IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Blanchard*, 2022 NLCA 15
Date: March 8, 2022
Docket Number: 202001H0002

BETWEEN:

HER MAJESTY THE QUEEN **APPELLANT**

AND:

NEILA BLANCHARD **RESPONDENT**

Coram: Hoegg, Goodridge and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201804G0316
(2019 NLSC 216)

Appeal Heard: May 13, 2021
Judgment Rendered: March 8, 2022

Reasons for Judgment by: Hoegg J.A.
Concurred in by: Goodridge and Butler JJ.A.

Counsel for the Appellant: Dana E. Sullivan
Counsel for the Respondent: T. James Bennett

Authorities Cited:

CASES CITED: *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49; *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60; *R. v. Chung*, 2020 SCC 8; *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. Skorlatowski*, 2016 SKCA 5; *R. v. Marquard*, [1993] 4 S.C.R. 223; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272; *R. v. Abbey*, 2009 ONCA 624, leave to appeal to SCC refused 33656 (8 July 2010); *R. v. Stevenson*, [1990] O.J. No. 1657, 58 C.C.C. (3d) 464 (Ont. C.A.); *R. v. B.(G.)*, [1990] 2 S.C.R. 57; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *Graat v. The Queen,* [1982] 2 S.C.R. 819; *R. v. Morin*, [1988] 2 S.C.R. 345; *Coté v. The King*, [1941] S.C.J. No. 49, 77 C.C.C. 75 (S.C.C.); *Wild v. The Queen*, [1971] S.C.R. 101; *R. v. Brodeur*, 2014 NBCA 44; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609.

Hoegg J.A.:

INTRODUCTION

[1] While walking to school on September 11, 2017, 17-year-old Justin Hynes was struck and killed by a vehicle driven by Neila Blanchard. The incident occurred at a turn on Main Street near the intersection with Veteran's Road, in the community of Cow Head, Newfoundland and Labrador. Ms. Blanchard was charged with dangerous driving causing the death of Mr. Hynes. She was tried and acquitted. The Crown appeals the acquittal, alleging that the Judge made errors of law in her treatment of the evidence and application of the law, and that her errors had a material bearing on the acquittal. The Crown asks that a new trial be ordered.

The Trial Evidence

[2] Cst. James Barter arrived at the scene shortly after the collision. He testified that he saw a damaged sign, one of Mr. Hynes's sneakers and scuff marks by the fire hydrant, tire marks on the shoulder of the street and grass of an adjacent property, blood and skid marks on the street up to where Mr. Hynes' body lay on the shoulder, and papers all over the area. He said he spoke with Ms. Blanchard, photographed the scene, and secured it. Cst. Barter's photographs were entered into evidence.

[3] Bruce Payne and Andrew Keough were shingling the roof of a house on Main Street. Mr. Payne said that he heard the sound of a vehicle revving, and looked to see it driving toward the intersection at a fast rate of speed. He identified the vehicle as Ms. Blanchard's. He said that he saw it "take-out" the sandwich-board museum sign that was positioned on the shoulder of the street a short distance before a fire hydrant, which was located just before the intersection. He said that the sign broke and flew into the air. Mr. Keough testified that he saw the Blanchard vehicle on the gravel shoulder of Main Street and that it appeared to have gone up onto the lawn of an adjacent property before correcting back toward the street. Both Mr. Payne and Mr. Keough testified that they saw Mr. Hynes walking on the side of the street toward the fire hydrant, and that they heard the sound of an impact. They said they did not actually see the vehicle strike Mr. Hynes but saw an immediate explosion of papers, which was later determined to be school papers that Mr. Hynes had been carrying. Both men saw the Blanchard vehicle continue driving after Mr. Hynes was struck for approximately 100 meters before stopping and backing up. Mr. Payne and Mr. Keough immediately came down off the roof and saw Mr. Hynes' body lying on the shoulder of Main Street some distance ahead of the fire hydrant.

[4] Mr. Payne and Mr. Keough testified that they saw tire marks from the passenger side tires of the Blanchard vehicle on the shoulder of Main Street and on an adjacent lawn. As well, they testified that when they saw Ms. Blanchard get out of her vehicle, she looked "shocked". Mr. Payne said that Ms. Blanchard said to him that she had not been driving fast, and that he told her that he disagreed and that she had been "flying".

[5] Portia Payne, an emergency medical responder, and Joshua Gale, a paramedic, arrived on the scene. Ms. Payne said Mr. Hynes was lying face down in a puddle of blood. She saw one of Mr. Hynes' sneakers under the Blanchard vehicle and the other by the fire hydrant. Ms. Payne and Mr. Gale testified that Mr. Hynes had no vital signs, and that his body was badly beaten. Mr. Gale said that he heard crepitus when Mr. Hynes was moved, and that his head was soft in places and his body parts were abnormally loose.

[6] Other witnesses testified to Ms. Blanchard's driving earlier that morning. Ambrose Chatman testified that about twenty minutes before the accident, he saw Ms. Blanchard's vehicle on the highway at Parsons Pond driving toward Cow Head. He said he was waiting at an intersection to turn onto the highway when he saw the two passenger-side tires of the Blanchard vehicle on the shoulder of the highway. He said that the vehicle was headed toward the ditch,

but that the driver swerved back onto the road. He said he did not believe the vehicle was speeding at that time.

[7] Calvin Brown testified that Ms. Blanchard was driving behind him on Main Street shortly before Mr. Hynes was struck. Mr. Brown said that he noticed the Blanchard vehicle "uncomfortably" close behind him, so he sped up, following which the Blanchard vehicle sped up behind him. This happened a second time. Mr. Brown remarked to his passenger, Craig Payne, words to the effect that "somebody was in a rush this morning". Mr. Brown said that he practically stopped his truck to make a left turn off Main Street between 200-300 metres back from the scene of the accident, and the Blanchard vehicle was "right up behind him". After he made the turn he heard the Blanchard vehicle "take off pretty fast" and speed away. Mr. Craig Payne gave similar evidence.

[8] Jody Blanchard, who was walking to school along the Main Street ahead of Mr. Hynes, also testified. His evidence was that he heard popping, which he later learned was from a nail gun, so he turned to look behind him. He said he saw a burgundy coloured vehicle coming around the turn by the museum, that he saw "the car hit something and it go up", and a lot of papers flying. He said he watched as the car came to a stop, and then he ran to a friend's house. He said the car was going faster than normal but admitted on cross-examination he did not really know that. He was unsure whether Mr. Hynes was on the street when he was struck, saying that he could not really see because he "wasn't right up to it".

[9] The hood of Ms. Blanchard's vehicle, a 2007 Honda CRV, was extensively damaged and its front windshield was smashed. The vehicle was found to have had no mechanical issues that caused or contributed to the collision. On the morning of September 11, the weather was fine and driving conditions were normal. The posted speed limit on Main Street was 50 km per hour.

[10] RCMP Sgt. Oliver Whiffen arrived at the scene several hours after the collision, having driven from Clarenville, Newfoundland and Labrador. He was tendered by the Crown to give expert evidence respecting the manner of the collision and the speed at which the Blanchard vehicle was traveling when it struck Mr. Hynes. The Judge qualified Sgt. Whiffen as an expert in collision investigation and reconstruction and pedestrian/vehicle collisions.

[11] Sgt. Whiffen testified to his observations of the scene, including the blood and dirt patterns on the street, the pool of blood where Mr. Hynes' head had

come to rest and Mr. Hynes' book bag which remained where it had landed. Sgt. Whiffen said that he saw tire marks on the gravel shoulder of the street and the grass of the adjacent property just before the fire hydrant, one of Mr. Hynes' sneakers by the fire hydrant, and chips of burgundy paint on the nearby grass. Sgt. Whiffen said he saw the damage to the hood of the Blanchard vehicle and a star-patterned smash in its windshield. Sgt. Whiffen testified that he attended at the morgue the next day to examine Mr. Hynes' body, and that he observed Mr. Hynes' head injuries and a mark on the back of his right knee.

[12] Sgt. Whiffen's opinion was that the collision was a "wrap trajectory collision". He explained that when Mr. Hynes was struck, the impact thrust him backwards onto the hood of the vehicle, causing damage to the hood and Mr. Hynes' head to smash the windshield before the still-moving vehicle projected him forward into the air. Sgt. Whiffen said that Mr. Hynes landed 8.30 metres from the point of impact, and then slid down the street a further 28.6 metres away before coming to a stop.

[13] Sgt. Whiffen testified that in his opinion Ms. Blanchard's vehicle was travelling at 74 km per hour when it struck Mr. Hynes. He said that he reached that conclusion by relying on two established methodologies for calculating speed in vehicle/pedestrian collisions. He explained how the methodology formulas worked, and the information he used to reach his conclusion.

[14] A blood sample was taken from Ms. Blanchard some four hours after the collision. There was some toxicology evidence presented to the Court respecting a prescription drug found in Ms. Blanchard's blood, but it was far from conclusive as to what, if any, effect the drug could have had on her driving.

The Judge's Decision

[15] The Judge's task was to determine whether the evidence established that Ms. Blanchard's driving was dangerous to the degree of being a marked departure from the standard of driving a reasonable person would have exercised in the same circumstances. This test, known as the modified objective test, is the test that must be met to establish dangerous driving causing death (*R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, at para. 48; *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60, at para. 36; and *R. v. Chung*, 2020 SCC 8, at para. 14). To this end, the Judge considered the individual pieces of evidence on which the Crown relied to establish that Ms. Blanchard's driving was markedly dangerous.

[16] The Judge found that Mr. Chatman's evidence of Ms. Blanchard's driving earlier that morning was a minor incident of carelessness and that she was not speeding (para. 125), that Ms. Blanchard's driving close behind Mr. Brown's truck and accelerating away did not mean that she was speeding at that time or moments later when she struck Mr. Hynes (para. 130), and that although the evidence of Mr. Payne and Mr. Keough was very credible, it and the evidence from other witnesses respecting the speed at which Ms. Blanchard's vehicle was travelling did not allow her to conclude that Ms. Blanchard was speeding when she struck Mr. Hynes.

[17] The Judge rejected Sgt. Whiffen's opinion evidence almost entirely. She did not accept his opinion respecting the speed at which the Blanchard vehicle was traveling when it struck Mr. Hynes. She also rejected Sgt. Whiffen's opinion that the collision was a "wrap trajectory" collision, saying that he had made assumptions that were not supported by the evidence and that were outside his area of expertise (see para. 163).

[18] In rejecting Sgt. Whiffen's opinion respecting the speed at which the Blanchard vehicle was traveling when it struck Mr. Hynes, the Judge did not accept his calculation of the "throw distance", which is the distance between where the vehicle collided with Mr. Hynes and his final resting place. The Judge reasoned that the points of impact and final rest that Sgt. Whiffen used in both of the speed calculation formulas were not exact, and that measurements from inexact locations could render the veracity of his calculations uncertain (para. 154). With respect to Sgt. Whiffen's "wrap trajectory" opinion, the Judge agreed that Mr. Hynes was struck from behind, but rejected Sgt. Whiffen's evidence that the blood patterns on the street showed that Mr. Hynes was not dragged, that the mark on the back of Mr. Hynes' knee showed where he had been struck, and that the smashed windshield was caused by his head when he was thrown onto the hood of the Blanchard vehicle. She said that Sgt. Whiffen was not qualified to opine on the blood patterns (paras. 157-158), or to say that the mark on the back of Mr. Hynes' knee was caused by the vehicle striking him (para. 159), or that his head injuries were consistent with causing the star-patterned smash in the windshield (paras. 160-161). She said that the museum sign Ms. Blanchard struck before she struck Mr. Hynes could have hit the windshield and caused it to smash in the star pattern (para. 161). The Judge also rejected Sgt. Whiffen's evidence that the tire marks on the gravel and grass were those of the Blanchard vehicle and that the burgundy paint chips were from the Blanchard vehicle, saying that there had been no testing of either the tire marks or the paint chips to confirm their provenance (paras. 148-150).

[19] The Judge stated:

> [163] In summary, I have carefully considered the whole of Sergeant Whiffen's evidence on its own, and in light of all the evidence. I agree with Defence Counsel's suggestion that Sergeant Whiffen testified outside his field of expertise, and made assumptions upon which the Court cannot reasonably rely. I am therefore not persuaded that the Court can accept and rely upon Sergeant Whiffen's opinion regarding the speed of the Accused's vehicle, at the time of the collision; nor can the Court reasonably rely upon his opinion that the manner of collision was a wrap trajectory collision.

[20] The Judge went on to conclude that while the Crown had proved that Ms. Blanchard's driving was dangerous, the Crown had not proved that Ms. Blanchard had the *mens rea* necessary for conviction:

> [170] Based on the evidence and findings, I conclude that the Crown has established beyond a reasonable doubt the *actus reus* of the offence. I conclude this after carefully considering the law, the submissions of Counsel, and the whole of the evidence regarding the Accused's manner of driving. Specifically, the *actus reus* is established by the Accused's manner of driving of veering off the main road, and onto the shoulder of the road, in a residential area, with pedestrian traffic, and without paved sidewalks. There was clearly a risk of damage or injury to the public created by the Accused's manner of driving. I find that viewed objectively, the Accused's manner of driving was dangerous to the public, in the circumstances. I make this finding, even though I cannot conclude that the Accused was speeding.
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> [177] To elaborate, in my view, a reasonable person who was taking a significant turn in a road, and driving into a residential area with pedestrians, where there was a gravel shoulder as opposed to a paved shoulder, would have foreseen the risk and taken precautions to avoid going off on the side of the road. Nevertheless, after considering all the evidence and submissions of Counsel, I find that the Accused's failure to foresee the risk, and her failure to take steps to avoid such, was not a "marked departure" from the standard of care expected of a reasonable person in the circumstances. The Accused was careless, and she drove in a manner which was dangerous to the public; but, as stated, I am not convinced that her dangerous conduct was of the degree of a "marked departure" from the norm (*R. v. Beatty*, paragraph 48). The inference of fault cannot be drawn in the circumstances of this case.

[21] The Judge acquitted Ms. Blanchard of dangerous driving causing death.

THE APPEAL

[22] The Crown alleges that the Judge made several errors in her treatment of the evidence. Specifically, the Crown argues that the Judge erred in rejecting

Sgt. Whiffen's opinion evidence on the basis that he testified outside of his area of expertise. The Crown also argues that the Judge failed to consider all of the evidence bearing on material issues before deciding them, and that she misapprehended the evidence respecting the speed at which Ms. Blanchard's vehicle was traveling and how speed related to the offence of dangerous driving causing death. As well, the Crown argues that the Judge assessed individual pieces of evidence in isolation on the standard of beyond a reasonable doubt, thereby failing to consider the evidence as a whole. Finally, the Crown argues that the Judge engaged in speculation in reaching her decision. The Crown maintains that the Judge's errors had a material bearing on her decision to acquit Ms. Blanchard, and that a new trial must be ordered.

[23] Ms. Blanchard responds by saying that the Judge properly considered the evidence and correctly concluded that she was not guilty of dangerous driving causing the death of Mr. Hynes.

ISSUES

The issues on appeal are:

- Did Sgt. Whiffen testify outside of his area of expertise?
- Did the Judge misapprehend the evidence respecting speed? Did she fail to consider all of the evidence respecting speed?
- Did the Judge err by piecemealing the evidence and thereby failing to consider it as a whole?
- Did the Judge engage in speculation?
- If the Judge erred, should a new trial be ordered?

Did Sgt. Whiffen testify outside his area of expertise?

The Voir Dire

[24] The Crown tendered Sgt. Whiffen to provide his opinion respecting the manner of the collision between the Blanchard vehicle and Mr. Hynes, and the speed at which the Blanchard vehicle was travelling when she struck him. A *voir dire* was held to determine whether his expert evidence should be received.

[25] Sgt. Whiffen said that he was the senior accident reconstructionist for the province of Newfoundland and Labrador, and that he had been involved in over 150 accident investigations over a period of 16 years. He testified to his education, training, and experience, and referenced the numerous courses he had taken respecting collision reconstruction, including instruction related to estimating and calculating speed, analyzing vehicle damage, skid testing, pedestrian crash investigations including pedestrian kinematics, behaviour and conspicuity, and pedestrian impact dynamics. The dates, duration and content of the courses were detailed in his *Curriculum Vitae* which was before the Court.

[26] Ms. Blanchard did not object to Sgt. Whiffen providing expert evidence or the filing of his expert report. Neither did she question his qualifications. Her counsel questioned Sgt. Whiffen only with respect to the number of times he had been qualified by a court to give expert evidence. He answered that he had testified in court on many occasions and had been qualified twice as an expert in accident reconstruction.

[27] Following the *voir dire*, the Judge qualified Sgt. Whiffen "to give expert opinion evidence with respect to collision investigation including scene diagraming, data collection and reconstruction, particularly pedestrian/vehicle collisions" (para. 81). His *Curriculum Vitae* and report were entered into evidence.

Sgt. Whiffen's Expert Evidence

[28] In a nutshell, Sgt. Whiffen described the collision as a "wrap trajectory" collision, and explained how the evidence and principles of physics supported his opinion. He opined that the Blanchard vehicle's front bumper hit Mr. Hynes on the back of his right knee, causing his body to fold back and be thrown up onto the vehicle, extensively damaging the hood, and causing his head to smash the windshield in a star pattern. Sgt. Whiffen went on to say that because every action has an equal and opposite reaction, Mr. Hynes' body took on the speed of the still-moving Blanchard vehicle and was projected forward into the air landing 8.3 meters away from where he was struck, from which point he slid a further 28.6 metres before coming to a stop. Sgt. Whiffen explained that when Mr. Hynes was projected into the air the Blanchard vehicle was pointed in a certain direction, which set the trajectory for the direction in which Mr. Hynes flew and slid before Ms. Blanchard corrected her vehicle's path of travel back onto the street and into its turn to the left. Sgt. Whiffen showed how the blood pattern on the street supported his evidence.

[29] Sgt. Whiffen also testified to the speed which he determined the Blanchard vehicle was traveling when it struck Mr. Hynes. He explained the two different speed calculation formulas he used and said the Searle formula calculated a minimum speed of 65 km per hour and a maximum speed of 78 km per hour and the Collins formula calculated the speed to be 74 km per hour. He said he viewed the Searle formula as a check on the Collins formula's method and result, and concluded that 74 km per hour was the speed of the Blanchard vehicle when it struck Mr. Hynes.

[30] Ms. Blanchard did not object to Sgt. Whiffen's expertise when he was testifying in direct or in cross-examination. Her counsel did ask him whether Mr. Hynes could have been dragged, as opposed to thrown, by the Blanchard vehicle. Sgt. Whiffen stated that it was not possible that Mr. Hynes had been dragged by Ms. Blanchard's car due to the blood pattern on the street and the locations of Mr. Hynes' body at rest and of the Blanchard vehicle when it stopped.

The Judge's Rulings Respecting Sgt. Whiffen's Expertise

[31] The Judge rejected Sgt. Whiffen's evidence respecting the manner of collision being a "wrap trajectory", saying that it was based on an assumption that he substantiated by testifying outside of his area of expertise (para. 155). She stated that he was testifying outside of his area of expertise in saying that the blood patterns on the road were consistent with a wrap trajectory collision and inconsistent with the body being dragged (para. 157), and rejected his evidence that the mark on the back of Mr. Hynes's right knee was consistent with a wrap trajectory collision saying he was not qualified to make such an assessment (para. 159). She also rejected Sgt. Whiffen's evidence that Mr. Hynes' head injury was consistent with his wrap trajectory opinion because such an assessment was outside of Sgt. Whiffen's area of expertise (para. 160).

Expert Evidence

[32] Expert evidence is opinion evidence provided by a witness who has specialized knowledge of the subject matter in issue. It is tendered for the purpose of providing information and analysis, usually scientific, which is outside of the knowledge and experience of the trier of fact. As such, it enables the trier of fact to draw inferences from the evidence which the trier of fact is otherwise not competent to draw.

[33] The function of an expert witness was described in *R. v. Mohan*, [1994] 2 S.C.R. 9, at 23, wherein Sopinka J., quoting Dickson J. in *R. v. Abbey*, [1982] 2 S.C.R. 24, at 42, stated:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, *per* Lawton L.J.)

[34] There is no requirement that every piece of evidence or factor that informs in an expert's analysis and ultimate opinion be proved beyond a reasonable doubt. The expert's training, experience, and specialized knowledge enables the expert to draw inferences from the circumstances and the evidence and the "ready-made" inferences are put forward for the court to consider in determining the ultimate issue on the standard of beyond a reasonable doubt.

[35] In *R. v. Skorlatowski*, 2016 SKCA 5, the Saskatchewan Court of Appeal considered whether the facts and assumptions an expert relies on in formulating an expert opinion must be proved beyond a reasonable doubt. At trial, the judge did not admit an expert report because the facts and assumptions on which the expert relied were not proved beyond a reasonable doubt. In ordering a new trial, the appellate court explained that the standard of proof beyond a reasonable doubt is reserved for the elements of an offence, and whether an accused is guilty on the basis of the evidence as a whole. See further explanation below respecting application of the proof beyond a reasonable doubt standard.

[36] Once an expert has been found to have testified outside of his area of expertise, that expert's evidence pertaining to matters outside of his expertise must be excluded from consideration (*R. v. Marquard*, [1993] 4 S.C.R. 223, at 244), or if the evidence has already been admitted, no weight can be assigned to it (*R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 48).

[37] It is an error of law to improperly exclude an expert opinion (*R. v. Abbey*, 2009 ONCA 624, at paras. 169-174, leave to appeal to SCC refused 33656 (8 July 2010 [*Abbey (ONCA)*]). See also *R. v. Stevenson*, [1990] O.J. No. 1657, 58 C.C.C. (3d) 464, at para. 94 (Ont. C.A.).

Analysis

[38] Sgt. Whiffen is an accident reconstructionist and the Judge qualified him as such. Upon arriving at the scene of the collision, he set about identifying pieces of evidence to assist him in formulating an opinion as to how the collision occurred. He examined the physical scene, including the blood patterns on the street, the dirt marks on the street and shoulder, the tire marks on the street, shoulder and adjacent lawn, the paint chips on the ground by the fire hydrant, the location of Mr. Hynes' final rest which had been marked by officers at the scene, and the locations of Mr. Hynes' sneakers and backpack. He also examined the damage to the Blanchard vehicle, and he attended at the morgue to view the injuries to Mr. Hynes' body. He then applied his knowledge, training and experience to the evidence, and formed the opinion that the accident was what is known in his field as a wrap trajectory collision (described in paragraph 28 above). He explained his opinion to the Court, including how the pieces of evidence he relied on fit together to support it.

[39] Ms. Blanchard did not object to Sgt. Whiffen's expertise while he was testifying. Nor did she not challenge the evidence he relied upon to form his opinion or the inferences he drew from it while he was explaining his expert opinion to the Court. The first suggestion that Sgt. Whiffen may have testified outside of his area of expertise was in her counsel's final submission.

[40] The place for objecting to an expert testifying beyond his expertise is when he is testifying. This is so the expert has the opportunity to respond to the objection, and so the Court can hear argument on the issue in the context of the objection so as to properly consider the matter. The Supreme Court of Canada addressed this point in *Marquard*, wherein the Court stated that opposing counsel are to object at the qualification stage or during the expert's testimony if and when an expert goes beyond the proper limits of his or her expertise (at para. 244). This is not to say that an argument respecting a witness testifying outside his area of expertise can never be entertained unless the expert was challenged during testimony and the issue argued. Rather, it is to say that a judge should be very slow to entertain such an argument in the absence of specific and timely objection and argument.

[41] It is always open to a trier of fact to accept or reject an expert's opinion evidence. In most cases where expert opinion is proffered, opposing parties each tender expert evidence, and the Judge has to decide between the conflicting expert evidence, in whole or in part. In this case there was no other evidence,

expert or otherwise, explaining a manner of collision different from wrap trajectory.

[42] Sgt. Whiffen's opinion was based on his expert insight respecting the import and significance of the evidence he identified, his knowledge of the laws of physics, and his education, training and experience in analyzing vehicle damage, skid testing, and pedestrian kinematics, conspicuity, and impact dynamics, which in this case involved considering the mechanics of Mr. Hynes' body's motion and his bodily injuries. Sgt.Whiffen's expertise enabled him to draw inferences from the blood patterns on the road, and the mark behind Mr. Hynes' right knee and his head injuries that the court would not be able to draw. His *Curriculum Vitae* and testimony, along with the record, amply support the conclusion that the evidence he gave fell squarely within his area of expertise, and that he did not base his evidence on assumptions he was not qualified to make. The Judge erred in law by improperly excluding from her consideration Sgt. Whiffen's evidence respecting the manner of collision on the basis that it was outside of his expertise (*Abbey (ONCA)*, at para. 174, and *Stevenson*, at para. 94).

Did the Judge err with respect to the evidence of speed?

[43] Speed was a material factor in determining whether Ms. Blanchard's driving was a marked departure from the standard of care expected of a reasonable person in her circumstances. The Crown argues that the Judge misapprehended Sgt. Whiffen's evidence respecting the speed the Blanchard vehicle was travelling, and that she misapprehended how speed related to the ultimate issue. The Crown also maintains that the Judge failed to consider all of the evidence respecting speed.

Alleged misapprehension of Sgt. Whiffen's evidence

[44] The Judge rejected Sgt. Whiffen's evidence that the Blanchard vehicle was travelling at 74 km per hour when it struck Mr. Hynes on the basis that the points of impact and final rest which Sgt. Whiffen used to calculate speed were not sufficiently precise to be reliable. Those co-ordinates were based on uncontroverted evidence respecting the locations of one of Mr. Hynes's shoes and the paint chips, as well as the locations of Mr. Hynes' head and feet at final rest and the pool of blood where his head had been which had been marked by the investigating officers before his body was removed. In performing his calculations, Sgt. Whiffen used well-established formulas and equipment whose

integrity was not impugned. He testified that the measurements calculated were accurate to millimeters.

[45] The Judge had no problem with the accuracy of Sgt. Whiffen's calculations, but considered the co-ordinates he used to be rough estimates. In so ruling, she did not consider the detailed and reliable evidence respecting how Sgt. Whiffen determined the co-ordinates for his calculations or the precision of his equipment. Consideration of how he determined the co-ordinates may have shown that his estimates were not rough. Moreover, the eyewitness testimony of Cst. Barter respecting the location of Mr. Hynes' body at final rest and his marking and photographing of same, as well as the eyewitness testimony from Bruce Payne and Andrew Keough respecting Mr. Hynes' location by the fire hydrant immediately before he was struck, ought to have been considered as a useful check on Sgt. Whiffen's co-ordinates before she dismissed them as rough and the evidence of speed as unreliable.

[46] The Judge's failure to consider the uncontradicted evidence respecting the co-ordinates Sgt. Whiffen used and how he determined them, as well as the evidence from eyewitnesses, caused her to misapprehend Sgt. Whiffen's evidence respecting the material issue of speed, and improperly disregard his expert opinion on the speed at which the Blanchard vehicle was travelling when it struck Mr. Hynes. This resulted in the Judge's failure to consider Sgt. Whiffen's expert evidence of speed when determining whether Ms. Blanchard's dangerous driving was a marked departure from the acceptable standard.

[47] It is an error of law to fail to consider relevant evidence when deciding a material point, or in this instance, the ultimate issue (*R. v. B.(G.)*, [1990] 2 S.C.R. 57, at 73-74). (See also *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 31). Further, and again, it is an error in law to improperly exclude from consideration an expert opinion (*Abbey (ONCA)*, at para. 174).

Alleged misapprehension of how speed related to the ultimate issue

[48] While speed was a material issue, it was not necessary to prove that Ms. Blanchard was speeding, or exceeding the speed limit. Speeding as such is not an essential element of dangerous driving causing death. Rather, driving at an excessive speed in the circumstances, on the "main road, and onto the shoulder of the road, in a residential area, with pedestrian traffic, and without paved sidewalks" (Judge's decision, at para. 170) was what was material to whether Ms. Blanchard's driving was beyond the standard of care expected of a reasonable person in the circumstances. The Judge's focus on whether Ms.

Blanchard was speeding — not whether the speed at which she was driving was excessive in the circumstances — was a misapprehension of how speed related to the ultimate issue, and resulted in her failing to consider speed as a factor when determining the ultimate issue.

Other evidence of speed

[49] Sgt. Whiffen was not the only witness who testified about the Blanchard vehicle's speed when it struck Mr. Hynes. Mr. Calvin Brown testified that after he turned off Main Street, Ms. Blanchard took off "pretty fast" behind him and he heard her engine accelerating as she sped away. This was 200-300 meters before she struck Mr. Hynes. The revving was also heard by Mr. Bruce Payne and Mr. Andrew Keough, who were closer to the place where Mr. Hynes was struck than Mr. Brown was, and the revving was what alerted them to look down from the roof to the street to see Ms. Blanchard's vehicle "flying", as Mr. Payne testified. Even young Jody Blanchard, who was on the other side of the collision looking backwards, testified that the vehicle was driving fast. However, the Judge said that the evidence from these lay witnesses did not allow her to conclude that Ms. Blanchard was speeding.

[50] The evidence respecting speed from these lay witnesses is admissible opinion evidence. This was explained by the Supreme Court of Canada in *Graat v. The Queen,* [1982] 2 S.C.R. 819, at 837, wherein Dickson J. stated: "…It is well established that a non-expert may give evidence that someone was intoxicated just as he may give evidence of age, speed, identity or emotional state". The Judge did not consider this evidence when determining the ultimate issue. She stated that it did not allow her to conclude that Ms. Blanchard was speeding.

[51] In the result, the Judge's misapprehension of Sgt. Whiffen's evidence respecting speed and her misapprehension of how speed related to the standard of care expected of Ms. Blanchard's driving in the circumstances caused the Judge to exclude Sgt. Whiffen's and other witnesses' evidence of speed from her consideration. These exclusions caused her to err in law by failing to consider all of the evidence going to the ultimate issue (*R. v. B.(G).,* at 73-74, and *R. v. Morin*, [1988] 2 S.C.R. 345, at 361-362).

Did the Judge piecemeal the evidence and fail to consider it as a whole?

[52] The Crown also argues that the Judge piecemealed the evidence by assessing individual pieces of evidence and subjecting them to the standard of

proof beyond a reasonable doubt, rather than considering whether the evidence as a whole supported a finding of guilt beyond a reasonable doubt.

The Law

[53] It is well-established law that a Court, in a criminal case, whether a judge or jury, is to assess the evidence as a whole with a view to determining whether all of it, taken together, establishes whether the subject offence is made out beyond a reasonable doubt. This principle was explained long ago by the Supreme Court of Canada in *Coté v. The King*, [1941] S.C.J. No. 49, 77 C.C.C. 75, per Taschereau J.:

> It may be, and such is very often the case, that the facts proven by the Crown, examined separately have not a very strong probative value, but all the facts put in evidence have to be considered each one in relation to the whole, and it is all of them taken together, that may constitute a proper basis for conviction.

[54] More recently, in *Morin*, Sopinka J. also explained the principle, saying that individual pieces of evidence standing alone may not be determinative of much or anything, but when taken together with other evidence, become more meaningful, and have more or less weight or significance. When individual pieces of evidence are examined in relation to the standard of proof beyond a reasonable doubt, they are prone to being dismissed out of hand, rendering the process of weighing the evidence meaningless. The Court went on to rule that a jury is not to examine the evidence piecemeal by reference to the criminal standard, and it is serious misdirection for a judge to charge a jury to do so (*Morin*, at 358-359).

[55] In *J.M.H.*, the Supreme Court of Canada stated that it is an error of law for a trial judge to assess the evidence piecemeal (para. 40) and confirmed that the criminal law standard of proof beyond a reasonable doubt applies to whether an offence is made out, not to individual pieces of evidence which comprise the whole (para. 31).

[56] This does not mean that pieces of evidence cannot be carefully examined. All evidence must be examined with a view to determining its weight, if any. What it does mean is that a "case is not decided by a series of separate and exclusive judgments on each item or by asking what does that by itself prove, or does it prove guilt? That is not the process at all. It is the cumulative effect" (*Morin*, at 359).

[57] In summary, pieces of evidence are not meant to be evaluated in isolation from each other. It is the whole of the evidence, composed of all pieces, that must be considered together, and it is that whole to which the standard of proof beyond a reasonable doubt applies.

Analysis

[58] In this case, the Crown points to several individual pieces of evidence which the Judge assessed in isolation and then effectively discounted when determining the ultimate issue by reasoning that they were not proven beyond a reasonable doubt. The Judge did not accept Sgt. Whiffen's use of the burgundy paint chips as having come from Ms. Blanchard's vehicle because there was no testing done to ensure they were from Ms. Blanchard's vehicle. This was despite Sgt. Whiffen testifying that the paint chips found by the fire hydrant were the same color as the paint of the Blanchard vehicle, that paint chips were in fact missing from the vehicle's hood and that there was no other explanation as to how such paint chips would be found where they were. I agree with the Crown that requiring laboratory testing to match the paint chips with the vehicle's paint in these circumstances is effectively requiring proof beyond a reasonable doubt. The Judge's rejection of the paint chips evidence was a factor which led her to reject Sgt. Whiffen's evidence of speed and his opinion that the collision was a wrap trajectory collision.

[59] Likewise, the Judge rejected the evidence of tire marks seen on the gravel shoulder of the street and the lawn of the adjacent property. Sgt. Whiffen's evidence was that the tire tracks matched the tires on the Blanchard vehicle, and he distinguished the tire marks he said were from the Blanchard vehicle from those of another vehicle. This demonstrated that he was alert to the distinguishing features of the Blanchard vehicle's tires marks. Cst. Barter saw the tire marks on the gravel and lawn, and took photographs of them which were in evidence. Moreover, both Mr. Bruce Payne and Mr. Keough saw the right tires of the Blanchard vehicle go onto the shoulder of the road and saw the tire marks on the lawn. Yet, the Judge discounted the evidence of the tire marks on the lawn on the basis that there was no testing to confirm that they belonged to the Blanchard vehicle. Again, I agree that the standard to which the Judge subjected the tire mark evidence was effectively that of beyond a reasonable doubt, if not a standard of certainty. Discounting the tire mark evidence removed important evidence from the Judge's consideration of the ultimate issue.

[60] The Judge also considered the evidence of Ms. Blanchard's driving from Mr. Chatman, and that from Mr. Brown and Mr. Craig Payne in isolation, and discounted it on the basis that it did not prove that Ms. Blanchard was speeding. Aside from the fact that the evidence respecting these two incidents was not tendered to show that Ms. Blanchard was exceeding the speed limit, it was not tendered to prove, on an individual basis, that Ms. Blanchard's driving fell below the requisite standard. The evidence respecting each incident was a piece of evidence, which, when taken together with all of the other evidence, was asserted to show, in the Crown's submission, that Ms. Blanchard's driving was a marked departure from the requisite standard.

[61] At this juncture it is important to appreciate that the weight of a piece of evidence does not determine its relevance. Individual pieces of evidence do not have to have equal weight, but each is to be weighed and considered in relation to the ultimate issue. In this case, Mr. Chatman's evidence may not have the same weight as that of Mr. Brown or Mr. Bruce Payne, or any other piece of evidence, but it is part of the whole of the evidence to be considered in relation to the ultimate issue.

[62] The Judge's assessment of these individual pieces of evidence was effectively measured on the standard of beyond a reasonable doubt, which resulted in her excluding them from her consideration in her assessment of the whole of the evidence in determining the ultimate issue. In so doing, she erred in law.

Did the Judge engage in speculation?

The Law

[63] In concluding that the Crown had not established the requisite *mens rea* for the offence, the Judge stated that Ms. Blanchard's "veering off the road may have been attributable to momentary inattentiveness", that the evidence was "not inconsistent with a momentary lapse of attention, causing the Accused to veer off onto the shoulder of the road", and that "it is reasonable to consider it possible that the Accused was not only distracted when she veered off the road, but also further distracted after her vehicle hit the museum sign" (paras. 179-180).

[64] The Crown maintains that it is an error of law to decide a case on speculation, and relies on *Wild v. The Queen*, [1971] S.C.R. 101, at 114 and 117, and *R. v. Brodeur*, 2014 NBCA 44, at para. 12, to support its position.

[65] In *Wild*, the trial judge accepted defence counsel's theory that the accused had not been the impaired driver of a motor vehicle involved in a serious crash, but had been a back-seat passenger thrown into the front seat and pinned into a position behind the wheel. There was no evidence to support counsel's theory, and much evidence to contradict it. The Supreme Court of Canada ruled that the judge had speculated that counsel's theory might be correct, and erred by acquitting the accused on that basis. In *Brodeur*, the trial judge speculated about the investigating officer's motives in stopping the accused and speculated on the effect of rain on the smell from a bottle of perfume in the accused's car. These speculations, among others, led the trial judge to acquit the accused of impaired driving. The New Brunswick Court of Appeal reversed, and ordered a new trial.

Analysis

[66] In this case the Judge found that Ms. Blanchard was driving dangerously when she struck Mr. Hynes, but she had a reasonable doubt about Ms. Blanchard's *mens rea* to commit the offence. There was no evidence respecting why Ms. Blanchard was driving dangerously. She did not testify and she did not offer any explanation for her driving in the statement she gave to police approximately three months after the collision. Neither was there explanation offered by any other witness.

[67] Momentary distraction can be a circumstance that differentiates an act of dangerous driving from driving which establishes the criminal offence of dangerous driving causing death. Momentary distraction is what occurred in *Beatty*, where the evidence was that the driver's momentary distraction caused him to cross the centre line of a highway and collide with an oncoming vehicle, when his driving was entirely normal in all other respects. Similarly, in *Roy*, the driver, who pulled out onto a highway in foggy driving conditions and collided with a tractor trailer, was ruled to have exercised a single and momentary error of judgment which had tragic consequences. The Supreme Court of Canada contrasted such momentary mistakes from the driving in *Chung*, where the accused engaged in a "brief period of rapidly changing lanes and accelerating towards an intersection". The Court found that the "full picture" of Mr. Chung's driving supported a finding that he had the requisite *mens rea* to be convicted of dangerous driving causing death.

[68] With respect, the evidence respecting Ms. Blanchard's dangerous driving in this case cannot be described as resulting from momentary distraction or a single lapse of judgment that could be made by any reasonable driver. The Judge's comments that Ms. Blanchard might have been momentarily distracted

were not based on any evidence, or an inference that could reasonably be drawn from the evidence.

[69] A finding of fact made in the absence of any supportive evidence is an error of law (see *J.M.H.*, at para. 39, and *R. v. B.(G.),* at paras 69-70). While the Judge did not find as a fact that Ms. Blanchard was momentarily distracted, her comments about momentary distraction were made in the context of her reasons for why she had a reasonable doubt that Ms. Blanchard's manner of driving did not meet the modified objective standard required to establish the *mens rea* of the offence. While a reasonable doubt may be based on a lack of evidence, a reasonable doubt based on speculation is erroneous. In these circumstances, the Judge's speculation about momentary inattentiveness in some measure informed her reasonable doubt about Ms. Blanchard's guilt. To the extent that it did, she was in error.

Did the Judge's errors have a material bearing on the acquittal?

[70] On a Crown appeal of an acquittal, the Crown must demonstrate legal error, and also that the error might reasonably be thought, in the concrete reality of the case, to have had a material bearing on the acquittal (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14).

[71] The Judge's legal errors in this case go the root of whether Ms. Blanchard's driving satisfied the modified objective standard required to convict. Her error in finding that Sgt. Whiffen testified outside his area of expertise resulted in wholesale rejection of Sgt. Whiffen's evidence respecting the manner of the collision which was an important factor relating to whether Ms. Blanchard's driving was a marked departure from the acceptable standard. Likewise, the Judge's misapprehension of Sgt. Whiffen's evidence of speed, her failure to consider all of the evidence respecting speed, and her failure to appreciate how speed related to the ultimate issue were factors important to determining the ultimate issue. As well, her piecemealing of the evidence led her to disregard evidence that bore directly on whether Ms. Blanchard's driving met the modified objective standard. Accordingly, in the concrete reality of the case, I am of the view that the Judge's legal errors can reasonably be said to have had a material bearing on the acquittal, and that the *Graveline* test is met.

Disposition

[72] In the result, I would allow the appeal and order a new trial.

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L.R. Hoegg J.A.

I concur: ___________________________
W.H. Goodridge J.A.

I concur: __________________________
G.D. Butler J.A.