

Citation: ☀

Date: ☀
File No: 243920-1
Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(Criminal Division)

REGINA

v.

KEN CHUNG

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE G. RIDEOUT**

Counsel for the Crown:	J. Coupal
Counsel for the Defendant:	R. Fowler, Q.C. L. Pearce, Articled Student
Place of Hearing:	Vancouver, B.C.
Dates of Hearing:	January 29, 30, 31, February 1, 5, 6, 2018
Date of Judgment:	May 25, 2018

I. INTRODUCTION

[1] Ken Chung (the “accused”) has been charged with a single count of dangerous driving causing the death of Alphonsus Hui (“Dr. Hui”), contrary to s. 249(4) of the *Criminal Code of Canada* (the “Code”).

[2] A collision occurred just before 9 AM on Saturday, November 14, 2015, at the intersection of Oak Street and W. 41st Ave. (the “intersection”) in Vancouver, British Columbia.

[3] Dr. Hui was travelling southbound on Oak Street in his red Suzuki motor vehicle (the “Suzuki”). At the intersection, he commenced a left-hand turn to travel eastbound onto W. 41st Ave., when the right passenger side of his Suzuki was struck by the accused’s silver Audi motor vehicle (the “Audi”). The impact caused the Suzuki to spin around, become airborne, hit a fire hydrant and come to rest in the southeast corner of the intersection next to a Petro Canada service station advertising sign.

[4] It was determined that at the point of impact the Audi was travelling at 119 km/h. Dr. Hui died at the scene of the collision. His death was caused by multiple blunt force trauma sustained from the force of the collision.

II. ISSUE

[5] Has the Crown established beyond a reasonable doubt that the accused operated his Audi 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 the time of the collision, and including the amount of traffic that at the time was or might reasonably be expected to be at that place?

III. THE AREA OF THE INTERSECTION

[6] West 41st Ave. runs nominally east-west and has two lanes of travel in each direction. East and westbound traffic are separated by a concrete median. There are dedicated left turn lanes in both east and westbound directions of travel.

[7] Oak Street runs nominally north-south and has three lanes of travel in each direction. North and southbound traffic are separated by a solid yellow line. There are dedicated left turn lanes with their own left turning signals in both north and south directions of travel.

[8] There are no traffic lights between W. 49th Ave. and W. 41st Ave., either northbound or southbound: Transcript, February 1, 2019, p. 28, ll. 34 - 37.

[9] The area of the intersection is mixed residential/commercial, with a posted speed limit of 50 km/h. There is a Petro Canada service station with a 7-11 store on the northeast corner of the intersection. There is a Jewish Community Centre - the Lubavitch Centre - on the southeast corner of the intersection. There is a Chevron gas station on the southwest corner of the intersection. There is a nursing home on the northwest corner of the intersection. There are bus stops along both W. 41st Ave. and Oak Street, as well as small retail businesses located south of the intersection along Oak Street [Ex. 2 - Book of Photographs].

IV. THE EVIDENCE

(A) Admissions of Fact

[10] Pursuant to s. 655 of the *Code*, the accused admitted the following summarized facts:

1. On November 14, 2015, at approximately 0843 hours, a 2007 Audi RS4 motor vehicle operated by the accused collided with a 2012 Suzuki SX4 operated by Dr. Hui, at Oak Street and W. 41st Ave., Vancouver, British Columbia.
2. Dr. Hui's death was caused by multiple blunt force trauma caused by the collision.
3. Trevor Dinn, P. Eng., is an expert qualified to give evidence in the area of motor vehicle collision investigation, reconstruction, and analysis.

(B) Civilian Evidence

(i) Jimmy Hsieh

[11] Mr. Hsieh was driving eastbound on 41st Ave. toward Oak Street in the curb lane in preparation to make a right turn. The collision was captured by his dashboard camera. That same day, he called the police and provided them with a video clip, which he had trimmed to only include events that unfolded at the intersection.

(ii) Sui Him Chan

[12] Dr. Chan is a cardiologist. He was on his way to his office in the Oakridge Mall the morning of the collision. He was driving southbound and in the left dedicated turning lane, two or three cars behind the Suzuki.

[13] He testified that although he did not hear any loud noises, he saw a "spinning grey vehicle or mass" going in front of him toward the Petro Canada service station.

[14] After the collision, he completed his turn and parked at the Lubavitch Centre, and returned to the scene of the collision to render assistance. He testified that Dr. Hui did not have a pulse. With the assistance of other bystanders, he extricated Dr. Hui from the Suzuki and performed CPR before the ambulance arrived.

(iii) Todd Millway

[15] Mr. Millway was on his way to a high school soccer game, driving southbound on Oak Street in the left dedicated turning lane behind the Suzuki.

[16] He testified that the Suzuki was in the process of clearing the intersection, and he was about to check whether it was clear for him to go, when a silver Audi entered the intersection “very, very quickly down the curb lane” and struck the Suzuki. The Suzuki launched into the air and took out the fire hydrant and a portion of the Petro Canada service station advertising sign located in the southeast corner of the intersection.

(iv) Aniko Gyorgi

[17] Ms. Gyorgi is a nurse. She was driving home from her hospital shift when she heard “an engine revving noise” just past 49th Ave. She noticed a “silver car passing [her] on the right side going at a very high speed down in the curb lane”: Transcript, January 31, 2018, p. 2, ll. 28 - 45.

[18] She recalled that the traffic light at the intersection of 41st Ave. and Oak Street went from green to yellow. She testified the silver car was not slowing down. She testified that there was another motor vehicle in front of the silver car making a right-hand turn eastbound on 41st Ave. The driver of the silver car put his brakes on “for about a second or so” but then kept going, passing the northbound cars that were stopped at the intersection. She then heard “a loud metallic bang” and saw the Suzuki “lifted off the ground, and flying into the Petro Canada service station advertising sign”.

(v) Shedrack Katarama

[19] Mr. Katarama was driving northbound on Highway 99 towards the Oak Street Bridge. He described the traffic that morning as “quiet and there is no traffic.”

[20] He testified he saw the Audi about “100 yards” in front of him at the south end of the merge of Bridgeport Road onto the Oak Street Bridge. He moved into the left lane to allow the Audi to merge. He testified that it seemed to him that the owner was travelling at “a little bit more than the speed”, causing him and another driver in front of him to briefly brake.

[21] He stated on several occasions in his testimony that it was “customary” for drivers to give the right-of-way to merging vehicles.

[22] He testified that he recollected that the driver of the Audi was “in a hurry”, though the next time he saw the Audi it was located behind him proceeding northbound on Oak Street. He recalled that he was travelling at a speed of approximately 50 km/h.

[23] He arrived before the Audi at the intersection of Oak Street and 41st Ave. He did not recall that there were cars behind him or on either side of him. The traffic light was green. He saw the Suzuki turning eastbound in front of him and he thought it had “all the right time to turn.” As the Suzuki was turning while he was entering the intersection, “the grey Audi just zoomed in, and it was a horrible crash.”

[24] Mr. Katarama parked next to the Audi and got out to check the driver. He asked the driver if he was okay and the driver responded, “Yeah, I feel fine.” Mr. Katarama became concerned as he saw smoke coming from the engine compartment and told the

driver to turn off the engine. He asked the driver again if he was okay. The driver responded by again stating he was okay and went on to state, "That was a green light." Mr. Katarama responded by telling the driver, "Yeah, it was a green light but you were speeding": Transcript, February 1, 2018, p. 4, ll. 1 - 11.

[25] During the course of his cross-examination, he adopted parts of a statement he provided to the ICBC adjuster approximately 2.5 months after the collision. I have compressed his evidence into narrative form:

As I carried on I could still see the Audi vehicle directly in my rearview mirror. I then passed W. 49th Ave. I recall being in the right lane at some point and just driving towards W. 41st Ave. At the intersection of Oak Street at 41st Ave. is a left turn lane as well. I remember as we were approaching the intersection I had seen a green arrow for traffic. It turned on for a while allowing cars to turn left. I was still approaching the intersection at this point. The left turn arrow then turned off. It was a solid green light as I was still approaching the intersection. I was probably about a block away from the intersection at this time, around 42nd Ave. I remember seeing the Audi vehicle behind me at this time.

(C) Police Evidence

[26] Cst. Reynold See is a member of the Vancouver Police Department (the "VPD").

He arrived at the collision scene at 9:26 AM. He began to take photographs of the collision scene at 10:28 AM. He observed the Suzuki to be heavily damaged on the northeast corner of the intersection. He observed fluid leaking from the Suzuki. He could smell gasoline. He also observed fluids leaking from the Audi.

[27] He described the intersection as a major arterial route in the City of Vancouver.

He described the usual traffic conditions at the intersection on a Saturday morning around 9 o'clock as, "It's not rush hour. It's fairly light. People coming in and out of the

city, going east and west, north and south”: Transcript, January 29, 2018, at p. 13, ll. 4 - 11.

[28] He described the road surface at the intersection to be wet though it was not raining outside.

[29] In cross-examination, Cst. See agreed that although he had experience in Vancouver doing speed enforcement, the VPD did not have statistics on the speed people normally traveled at major arteries within the city. He agreed with the suggestion that people generally do not travel at 50 km/h; rather, drivers will go above the 50 km/h speed limit: *Ibid*, p. 37, ll. 19 - 36.

[30] Cst. See agreed that looking south along Oak Street from the left dedicated turning lane of the intersection that there was no appreciable curve in the road that would obstruct a driver’s view of oncoming traffic: *Ibid*, p. 34, ll. 31 - 37.

[31] Cst. See agreed that it would appear that the brake lights of the Audi were engaged at the stop line at the intersection of the northbound lane of Oak Street at 41st Ave.: *Ibid*, p. 40, ll. 13 - 44.

(D) Expert Evidence

(i) Cst. Uwe Rieger

[32] Cst. Rieger is a VPD Collision Unit Analyst and Accident Reconstructionist. He was qualified in the field of forensic collision reconstruction and analysis. His Motion Analysis Report was not filed as an exhibit, but parts of this report were adopted into evidence.

[33] Cst. Rieger testified that he received a call at 8:54 AM advising him of a serious collision at the intersection. When he arrived at the intersection, the scene was already “contained” by other first responders. He observed the Suzuki at the southeast corner of the intersection and the Audi on the east side of Oak Street, at the end of the Petro Canada service station. He described that there was a lot of debris on the road and the fire hydrant located near the Petro Canada station had been dislodged and was actively spilling water onto the street. He noticed skid marks on the road surface from where the Audi had to come to a stop.

[34] From page 14 of his unfiled report, Cst. Rieger identified a photograph which depicts a pedestrian countdown timer fixed to a traffic light pole situated on the southeastern corner of the intersection that controls the north and south traffic on Oak Street: Transcript, January 31, 2018, p. 16, ll. 38 - 47 & p. 17, ll. 1 - 11.

[35] Cst. Rieger used a frame by frame breakdown of the pedestrian countdown timer and Mr. Hsieh’s dashboard camera video to determine the speed of the Audi between two fixed curb poles situated along the east side of Oak Street.

[36] According to his calculations, the Audi traveled at a speed of 143 km/h between the first and the second pole, as determined from the vantage point of the dashboard camera in Mr. Hsieh’s motor vehicle. When Cst. Rieger was asked whether the accused’s Audi was travelling at 143 km/h before it struck the Suzuki, he answered that his speed calculation was determined between the two poles (a distance of 27.85 meters), but he did not want to speculate on the speed past the two poles: *Ibid*, p. 19, ll. 31 - 43.

[37] In cross-examination, Cst. Rieger agreed that according to his on-line Google search of the accused's Audi's specifications, it had "420 horse power which is a lot for a car": *Ibid*, p. 22, ll. 28 - 29.

(ii) Trevor Dinn, P. Eng.

[38] Mr. Dinn is an expert qualified to give evidence in the area of motor vehicle collision investigation, reconstruction and analysis. Counsels' questions focused on the calculated pre-impact positions (as depicted in figure 15 of Ex. 8A) and Mr. Dinn's gap acceptance theory. His calculations are based on the dashboard camera video, combined with the 3-D scan of the intersection conducted by Dave Little of Baker Engineering on November 18, 2015.

[39] Both at p. 15 of Ex. 8A and in his testimony, Mr. Dinn stated, "Studies of gap acceptance have shown that 50% of drivers made a left turn to cross traffic when there was a gap of 6 seconds."

[40] The following calculations are summarized from his direct evidence:

- The Audi was before 42nd Ave. 3.5 seconds prior to impact;
- When the Suzuki started to move, if the Audi traveled at 50 km/h, the gap would have been 8.3 to 9.6 seconds instead of 3.5 seconds;
- Hypothetically, if the Audi traveled at 80 km/h, the gap would have been 5.2 to 6 seconds; and,
- Dr. Hui only needed a half second more to complete the turn.

[41] Mr. Dinn further testified in direct examination that the gap acceptance analysis was performed without considering the right-turning vehicle travelling north on Oak Street at 41st Ave. The Audi was within a half second of striking that vehicle's rear end.

[42] The following calculations are summarized from his cross-examination:

- The Audi was travelling at 139 km/h when it was first captured in the dashboard camera, between 0.5 and 1.2 second markings;
- The Audi speed at impact with the Suzuki was 119 km/h;
- The Suzuki speed at impact was approximately 34 km/h;
- The speeds were calculated based on the assumption that the Audi was travelling at 139 km/h. The Audi could have been accelerating or braking; and
- The Audi braked between 0.5 and 1.2 second markings and impact.

[43] In addition, Mr. Dinn estimated using expert auto statistics that it takes 4.5 seconds for the Audi to accelerate from 0 to 100 km/h. He did not have data beyond those numbers. He agreed this Audi is a powerful vehicle with acceleration capabilities. He added the calculations assumed the road was dry - the Audi would not have the same acceleration capabilities on a wet road: Transcript, February 1, 2018, p. 43, ll. 28 - 35.

[44] Mr. Dinn did not have data on the standard deviation or confidence levels of the study on which he relied for gap acceptance. He also had no data on measured average speed on Oak Street. To his knowledge, there is no research on how the pedestrian countdown timer influences the driver's decision-making: *Ibid*, p. 42, ll. 46 - 47 & p. 43, ll. 1 - 5, and p. 44, ll. 20 - 24.

(E) Dashboard Camera View

[45] Mr. Hsieh's dashboard camera is a Transcend DrivePro 200 with 16 GB of memory. Mr. Hsieh testified that the camera records 30 frames per second. The quality of the video is 1080 HD.

[46] The dashboard camera video captures 4.9 seconds of the event.

[47] At the time of the collision, Mr. Hsieh's vehicle was in the curb lane travelling eastbound on W. 41st Ave., about to make a right-hand or southbound turn onto Oak Street. Mr. Hsieh viewed the video on his computer once he returned home. He removed footage to and from the intersection on a flash drive and gave the flash drive to the police.

[48] Beyond trimming the irrelevant video information, there has been no suggestion that this video has been altered in any manner.

[49] As seen on the video, Dr. Hui's Suzuki was the first vehicle in the southbound dedicated left turning lane on Oak Street, about to make a left-hand or eastbound turn onto W. 41st Ave. Dr. Hui yielded to a blue or grey passenger motor vehicle travelling northbound on Oak Street.

[50] As the blue or grey motor vehicle passed through the intersection, a green Toyota motor vehicle pulled up to the intersection in the northbound curb lane of Oak Street. The driver indicated a right-hand or eastbound turn and slowed down to turn into the eastbound curb lane of W. 41st Ave. It is at this time that Dr. Hui proceeded to make his left turn.

[51] As the green Toyota was completing its right-hand turn and Dr. Hui was in the process of making his left-hand turn, the Audi can be seen approaching the intersection in the northbound curb lane of Oak Street at a high rate of speed.

[52] Just before entering the intersection, the Audi's brake lights are engaged. It is unclear from the video whether without braking, the Audi would have rear-ended the green Toyota.

[53] The Audi then violently crashes into the passenger side of the Suzuki.

[54] A frame-by-frame playback of the video shows four pedestrians were in the area of the intersection at the time of the collision. Before the Audi reached the intersection, one pedestrian had finished crossing 41st Ave. and had arrived in front of the Lubavitch Centre. Another pedestrian was walking westbound on the south side of 41st Ave. beside the Petro Canada service station, which was very close to where the Suzuki came to rest after impact. Two more pedestrians could be spotted in front of the Lubavitch Centre on 41st Ave.'s southern sidewalk post collision.

[55] Visibility was good. The sky was overcast but it was not raining. The road surface appeared to be wet/damp. Traffic was light.

V. POSITION OF THE PARTIES

(A) The Crown

[56] The Crown's position can be summarized as follows:

- The accused was travelling at an excessive speed of approximately 140 km/h in the curb lane northbound on Oak Street as he approached the intersection;
- The intersection is a major intersection in Vancouver;

- Although the accused applied his brakes as he entered the intersection, he was only able to slow down to 119 km/h, which was the calculated speed at impact;
- The area of the collision is mixed residential/commercial, with a posted speed limit of 50 km/h;
- The road was wet;
- The accused was not attentive to the upcoming intersection as:
 - (1) "... he was overtaking vehicles while driving in the curb lane": Written Submission at para. 2;
 - (2) "... he came within a half second of rear-ending a right turning vehicle in the curb lane in front of him": *Ibid*, para. 82;
 - (3) "... he did not see or could not have seen Dr. Hui's vehicle in the intersection": *Ibid*.
- The accused had a duty to yield to Dr. Hui by operation of s. 174 of the *Motor Vehicle Act of British Columbia* (the "MVA"): *Ibid*, paras. 66 - 68;
- The evidence in this case would amply support a conviction of dangerous driving causing death as the accused's driving was "objectively dangerous conduct" that constitutes a marked departure from the standard of a reasonably prudent driver: *Ibid*, para. 79.

(B) The Accused

[57] The accused's position can be summarized as follows:

- the accused momentarily accelerated his high-powered Audi to an excessive speed while travelling over a block or less;
- for all of the blocks on Oak Street south of 42nd Ave., he was driving "perfectly properly" at the posted speed limit;
- it was not raining. The road was damp rather than wet. Some of the water on the road surface depicted in the photographs was from the damaged fire hydrant;
- vehicular traffic was light;
- there was no evidence regarding whether any businesses were open or pedestrians were in the area at the time of the collision;

- there was no evidence regarding the normal speed of vehicles on Oak Street;
- Cst. See testified that from his experience most drivers in Vancouver will go above the posted 50 km/h speed limit; and
- the accused's conduct may be objectively dangerous such that it departed from the standard of care of a reasonable driver in the circumstances, but there is at least a reasonable doubt that it amounted to a marked departure from the standard of care.

VI. LEGAL FRAMEWORK

[58] Section 249(1)(a) of the *Code* defines dangerous driving as follows:

249 (1) Every one commits an offence who operates

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

[59] Section 249(4) of the *Code* provides the penalty in the event dangerous driving causes death as follows:

(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.

[60] In *R. v. Beatty*, 2008 SCC 5, at para. 43, the Supreme Court of Canada (the "SCC") set out the requisite elements for dangerous driving. The *actus reus* requires proof that the accused objectively drove in a manner that endangers the public, with regard to all of the circumstances surrounding the use of the motor vehicle. The *mens rea* requires a marked departure from the standard of a reasonably prudent driver the same circumstances as the accused, as contrasted with a mere departure sufficient for establishing civil negligence.

[61] The test for *mens rea* is modified objective. It does not import the idiosyncrasies or personal attributes of the accused such as age, experience and education, but situates the reasonable driver in the position of the accused. The trier of fact must examine all of the evidence, including the accused's actual state of mind: *Ibid*, at paras. 8 & 47.

[62] The SCC explained the underlying premise in part, at para. 37, as follows:

[37] 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. (emphasis added)

[63] The SCC in *R. v. Roy*, 2012 SCC 26, at para. 36, further discussed the requisite *mens rea* element by proposing that the trier of fact in examining all of the evidence ask two questions:

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

[64] The fault component is critical, "... as it ensures that criminal punishment is only imposed on those deserving the stigma of a criminal conviction. While a mere departure from the standard of care justifies imposing civil liability, only a marked departure justifies the fault component for this serious criminal offence": *Ibid*, at para. 1.

[65] The distinction between a mere departure, which may support civil liability, and the marked departure required for criminal fault, is a matter of degree, but the trier of fact must identify how and in what way the driver went markedly beyond mere carelessness: *Ibid*, at para. 30.

[66] Proof of the *actus reus* on its own does not support a reasonable inference that the required fault element was present. In other words, the trier of fact cannot simply infer from the objectively dangerous manner of driving that this conduct constituted a marked departure from the requisite standard of care: *Ibid*, at para. 42.

VII. ANALYSIS AND FINDINGS

(A) Weather and Road Conditions

[67] The area of 41st Ave. and Oak Street is a mixed residential/commercial area. There are bus stops and “little businesses” near the intersection.

[68] There were four identifiable pedestrians captured in the dashboard camera video. The pedestrian near the Petro Canada service station was most at risk when the Audi entered the intersection. I cannot determine, and no evidence has been called, to establish whether or not the accused could see or should have seen this pedestrian.

[69] I find that there is no evidence to establish that there were any pedestrians at any of the bus stops near the intersection.

[70] There was a 7-11 store at the Petro Canada service station. Typically 7-11 stores are open 24/7. The lights were on at the 7-11 store. It is likely that the 7-11 store was

open at the time of the collision in the intersection. Whether any other businesses in the area of the intersection were open is unclear.

[71] I am not prepared to find, as submitted by the accused, that there is no evidence regarding whether or not any businesses were open or there were any pedestrians in the area of the intersection. There is clearly some evidence.

[72] West 41st Ave. and Oak Street are major arterial roads in the City of Vancouver. The posted speed limit for both Oak Street and W. 41st Ave. is 50 km/h. I accept the evidence of Cst. See that in his opinion drivers generally do not travel at 50 km/h; rather, drivers will go above the 50 km/h speed limit.

[73] From a review of the photographs, the dashboard camera video and the evidence of Cst. See, I find that neither 41st Ave. nor Oak St. has any appreciable curve that would obstruct a driver's view. Oak Street in both north and south directions had dedicated left turn turning lanes with left turning signals.

[74] Witnesses consistently testified that traffic conditions were light on the day of the collision. I accept that characterization as accurate. As well, I find the dashboard camera video establishes that traffic travelling north and south on Oak Street was light at the time of the collision.

[75] It was daylight at the time of the collision. It was not raining. Both the Crown and the accused took differing positions on whether or not the road was wet or damp. Mr. Dinn testified that acceleration capabilities may be compromised on a wet road. He agreed that the Audi driven by the accused was "a powerful vehicle." I find the

distinction between a wet road surface and a damp road surface to be inconsequential in this case absent precise calculations with respect to the Audi's road worthiness and performance capabilities, including tire conditions.

(B) Actions of the Accused

(i) The Dashboard Camera Video

[76] The dashboard camera video was heavily relied upon by both parties.

[77] The SCC in *R. v. Nikolovski*, [1996] 3 SCR 1197, at para. 28, set two preconditions for the admission into evidence of a video recording: (1) that the video accurately depicts the scene of the crime; and, (2) that the recording has not been altered or changed.

[78] The Transcend DrivePro 200 records 1080 HD quality videos. The video clip submitted has been trimmed but not altered. I have viewed the recording on numerous occasions.

[79] I find that the video clip clearly captured the moments prior to, during, and after the collision. The quality of the video clip is a very good.

[80] I find the dashboard camera video is reliable evidence in capturing the sequence of events prior to, during, and after the collision.

(ii) Civilian Evidence

[81] A total of five civilian witnesses gave evidence. Among them, the evidence of Ms. Gyorgi and Mr. Katarama are the most relevant as they made observations of the accused's vehicle prior to approaching the intersection.

[82] I find Ms. Gyorgi's evidence to be credible, but ultimately concerning in relation to her reliability. As noted by the accused in his written submissions at para. 10, there are some "unequivocal discrepancies" between her evidence and the rest of the evidence.

[83] Ms. Gyorgi testified that the intersection traffic control light had changed to yellow when the Audi came to the intersection. Mr. Katarama testified that the intersection traffic control light was a solid green when the Audi came to the intersection.

[84] The evidence of Mr. Katarama on this point is confirmed by the dashboard camera video, which shows that the intersection traffic control light was green at the time the Audi entered the intersection and then the collided with the Suzuki.

[85] Ms. Gyorgi testified that she heard the "revving noise" of an engine just past 49th Ave. and she then noticed a silver car [the Audi] passing on her right side at a high rate of speed. No such observations were made by Mr. Katarama.

[86] Ms. Gyorgi testified that she was in a state of shock after witnessing the collision to a point, but she was unable to unlock her cellular telephone. Without question the collision was violent. Her state of mind may have influenced her perception and recollection of the events. Accordingly, I have approached her evidence with caution.

[87] I find Mr. Katarama to be the most helpful witness in establishing the accused's manner of driving prior to the collision. I accept his evidence to be both credible and reliable. His evidence is consistent with the content of the dashboard camera video and with the statement he provided to the ICBC adjuster 2.5 months after the collision.

[88] Mr. Katarama testified that he was driving at a speed of approximately 50 km/h. He first observed the Audi on the south end of the merge of Bridgeport Road onto the Oak Street Bridge. He testified that the Audi appeared to be “in a hurry” causing him and another driver to apply their brakes. He also testified that it was “customary” for him to yield to merging vehicles that appeared to be in a hurry.

[89] As Mr. Katarama continued northbound on Oak Street, he observed the Audi behind him. He testified that he was travelling at approximately 50 km/h on that stretch of the roadway. The Audi remained behind him all the way up to 42nd Ave., when the Audi passed him in the curb lane between 42nd Ave. and 41st Ave. at a high speed. He then observed the collision.

(iii) Expert Evidence

[90] Cst. Rieger and Mr. Dinn gave differing opinions in relation to the speed of the Audi between 41st Ave. and 42nd Ave. Cst. Rieger opined the Audi was travelling at 143 km/h for a distance of 27.85m. Mr. Dinn opined that based on his calculations, the Audi was travelling at 139 km/h at some point between 0.5 and 1.2 seconds prior to impact. The Audi’s speed at impact was 119 km/h.

[91] Both experts agreed in cross-examination that the Audi is a very powerful car capable of accelerating quickly.

[92] Mr. Dinn’s gap acceptance theory - that Dr. Hui only needed a half second more to complete the turn - was based on the assumption that that the Audi was travelling at 139 km/h, as well as on the study that 50 percent of drivers would make a left turn when oncoming traffic is six seconds away. On cross-examination, he agreed that (1) his

calculations of the Audi's speed at certain points in time do not reflect any acceleration or deceleration that may have been done; and, (2) he did not have the standard deviation or confidence level as relating to aforementioned study.

[93] Absent reconstruction of Dr. Hui's sightline, it would be speculative to assume that Dr. Hui saw the Audi approaching but believed it was travelling at a normal speed, slow enough for him to complete the turn.

[94] While Cst. Rieger and Mr. Dinn may differ in their opinions of the speed of the Audi, I find their evidence to be reliable in establishing that the Audi accelerated to a rate of approximately 140 km/h somewhere between 41st and 42nd Avenues. The accused applied the brakes to the Audi when entering the intersection, but was only able to bring the speed down to 119 km/h at the time of impact. By either calculation, the accused was driving his Audi at an excessive speed.

(C) Excessive Speed in the Context of Dangerous Driving

[95] In part, the Crown has submitted that the accused was not attentive to the upcoming intersection as he travelled north on Oak Street.

[96] The evidence does not support a finding that the accused was overtaking vehicles while driving in the curb lane of Oak Street, except between 42nd St. and 41st St., just prior to the collision.

[97] While the accused came close to rear ending the right turning vehicle onto E. 41st Ave., the fact is that no collision occurred. From a careful review of the dashboard

camera video, I would describe what took place as a close call but not indicative of an inattention on the part of the accused.

[98] I cannot agree with the submission of the Crown that the evidence would establish that the accused “did not or could not have seen Dr. Hui’s Suzuki in the intersection.” From a review of the photographs and the dashboard camera video, it is clear that the dedicated left turn lane southbound on Oak Street at 41st Ave. is located on the right half of the roadway. This would be at an angle to traffic travelling northbound on Oak in the curb lane.

[99] No expert evidence was called to establish hypothetical sightlines that could assist the Court in determining whether or not the accused could not have seen Dr. Hui’s Suzuki.

[100] There is some evidence that would establish that the accused did see Dr. Hui’s Suzuki and he did not expect Dr. Hui would turn in front of him as he entered the intersection. Mr. Katamara testified that he went over to check the driver of the Audi who spontaneously told him, “That was a green light.” It would be reasonable to infer from that statement that the accused saw Dr. Hui’s Suzuki, but did not expect that he would turn in front of him as the accused had the green light.

[101] Additionally, the accused did engage the brakes of his Audi as he entered the intersection which I infer is more consistent with attention, rather than, inattention to the hazard posed as Dr. Hui made his left hand turn.

[102] I find the accused had the right of way as required by s. 174 of the *Motor Vehicle Act*, I do not find that there is any sufficient evidence to establish that Dr. Hui signalled to make the left turn as required by s. 174 of the *Motor Vehicle Act*.

[103] The Crown cited several cases in which courts found that excessive speed alone was sufficient to establish the *mens rea* of dangerous driving. In *R. v. Malkowski*, 2014 ONCJ 192, the accused was driving at 152 km/h on a regional road leading into a town that had a speed limit of 50 km/h, killing a 14-year-old girl. The accused was found guilty of dangerous driving causing death.

[104] Several factors distinguish *Malkowski* from the case at bar. It was a Saturday, but also it was St. Patrick's Day weekend and March break. People were "out and about" because of the nice weather. The Airport Road in which the accused had been driving was a two-lane North-South Road with gravel shoulders on both sides. It was dark. It was not a case involving a momentary acceleration.

[105] *R. v. Richards*, [2003] OJ No. 1042 (ONCA) is a pre-*Beatty* case. On the rare occasions it has been followed, the circumstances comprise more than the excessive speed: curve on dry highway and consumption of alcohol in *R. v. Sarkis*, 2003 CarswellOnt 4973; accused acquitted in *R. v. Wu*, 2004 ONCJ 354; and accused was in the wrong lane and cutting corners in *R. v. Huynh*, 2016 ABPC 79.

[106] In *R. v. Ally*, 2017 ONCA 67, the appellant was travelling through a residential area at a high rate of speed at night. Two witnesses testified that the appellant appeared to be racing with another vehicle. The Crown argued that in the

circumstances, the appellant's speed, particularly combined with racing, established the offence of dangerous driving. Again, the facts differ from the case at bar.

[107] *R. v. St Pierre*, 2005 BCSC 1899 is also a pre-*Beatty* case. However, it is useful as it establishes that generally, where speeding is involved, there are other factors that combine with it to amount to dangerous driving:

[21] ... Generally where speeding is involved, there are other factors that combine with it to amount to dangerous driving, such as failure to maintain a proper lookout for other cars on the road, as in *R. v. Rai*, [1993] BCJ No. 2376 (C.A.); missing traffic control signs or devices, as in *R. v. R.D.V.*, [1995] BCJ No. 759 (C.A.) and *R. v. Newman*, [1998] BCJ No. 1414 (C.A.); permitting distractions to take one's attention from the road, as in *R. v. Carlson*, [1993] BCJ No. 3066 (C.A.); speeding in a car with which one is not familiar or which is not in good mechanical condition, as in *R. v. Quesnel*, [1996] BCJ No. 1137 (C.A.); or speeding at night or in difficult driving conditions, as in *R. v. Reed*, [1997] BCJ No. 2821 (S.C.) and *R. v. Topping*, [1993] BCJ No. 2517 (C.A.).

(D) Actus Reus

[108] In this case, the evidence establishes that 41st Ave. at Oak Street in Vancouver is a major intersection. The collision occurred shortly before 9 AM on a Saturday. The intersection is controlled by numerous illuminated traffic lights. The area is a mix of residential and small businesses. Traffic was light in the area. There were also several pedestrians in the area of the intersection.

[109] The posted speed limit is 50 km/h. The Audi is a powerful motor vehicle. This would have been known to the accused. The Audi accelerated over a short distance between 42nd Ave. and 41st Ave. to almost three times the posted speed limit. At the time of impact with the Suzuki the Audi was travelling at 119 km/h.

[110] I find that the excessive speed of the Audi, taking into account all of the surrounding circumstances, objectively establishes the *actus reus* for dangerous driving beyond a reasonable doubt.

(E) *Mens Rea*

[111] The accused elected to call no evidence in his defence. He did not provide an explanation for his conduct. I do not find that the absence of any explanation for the collision from the accused can make the case for the Crown. The evidence in this case did not reach that threshold.

[112] The *mens rea* may be proven based on inferences from conduct, though proof of the *actus reus* of dangerous driving will not be sufficient on its own to prove the *mens rea*. The question is whether the accused's failure to foresee or avoid the risk constitutes a marked departure from the requisite standard of care that a reasonable person would observe in the accused's circumstances.

[113] There is essentially no evidence in relation to the accused's driving conduct prior to the collision that would be described as a marked departure. He was travelling at the speed limit before 49th Ave. until 42nd Ave. He did not run any red or yellow traffic control lights. He did not run any stop signs. He did not swerve into oncoming lanes. It was daylight and traffic was light. I have found that whether the road was wet or damp to be inconsequential. Visibility was good. The roadway along Oak Street was wide and straight in both directions.

[114] I have found that the evidence does establish that the accused engaged the brakes of the Audi at the time it entered the intersection. I infer from that conduct that the accused saw Dr. Hui's Suzuki commencing its turn eastbound onto 41st Ave.

[115] In addition, the accused spontaneously expressed to Mr. Katarama after the collision, "That was a green light." I have inferred from that statement that the accused saw Dr. Hui's Suzuki, but did not expect that he would turn in front of him as the accused had the green light.

[116] The remarks of the Prince Edward Island Court of Appeal in *R. v. Adams*, 2012 PECA 15, at para. 65, are apposite to this case:

65 The respondent's failure to foresee the risk was, therefore, a departure or a mere departure from the normal manner of driving. This being so, however, the trial judge had a reasonable doubt that the failure of the accused to foresee this risk was a marked departure from the standard of care of a reasonable driver in those circumstances. What constitutes a marked departure is a matter of degree -- ...

[117] Critically, I find that the excessive speed was momentary - mere seconds in duration. As Doherty J.A. remarked in *R. v. Willock*, 2006 CanLII 20679, at para. 31 (ONCA):

31 There can be no doubt that conduct occurring in a two to three second interval can amount to a marked departure from the standard of a reasonable person and demonstrate a wanton or reckless disregard for the life or safety of others. However, conduct that occurs in such a brief timeframe in the course of driving, which is otherwise proper in all respects, is more suggestive of the civil rather than the criminal end of the negligence continuum: see *R. v. Waite* (Ont. C.A.), *supra*, at 342; *R. v. Hundel* (1993), 79 CCC (3d) 97 at 106 (S.C.C.).

[118] Additionally, this is not a case where the evidence would support a finding that the accused sustained his acceleration over an established distance which would amount to conduct inconsistent with a momentary lapse of judgement: *R. v. Harry*, 2018 BCSC 820, at paras. 66 and 67.

(F) CONCLUSION

[119] In this case there were fatal and tragic consequences arising from the accused's objectively dangerous driving conduct as result of his excessive speeding. There is at least a reasonable doubt that such conduct amounted to a marked departure from the standard of a reasonably prudent driver: *R. v. Bagri*, 2016 BCCA 272, at para. 31.

[120] I conclude the momentariness of the accused's conduct in excessively speeding is insufficient to meet the criminal fault component and he must be acquitted.

The Honourable Judge G. Rideout
Provincial Court of British Columbia