count 1 – Impaired driving causing death – 42 months;
- Count 2 – Impaired driving causing bodily harm – 36 months;
- Count 3 – Dangerous driving causing death – 30 months; and
- Count 4 – Dangerous driving causing bodily harm – 24 months;

together with a five-year driving prohibition. From these sentences, it is apparent that the impaired driving convictions are regarded as more serious than those for dangerous driving — an inference supported by the fact that impaired driving causing death carries a higher maximum sentence (life) than dangerous driving causing death (14 years.)

[64] As mentioned earlier, the trial judge stated at para. 2 of his sentencing reasons that he was granting conditional stays on Counts 5 and 6 (causing an accident while having a detectable level of methamphetamine in his blood) pursuant to *Kienapple*. The judge declined to stay Counts 3 and 4, finding at para. 73 that the Court's reasoning in *R. v. Ramage* 2010 ONCA 488 was a "complete answer" to the defence submission on this point. (As to *conditional* stays, see *R. v. Provo* [1989] 2 S.C.R. 3 at 16–7.)

New Issue

[65] The appellant's submissions regarding the principle in *Kienapple* changed somewhat between the date Mr. Thomas filed his factum and the date of his reply some months later. In his factum, he contended that the trial judge had erred in law by failing to stay Counts *5 and 6* while at the same time convicting the appellant on the *impaired driving* charges, Counts 1 and 2. Counts 5 and 6 had already been stayed at the time of sentencing.

[66] In his reply to the Crown's factum on appeal, Mr. Thomas now seeks to raise as a "new complaint" in this court that a stay of the *most serious* counts — Counts 1 and 2 — should have been granted on the basis that the Crown's "primary submission", which was adopted by the trial judge, was that his culpability for dangerous driving turned on his culpability for impaired driving. As for the Crown's "alternative theory" — that the appellant was guilty of dangerous driving because he had embarked on his errand after ingesting the drugs and after having the previous accident, thus creating a reasonably foreseeable risk to other users of the highway — the appellant says this was simply a "more detailed version" of the "primary" basis of culpability found by the judge.

[67] The Crown seeks leave to file a sur-reply responding to these issues. It says the crimes of dangerous driving and impaired driving are separate and distinct delicts. As many courts have observed, impaired driving focuses on the impairment of the driver's *capacity* followed by driving (which may or may not be below a reasonable standard), while dangerous driving focuses on the *manner of driving*, which must be objectively dangerous and requires a different *mens rea*. The Crown emphasised that the two crimes are different and each can occur without the other: a person can drive properly while impaired, but still be guilty of impaired driving, while a person can drive in a dangerous manner without being impaired. Thus the Crown says the "element" of driving while impaired cannot be considered merely as a particularization of the "marked departure" standard that is an element of dangerous driving.

[68] These arguments raise a question of law and as the appellant points out, the evidentiary record is sufficiently comprehensive to permit us to resolve the *Kienapple* issue. I am persuaded that in order to avoid any miscarriage of justice, it is appropriate for us to permit him to raise the issue on appeal and for us to accept and consider his reply and the Crown's sur-reply.

The Authorities

[69] The seminal authority on the *Kienapple* principle in this province is *R. v. Andrew* [1990] 57 C.C.C. (3d) 301. In that instance, the appellant pleaded guilty to one count of impaired driving causing bodily harm and one of criminal negligence causing bodily harm, the victim in each case being the same person. In sentencing submissions, counsel for the appellant argued that a conviction should be entered on only one of the counts, without specifying which should carry the conviction. (At 303.) The trial judge declined to apply *Kienapple*, observing that there were different elements in each charge even though both covered the same conduct.

[70] This court sat in a division of five and the judgment of the Court was delivered by Mr. Justice Lambert. He began by describing what he called the "double test" set out in *R. v. Prince* [1986] 2 S.C.R. 480, that must be met before *Kienapple* applies. Chief Justice Dickson formulated the test as follows:

> There must be a relationship of sufficient proximity firstly as between the facts, and secondly as between the offences, which form the basis of two or more charges for which it is sought to invoke the rule against multiple convictions. [At 495 of *Prince*, quoted at para. 10 of *Andrew*; emphasis added.]

The Chief Justice continued in *Prince*:

> No element which Parliament has seen fit to incorporate into an offence and which has been proven beyond a reasonable doubt ought to be omitted from the offender's accounting to society, unless that element is substantially the same as, or adequately corresponds to, an element in the other offence for which he or she has been convicted.
>
> I conclude, therefore, that the requirement of sufficient proximity between the offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle. …

> There is, however, a corollary to this conclusion. Where the offences are of unequal gravity, *Kienapple* may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence. [At p. 498-9 of *Prince*, quoted at para. 10 of *Andrew*; emphasis added.]

[71] In *Andrew*, this court went on to suggest four "clear keys" which assist in determining when *Kienapple* should be applied (other than the longstanding case of included offences, which Lambert J.A. did not regard as an application of the *Kienapple* principle). He formulated the four key situations as follows:

> 1) Where the offences are of unequal gravity, *Kienapple* may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence. (*Prince* p. 499)
> 2) Where an element of one offence is a particularization of essentially the same element in the other offence. (*Prince* p. 500)
> 3) Where there is more than one method, embodied in more than one offence, to prove a single criminal act (*Prince*, p. 501. But I have used "criminal act" instead of "delict")
> 4) Where Parliament has deemed a particular element to be satisfied on proof of another element. (*Prince* p. 501)
>
> Chief Justice Dickson specifically said that his examples were not intended to be exhaustive. But I would be cautious about adding to them.
>
> It is very important to understand that Chief Justice Dickson, in *Prince*, explicitly endorsed the view that the facts and the charges must be considered together and in their relationship to each other. So, in undertaking the double test, it is a guide to judgment to let the decision about the proximity of the facts be informed by an [understanding] of the offences, and the decision about the proximity of the offences be informed by an understanding of the facts. In short, the double test cannot be separated out entirely into two separate consecutive tests. [At para. 306; emphasis added.]

[72] The Court in *Andrew* then suggested the following course to be considered by trial judges in connection with *Kienapple*:

> A. Look at the facts, in the context of the offences, and ask whether only one wrongful act, in both its physical and mental elements, is involved.
> B. Look at the offences, in the context of the facts, and ask whether there is an additional or distinguishing element in one offence that is not contained in the other. If there is, the *Kienapple* principle does not

> apply unless the additional and distinguishing element is covered by one of the four types of situations enumerated by Chief Justice Dickson…
>
> The two tests which I have described should be undertaken together. Each of the tests becomes an empty exercise unless the two tests complement each other. It is a double test; not two consecutive tests.

[73] In *Andrew* itself, the Court found that it could not be said only one wrongful act had occurred. In the Court's words:

> The reason is that impairment of capacity followed by driving, which is the wrongful act in impaired driving, does not encompass the manner of driving, which in this case formed a part of the sequence of actions which constituted criminal negligence. Nor, in this case, considering the offences in the context of the facts, can the element of driving after becoming impaired be considered merely as a particularization of the element of wanton and reckless conduct underlying criminal negligence. [At 307; emphasis added.]

[74] The Court also referred to an earlier decision of this court, *R. v. Andrews* (January 18, 1979), Vancouver CA780036 (C.A.), which had involved convictions for impaired and dangerous driving. The Court of Appeal had allowed the Crown's appeal from the trial judge's application of *Kienapple* on the basis that the impaired driving offence "was directed to the condition of the driver and that the dangerous driving offence was directed to the manner of his driving." The Court of Appeal in *Andrew* added, however, that *the actual facts of the driving* had not been set out in the trial judge's reasons. *Kienapple* could have applied only if the dangerous driving consisted solely of driving while impaired by alcohol; it must therefore be assumed that the dangerous driving had consisted "solely of driving when the capacity to drive was briefly impaired by alcohol." (At para. 308.) Even then, Lambert J.A. said in *Andrew*, he was "by no means satisfied" that *Kienapple* would have applied.

[75] In contrast, in *R. v. Worrall* [1988] B.C.W.L.D. 3308, *Kienapple* had been applied, apparently because the trial judge had indicated that "the elements he thought important in reaching as to the culpability of the appellant for the two offences [seemed] to overlap almost in their entirety." In *Andrew*, Lambert J.A. suggested that *Kienapple* should not have been applied in *Worrall* "because the manner of driving was a factual element which constituted part of a finding of guilt on

one offence but which formed no part of the finding of guilt on the other offence." (At 308; my emphasis.)

[76] A different result was reached by the Alberta Court of Appeal in *R. v. Colby* 1989 ABCA 285. Ms. Colby was found guilty of impaired driving and dangerous driving after she drove her vehicle home from a bar while she was intoxicated. On her way she struck a cyclist who was travelling in the same direction as her vehicle, killing him instantly. The evidence suggested that Ms. Colby had not applied her brakes before or after the collision, and there was no evidence before the trial court that made out "objectively dangerous driving" (i.e., conduct such as excessive speeding, swerving or running stop signs). In the Court of Appeal's view, the only moment in which her driving was "objectively dangerous" was the moment when she struck the cyclist. Given these particular facts, the Court, *per* Chief Justice Laycraft, reasoned as follows:

> In the present case the act of the accused which amounts to dangerous driving is operating her motor vehicle while her ability to do so was substantially impaired by alcohol. In the tragic circumstances, that delict founds the conviction for dangerous driving causing death. Precisely the same wrongful act founds the further count of impaired driving causing death. There are no "additional distinguishing features" of that count as compared to the other. In my view, the *Kienapple* principle applies and convictions cannot be entered on both counts. [At para. 31; emphasis added.]

[77] *Ramage*, *supra*, is a more recent case that is often cited. Mr. Ramage's vehicle had travelled straight across four lanes of traffic, striking another vehicle head on, ricocheted off another vehicle and came to rest on the guardrail. His passenger died at the scene and the appellant himself suffered significant bodily injuries. He was charged with the same impaired and dangerous driving counts as was Mr. Thomas, plus a fifth charge of operating a motor vehicle with a blood alcohol level exceeding 0.08. The latter count was stayed by the trial court and four convictions were entered on the other charges.

[78] At the outset of his analysis of *Kienapple* on appeal, Mr. Justice Doherty for the Court noted that it is often only "of academic interest", since its outcome usually has no impact on the actual sentence to be served by an accused — i.e., that the

sentence pronounced on the more serious offence remains in place. This was such a case. After citing *Andrew*, *Colby* and *R. v. Galloway* 2004 SKCA 106, a decision of the Saskatchewan Court of Appeal, the Court in *Ramage* agreed with the distinction drawn in *Andrew* between the offences of impaired and dangerous driving (or criminal negligence). Again it was observed that whereas dangerous driving focuses on the manner in which the accused drove, an impaired driving charge focuses on an accused's ability to operate a motor vehicle. (At para. 64.) Doherty J.A. continued:

> In *Andrew*, the court acknowledged that *Kienapple* had been applied in cases where there was no evidence of the manner of driving apart from the accident that produced the injuries or death. The court, at p. 308, expressed some doubt as to the correctness of those decisions. I, too, doubt their correctness. I do not regard an allegation that the accused's ability to drive was impaired by alcohol or some other drug as merely a particularization of the allegation that he or she drove dangerously. As I have tried to explain, the two allegations address different issues. [At para. 65; emphasis added.]

[79] In *Ramage*, there was also a temporal separation between the crime of impaired driving (which occurred when the appellant got into his car and set off to his meeting many miles away) and his dangerous driving (which occurred about half an hour later when he drove across four lanes of traffic into oncoming vehicles). In the Court's words:

> This criminal conduct cannot be described as a single delict. To the extent that *Colby* suggests that it can be described in this manner, I must, with respect, disagree. Even if one could imagine a case where the factual allegations supporting the charge of impaired driving are the same as the factual allegations supporting the charge of dangerous driving, that is not this case. The trial judge correctly held that *Kienapple* had no application. [At para. 66; emphasis added.]

[80] Not surprisingly, Mr. Thomas seeks to bring himself within the shelter of *Colby*. He argues first that the "primary" basis for his convictions for dangerous driving was the fact that his ability to operate a vehicle was impaired. On this point, he notes the Crown's submission in its factum that the trial judge had agreed with the Crown's "primary submission" that if the appellant's ability to operate a motor vehicle was impaired by a drug, the *mens rea* requirement for dangerous driving was

established and “a conviction for dangerous driving must necessarily follow.” With respect, what the trial judge found at the relevant paragraph was that:

> … once the Crown has proven beyond a reasonable doubt that a person’s ability to operate a motor vehicle is impaired, in combination with the manner of driving that is objectively dangerous, that a conviction for dangerous driving must be necessarily follow. [At para. 112; emphasis added.]

Reading this passage without the underlined words obviously supports the appellant’s submission that the appellant’s conviction for dangerous driving turned solely on the impairment of his capacity to drive. It would, the appellant says, be difficult to find a “more glaring example of an inherent *Kienapple* problem than in this submission.”

[81] The trial judge’s reasoning at para. 112 should not, however, be distorted by omitting the underlined phrase. The judge went on to state at para. 114 that he was “satisfied the requisite *mens rea* [for dangerous driving] could be inferred from Mr. Thomas’s objectively dangerous manner of driving whilst his ability to operate the motor vehicle was impaired by drugs.” This first route to conviction for dangerous driving cannot be said to be the trial judge’s “primary” route: the second approach was of at least equal importance, and perhaps more importance, than the first route. As the Crown argues, the second route tracked closely the reasoning in *Roy* and *Beatty* in connection with the *mens rea* of foreseeability.

[82] In my view, the issue of whether *Kienapple* should be applied in this case depends more on the facts found by the trial judge than on the legal authorities. Here, the eyewitness evidence was to the effect that Mr. Thomas had been driving “normally with the speed of traffic, albeit somewhat over the speed limit, with no apparent swerving or other erratic behaviour” until he “suddenly and unexpectedly” fell asleep or lost consciousness. When he regained consciousness, his vehicle was “bouncing over the boulders along the shoulder of the road.” He applied his brakes 1.2 seconds before hitting the cement structure. (See para. 125.) The judge was satisfied that his dangerous driving “was over a significant stretch of road in the vicinity of a hundred metres … or for about 10 seconds, as suggested by the

defence.” Over those 10 seconds, however, he was unconscious, as both counsel acknowledged at trial. (See para. 120.) The law is clear that one cannot be convicted for something he or she did while unconscious: see *Jiang, supra*, at paras. 13–22; and *Beatty* at paras. 37 and 51, where the majority noted that no suggestion had been made that Mr. Beatty had been in a state of non-insane automatism at the time of the accident, but that this went only to *actus reus.* (See also *R. v. Hunter* 2015 SCKA 137; *R. v. Grewal* 2021 BCSC 751.) The trial judge found that Mr. Thomas had engaged in a marked departure from the reasonable standard only by reference to his decision immediately after the first accident, to continue on his errand notwithstanding his ingestion of the illegal drugs, thus creating a real risk of danger to other users of the road. It was this fact that satisfied the *mens rea* requirement of Counts 3 and 4: see para. 128.

[83] In a sense, then, this case is similar to *Colby*, where a “single act” — i.e., the *decision to proceed after the first accident* — gave rise to two charges, impaired and dangerous driving. Here, as in *Colby*, the delict that founded the conviction for dangerous driving causing death was the same wrongful act that founded the impaired driving counts. There were no “additional distinguishing features” of one count as compared to the other. (See para. 31 of *Colby*, quoted above.) The result would have been different if Mr. Thomas had, *while conscious*, crossed the median of the highway and gone onto the shoulder. Certainly if he had been driving erratically on the way to the scene of the accident, it could be said that two different delicts were committed. Tragically, by the time he regained consciousness, it was too late and he was unable to avoid the Ward sisters. Considering the facts as well as the applicable law, the convictions on Counts 3 and 4 depended *in this particular instance and in light of the trial court’s particular findings*, on the same delict as Counts 1 and 2, i.e., his decision to drive when a reasonable person in his condition would have known that doing so would create a danger to users of the road.

[84] In terms of the “double test” referred to in *Prince*, *supra*, there is in my view a relationship of “sufficient proximity” as between the facts and as between the offences which formed the basis for the appellant’s convictions on the impaired and

dangerous driving charges. Clearly, the offences of dangerous driving and impaired driving *can* (and usually do) stand alone in that, as already noted in these reasons, a person may be convicted of impaired driving without driving dangerously, and a person may be convicted of dangerous driving without being impaired. Here, however, the two different offences were proven by reference to Mr. Thomas' decision to continue driving after the first accident. His impairment created a reasonably foreseeable danger that became manifest when he lost consciousness because of that impairment. Thus, paraphrasing *Prince*, the element of impairment was the crucial element of both his impaired driving and dangerous driving convictions. It was the fact of his impairment that made his decision, taken after the first accident, to continue driving, dangerous. In the particular circumstances of this case, that element was "substantially the same" in both offences. This conclusion conforms to the principle enunciated in *Prince* that the facts and the charges in a given case must be considered together and in their relationship to each other.

[85] Referring to the first "key" described by this court in *Andrews*, I also note that the offences of dangerous driving and impaired driving are of "unequal gravity" such that *Kienapple* may be applied even though impaired driving contains the additional element of impairment. And, since in this case the dangerousness of Mr. Thomas' decision to continue driving emanated from his impaired condition, there is "no additional and distinguishing element" that goes to guilt for dangerous driving in the particular circumstances of the trial judge's findings in this case.

[86] In the result, I conclude that *Kienapple* applies and that the less serious offences, Counts 3 and 4, should be conditionally stayed.

Disposition

[87] I would allow the appeal only to the extent of applying *Kienapple* to stay Counts 3 and 4 conditionally.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Stromberg-Stein"

Schedule 1

Excerpts from the *Criminal Code*, R.S.C. 1985, c. C-46 (as it stood in August 2018):

> **Dangerous operation of motor vehicles, vessels and aircraft**
>
> 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;
>
> …
>
> **Dangerous operation causing bodily harm**
>
> (3) Every one who commits an offence under subsection (1) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
>
> **Dangerous operation causing death**
>
> (4) Every one who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.
>
> . . .
>
> **Operation while impaired**
>
> 253 (1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment 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; or
> >
> > (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.
>
> **For greater certainty**
>
> (2) For greater certainty, the reference to impairment by alcohol or a drug in paragraph (1)(a) includes impairment by a combination of alcohol and a drug.
>
> . . .

Punishment

255

...

Impaired driving causing bodily harm

(2) Everyone who commits an offence under paragraph 253(1)(a) and causes bodily harm to another person as a result is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

Blood concentration equal to or over legal limit — bodily harm

(2.1) Everyone who, while committing an offence under paragraph 253(1)(b) or (3)(a) or (c), causes an accident resulting in bodily harm to another person is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

…

Impaired driving causing death

(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.

Blood concentration equal to or over legal limit — death

(3.1) Everyone who, while committing an offence under paragraph 253(1)(b) or (3)(a) or (c), causes an accident resulting in the death of another person is guilty of an indictable offence and is liable to imprisonment for life.