# Court of Queen's Bench of Alberta

**Citation: R v Pratt, 2014 ABQB 319**

**Date:** 20140528
**Docket:** 130540289Q1
**Registry:** Wetaskiwin



Between:

**Her Majesty the Queen**

- and -

**Johnathan Robert Pratt**

Accused

**Corrected judgment:** A corrigendum was issued on May 28, 2014; the corrections have been made to the text and the corrigendum is appended to this judgment.

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**Reasons for Judgment**
**of the**
**Honourable Mr. Justice R. Paul Belzil**

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[1] The accused has been charged with three counts of operating a motor vehicle while his ability to do so was impaired by alcohol and thereby caused the deaths of Bradley Arsenault, Kole Novak, and Thaddeus Lake contrary to s 255(3) of the *Criminal Code*.

[2] He has also been charged with three counts of operating a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, causing an accident resulting in the deaths of Bradley Arsenault, Kole Novak and Thaddeus Lake contrary to s 255(3.1) of the *Criminal Code*.

[3] He has further been charged with three counts of unlawfully killing and thereby committing the manslaughter of Bradley Arsenault, Kole Novak and Thaddeus Lake contrary to s 236(b) of the *Criminal Code*.

[4] The charges arise out of a catastrophic motor vehicle collision which occurred on November 26, 2011, at approximately 2:45 AM, one kilometre west of Beaumont, Alberta.

[5] The Crown alleges that three occupants of a Pontiac Grand Am, Bradley Arsenault, Kole Novak and Thaddeus Lake, were killed when the Pontiac was struck from the rear by a Dodge Ram operated by the accused. The Crown also alleges that the accused was heavily intoxicated by alcohol at the time.



**Evidence of Corporal Ken Alexander**

[6] Corporal Alexander was qualified by consent as an Expert Traffic Collision Analyst. He is a Level 4 analyst who has investigated over 2,000 collisions.

[7] He was also qualified by consent as an expert in the analysis of crash data retrieval which is obtained by imaging the Airbag Control Module, known as an ACM, on newer motor vehicles.

[8] Corporal Alexander prepared a detailed Technical Collision Investigation Report which was exhibited at trial.

[9] He attended the scene on November 26, 2011, arriving at approximately 4:46 AM. He took a number of photographs which are appended to his report and, as well, he made a series of observations of the scene.

[10] On December 11, 2011, under the authority of a search warrant, he downloaded data from the ACM of a 2011 Dodge Ram, model 2500, which had been seized by the RCMP and put into secure storage.

[11] On completing his report, he made a number of calculations and prepared diagrams which are also appended to his report.

[12] Corporal Alexander's report is very lengthy, and I propose for the purposes of this judgment to summarize the key findings he made.

[13] The collision occurred on a secondary Highway 625, approximately one kilometre west of Beaumont, Alberta, and occurred at approximately 2:45 AM. There were no eyewitnesses to the collision.

[14] There were two vehicles involved, being a 2011 Dodge Rain, model 2500, truck weighing approximately 3,500 kilograms and a Pontiac Grand Am weighing approximately 1,520 kilograms.

[15] Secondary Highway 625 at the point of the collision is a straight and level asphalt highway with one eastbound lane and one westbound lane divided by a double-solid yellow centre line. The posted speed limit at the point of the collision is 70 kilometres per hour.

[16] He observed that the asphalt surface of secondary Highway 625 was bare and dry.

[17] Weather at the time of the collision was clear with no precipitation. The temperature was -8.2 degrees celsius. It was dark, and there is no artificial lighting in that area.

[18] Corporal Alexander opined that both vehicles were travelling in an easterly direction and that the Dodge Ram collided with the rear of the Pontiac. Both vehicles were properly oriented in the eastbound lane of secondary Highway 625 on initial impact.

[19] There was approximately 90 percent overlap between the front of the Dodge Ram and the rear of the Pontiac. The Dodge Ram mounted the rear bumper of the Pontiac and plowed through the vehicle completely destroying the entire passenger compartment.

[20] Both vehicles rotated clockwise. The Pontiac entered the south ditch and rolled. He estimated that the Pontiac travelled 120.4 metres southeast of the initial area of impact, and that the Dodge Ram also entered the south ditch and travelled 177.4 metres southeast of the initial area of impact and rolled several times before coming to a stop in a small slough. The Pontiac was virtually demolished; whereas, the Dodge Ram sustained very serious damage.

[21] He concluded that there was no evidence to indicate any mechanical defect or roadway defect which may have contributed to the collision.

[22] There was no evidence of anything which would have obstructed the view of anyone driving eastbound on secondary Highway 625 at that time and at that point on the highway.

[23] He also concluded that there was no evidence of any steering or braking evasive action being taken by the operator of the Dodge Ram, and, in particular, no skid marks were observed on the highway.

[24] He did a series of calculations of estimated speeds of the two vehicles at the time of the initial impact and concluded that the Dodge Ram was travelling at the speed of 174 kilometres per hour; whereas, the Pontiac was travelling at 70 kilometres per hour. He testified that these types of calculations require the use of estimates and variables and are conservative.

[25] Appended to his report are copies of the downloaded data from the ACM of the Dodge Ram which is referred to as pre-crash data.

[26] Corporal Alexander testified that two sets of data were imaged. The first being the initial impact referred to as the first priority event, and the second being the most recent which would have recorded the deployment of the side airbags when the Dodge Ram rolled.

[27] He observed that the pre-crash data records a number of items as follows:

(a) engine rpm;
(b) speed of the vehicle;
(c) accelerator pedal placement;
(d) brake switch; and
(e) brake lamp.

[28] He testified that the data is recorded in intervals of 0.1 of a second and on deployment of the airbag, data for the preceding 5 seconds is recorded.

[29] The crash data schedules appended to his report recorded the following at 0.1 of a second prior to the initial impact:

(a) engine rpm of 3,156 which was steady and virtually unchanged for the preceding 5 seconds;
(b) the vehicle speed was 199 kilometres per hour which was unchanged in the preceding five seconds;

(c) the accelerator pedal was 100 percent depressed which was unchanged in the preceding five seconds;
(d) the brake switch was open, meaning that the brakes were not engaged and the brake switch was open in the preceding five seconds;
(e) the brake lamps were off and were in the off position in the preceding five seconds.

[30] He testified that the crash data recording of the speed for the Dodge Ram of 199 kilometres per hour, one of a second before initial impact, is a more reliable indicator of speed than his own calculation of 174 kilometres per hour.

[31] Corporal Alexander was a very credible witness who was not seriously challenged in cross-examination.

[32] I find that his conclusions as to how the collision occurred are reliable and I accept them without exception. In particular, I accept his evidence that the crash data recording of a speed of 199 kilometres per hour, 0.1 of a second prior to impact, is a more reliable indicator of the speed of the Dodge Ram at initial impact than his own calculation of 174 kilometres per hour.

[33] In the result, I conclude that the Crown has proven beyond a reasonable doubt that the operator of the Dodge Ram caused the collision with the Pontiac.

[34] Has the Crown proven beyond a reasonable doubt that the accused was driving the Dodge Ram at the time of the collision?

[35] The accused cannot be convicted of any of these charges unless the Crown has proven beyond a reasonable doubt that he was the driver of the Dodge Ram.

[36] Clearly, the accused was at the scene as he was located pinned underneath the Dodge Ram.

[37] Given that there were no eyewitnesses to the collision, the Crown's case on the issue of identification of the driver is entirely circumstantial.

[38] The accused admitted that he was the registered owner of the Dodge Ram as of November 26, 2011.

[39] The accused's DNA was found on the driver's front airbag which is located in the steering wheel. The Crown concedes that the presence of the accused's DNA on the driver's front airbag is not conclusive of the issue of whether the accused was operating the vehicle at the time of the deployment of the airbag, given the admission that it is not possible to determine how long the accused's DNA was on the airbag.

[40] Nonetheless, the presence of the accused's DNA on the driver's front airbag is one piece of evidence to be considered, along with all of the other evidence, in determining whether the Crown has proven beyond a reasonable doubt that the accused was the driver of the Dodge Ram.

[41] Police, firefighters and several other persons, including Mr. Pickle, thoroughly searched the surrounding area for other persons who may have been in either vehicle at the time of the collision. Both sides of secondary Highway 625 were searched and firefighters used infrared scanners in searching the area.

[42] A number of photographs of the area where the Dodge Ram came to rest were presented at trial. The area is flat and open. The individuals searching the area to determine if anyone else

was present or had left the scene were aided by the fact that snow and ice surfaces adjacent to the truck were undisturbed.

[43] The only persons found at the scene were the accused and the three deceased occupants of the Pontiac.

[44] I find as a fact that, following the thorough search, all persons at the scene were located and identified.

[45] Defence counsel argued that someone else may have been driving the Dodge Ram and walked away from the scene.

[46] As noted, both vehicles rolled after initial impact and both were extensively damaged. The extent of damage to the Dodge Ram was graphically illustrated in the photographs, exhibited at trial, taken by Constable Scoff of the forensic identification section of the RCMP. The roof of the truck was torn off, and in addition, there was massive damage done to the body of the vehicle.

[47] By any measure, this was a catastrophic high-speed collision resulting in the Dodge Ram rolling over. The three occupants of the Pontiac were killed. The accused sustained a fractured leg, chest injuries and a head injury, as a result of which he spent six weeks in hospital.

[48] There is no evidence whatsoever linking anyone to this vehicle, other than the accused, except for the presence of the DNA of an unknown person on the front passenger airbag but it is not possible to determine when this DNA contacted this airbag.

[49] On the evidence before me, I find that it would be practically impossible for anyone riding in either vehicle to escape being killed or seriously injured as a result of this collision.

[50] While it is theoretically possible someone else was driving the Dodge Ram, this amounts to nothing more than speculation in an evidentiary vacuum.

[51] As observed by the Supreme Court of Canada in ***R v Lifchus***, [1997] 3 SCR 320, at paragraph 36, and ***R v Starr***, 2000 SCC 40, at paragraph 230, the obligation of the Crown to prove charges beyond a reasonable doubt does not mean that the Crown must prove them to an absolute certainty.

[52] Having regard to all of the evidence, I find that the Crown has proven beyond a reasonable doubt that the accused was driving the Dodge Ram at the time of the collision of November 26, 2011.

[53] Did the collision of November 26, 2011 cause the deaths of Bradley Arsenault, Kole Novak and Thaddeus Lake?

[54] The bodies of Bradley Arsenault, Kole Novak and Thaddeus Lake were found at the scene and all were pronounced dead.

[55] Dr. Dowling, a forensic pathologist, examined the bodies and concluded that Bradley Arsenault and Kole Novak died of multiple blunt injuries whereas Thaddeus Lake died of blunt cranial trauma.

[56] On the evidence there can be no doubt that they died directly and solely as a result of the collision between the Dodge Ram and the Pontiac vehicle they were riding in.

[57] Toxicology reports were appended to the certificates of medical examiner for Bradley Arsenault and Thaddeus Lake, as it was not definitively determined which one of them was driving the Pontiac. Kole Novak was found seat belted in the passenger seat and clearly was not driving.

[58] Bradley Arsenault's blood alcohol content was 40 milligrams percent, or .04, and, as well, his blood tested positive for THC, which is the active ingredient in marijuana.

[59] Thaddeus Lake's blood alcohol content was 180 milligrams percent or .18.

[60] Dr. Dowling testified that these toxicology findings in no way change the cause of death for either of them.

[61] Irrespective of whether Bradley Arsenault or Kole Novak was driving the Pontiac, their toxicology findings are irrelevant given that the Pontiac was determined by Corporal Alexander to have been situated properly in the eastbound lane of secondary Highway 625 and travelling at the posted speed limit of 70 kilometres per hour when it was struck from the rear by the Dodge Ram.



**Continuity of Hospital Blood Samples Tested for Ethanol**

[62] Defence counsel argued that the Crown has failed to prove continuity of hospital blood samples that were tested for ethanol content within the hospital for hospital treatment purposes, the results of which form part of the test results utilized by the Crown's toxicology expert Ms. Lehmann.

[63] In ***R v Smith***, 2011 ABCA 136, the Alberta Court of Appeal discussed the significance of s 30 of the *Canada Evidence Act* and the following passage appears at paragraph 32:

> ... hospital records are capable of being admitted as evidence for the proof of their contents sufficient to meet the requirements of proof beyond a reasonable doubt under Section 30 of the *Canada Evidence Act*, without more, in the absence of other evidence sufficient to raise a doubt in the mind of the trier of fact.

[64] I do not accept that there is any other evidence which raises a reasonable doubt on the issue of continuity of hospital blood samples used internally to test for the presence of ethanol.

**Impaired Driving Causing Death**

[65] The Alberta Court of Appeal in the case of ***R v Andrews***, 1996 ABCA 23, at paragraph 31 outlined the general principles applicable in charges of impaired driving:

> In my view, the following general principles emerge in an impaired driving charge:
>
> (1) the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;
>
> (2) there must be an impairment of the ability to drive of the individual;

> (3) that the impairment of the ability to drive must be caused by the consumption of alcohol or a drug;
>
> (4) that the impairment of ability to drive by alcohol or drugs need not be to a marked degree; and
>
> (5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, these observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent, the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.



[66] In this case, there were no eyewitnesses to the operation of the accused's motor vehicle prior to the collision. As such, the Crown relies on the evidence at trial relating to the blood alcohol content of the accused at the time of the collision, as estimated by its toxicology expert, coupled with circumstances surrounding the collision.

[67] In the case of ***R v Dinelle***, [1986] NSJ No 246, the Nova Scotia Court of Appeal dismissed the appeal from a decision that in a charge of impaired driving, the trial judge is entitled to use the certificate of analysis as one piece of evidence to be considered along with all of the other evidence.

[68] The certificate of analysis exhibited at trial by consent disclosed a blood alcohol content in the accused's blood of 174 milligrams percent or .174.

[69] The Crown called Ms. Lehmann who was qualified by consent as an expert toxicologist qualified to calculate blood alcohol content of blood and to give opinion evidence on the effects of alcohol on the human body.

[70] She opined that at the time of the collision, being 2:45 AM, on November 26, 2011, the accused's blood alcohol content was estimated to be no less than 200 milligrams percent, or .20, which is 2.5 times the legal limit of 80 milligrams percent or .08. She testified that alcohol elimination and absorption rates vary from person to person, and accordingly, it is scientifically appropriate to estimate ranges of blood alcohol content levels.

[71] In ***R v Gibson***, 2008 SCC 16, the Supreme Court of Canada approved the use of ranges in estimating blood alcohol content as being scientifically sound.

[72] Defence counsel argued that her evidence is not reliable because the accused may have engaged in bolus drinking prior to the collision.

[73] No evidence was presented at the trial as to the amount of alcohol the accused consumed prior to the collision or how quickly he consumed it, and accordingly, any suggestion of bolus drinking has no evidentiary foundation.

[74] I found Ms. Lehmann to be a credible witness and accept the conclusions in her report and testimony as to the estimated blood alcohol content of the accused at the time of the collision.

[75] Moreover, I accept her opinion that the accused's ability to operate a motor vehicle would have been significantly impaired at the blood alcohol content levels she estimated.

[76] The circumstances of the collision were described in the report and testimony of Corporal Alexander.

[77] The highway where this collision occurred is straight and level and the asphalt at the time was bare and dry. There was no precipitation at the time.

[78] The posted speed limit was 70 kilometres per hour and the crash data indicated that the accused's vehicle was travelling at 199 kilometres per hour, grossly in excess of the posted speed limit. The accused's Dodge Ram rear-ended the Pontiac which was estimated to be travelling at the posted limit of 70 kilometres per hour.

[79] Corporal Alexander was unable to identify anything which would have obstructed the accused's vision of the road, nor could he identify anything of a mechanical nature or anything in the condition of the highway that contributed to the collision.

[80] Notably, he opined that he found no evidence of any evasive action by the driver of the Dodge Ram prior to impact.

[81] No evidence was proffered at trial which in any way could explain why this collision occurred other than as a result of the operation of the Dodge Ram by the accused.

[82] In ***Andrews***, the following passage is found at paragraph 30:

> ... the question is simply whether the totality of the accused's conduct and condition can lead to a conclusion other than that his or her ability to drive is impaired to some degree. Obviously, if the totality of the evidence is ambiguous in that regard, the onus will not be met. Common sense dictates that the greater the departure from the norm, the greater the indication that the person's ability to drive is impaired.

[83] The totality of the evidence in this case overwhelmingly establishes that the accused's driving was an extreme departure from the norm and this is in no way a factual situation wherein any ambiguity on this issue could possibly exist.

[84] I find that the Crown has proven beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol at the time of the collision which caused the deaths of Bradley Arsenault, Kole Novak and Thaddeus Lake.

[85] Accordingly, I find the accused guilty of Counts 1, 2 and 3.

[86] Has the Crown proven beyond a reasonable doubt that the accused was operating the Dodge Ram having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood did, while operating a motor vehicle, caused an accident resulting in the deaths of Bradley Arsenault, Kole Novak and Thaddeus Lake?

[87] As noted, I accept Ms. Lehmann's report and testimony and find that the Crown has proven beyond a reasonable doubt that at 2:45 AM, on November 26, 2011, the accused was operating his motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood and that while

operating his motor vehicle caused an accident resulting in the deaths of Bradley Arsenault, Kole Novak and Thaddeus Lake.

[88] Accordingly, I find the accused guilty of Counts 4, 5 and 6.

**Manslaughter**

[89] The Crown argues that pursuant to s 222 of the *Criminal Code* the accused can be convicted of manslaughter for the culpable homicides of Bradley Arsenault, Kole Novak and Thaddeus Lake, either by means of an unlawful act or by criminal negligence.

In ***R v Creighton***, [1993] SCR 3, the Supreme Court of Canada considered the *mens rea* required for manslaughter. At pages 44 and 45 of the majority judgment, the following passage appears:

> So the test for the *mens rea* of unlawful act manslaughter in Canada, as in the United Kingdom, is (in addition to the *mens rea* of the underlying offence) objective foreseeability of the risk of bodily harm which is neither trivial nor transitory in the context of a dangerous act. Foreseeability of the risk of death is not required.

[90] In order to convict a person for unlawful act manslaughter, the Crown must prove beyond a reasonable doubt that the unlawful act was objectively dangerous in the sense that a reasonable person in the same circumstances as the accused would recognize that the unlawful act would subject other persons to the risk of bodily harm which is neither trivial or transitory.

[91] The Crown does not have to prove that the accused foresaw or intended bodily harm.

[92] In ***Creighton***, the majority at pages 73 and 74 defined the *mens rea* for criminal negligence as follows:

> The foregoing analysis suggests the following line of inquiry in cases of penal negligence. The first question is whether the *actus reus* is established. This requires that the negligence constitute a marked departure from the standard of the reasonable person in all the circumstances of the cases. This 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.
>
> The next question is whether the *mens rea* is established. As is the case with crimes of subjective *mens rea*, the *mens rea* for objective foresight of risking bodily harm is normally inferred from the facts. The standard is that of a reasonable person in the circumstances of the accused. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he or she failed to direct his or her mind to the risk and the need to take care.

[93] In order to convict a person of manslaughter by criminal negligence, the Crown must prove beyond a reasonable doubt the conduct was a marked and substantial departure from the standard of care of a reasonable person in the circumstances.

[94] Moreover, the Crown must also prove that the conduct showed a wanton or reckless disregard for the lives or safety of other persons.

[95] There is an elevated standard required to convict of manslaughter by criminal negligence.

[96] The Crown argues that the underlying offence in this case is dangerous driving.

In ***R v Beatty***, [2008] 1 SCR 49, the Supreme Court of Canada described the *actus reus* and *mens rea* for dangerous driving at paragraph 43 as follows:

> (a) The *Actus Reus*
>
> The trier of fact must be satisfied beyond a reasonable doubt that viewed objectively, the accused was, in the words of the s, 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*
>
> A 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 of 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.

[97] I am mindful that pursuant to s 662(5) of the *Criminal Code* dangerous driving is a lesser and included offence to vehicular manslaughter.

[98] In my view, the Crown's description of the underlying offence is incomplete. It is at the core of the Crown's case that the deaths of Bradley Arsenault, Kole Novak and Thaddeus Lake were caused by a combination of dangerous driving coupled with the Crown's allegation that the accused's ability to operate a motor vehicle was significantly impaired by alcohol. Indeed, the Crown charged the accused with three counts of impaired driving causing death and three counts of operating a motor vehicle with the blood alcohol content exceeding .08 causing an accident resulting in the deaths of Bradley Arsenault, Kole Novak and Thaddeus Lake.

[99] I have already concluded the Crown did prove beyond a reasonable doubt that the accused is guilty of these two serious alcohol-based offences.

[100] The correct and complete characterization of the Crown's case is that the accused engaged in horrendous driving while his ability to operate his motor vehicle was significantly impaired by alcohol.

[101] I have concluded that the Crown has proven beyond a reasonable doubt that the accused committed the manslaughter of Bradley Arsenault, Kole Novak and Thaddeus Lake both by means of an unlawful act and by criminal negligence.

[102] As noted above, I have concluded that the accused was operating his motor vehicle at a grossly excessive speed of 199 kilometres per hour, in a 70 kilometre per hour zone, and failed to take any evasive action prior to rear-ending the Pontiac vehicle and that he was driving while his

ability to operate a motor vehicle was significantly impaired by alcohol. On this evidence, anyone in the accused's position would have objective foreseeability of the risk of bodily harm from this extreme driving conduct coupled with significant impairment by alcohol of his ability to operate a motor vehicle.

[103] Moreover, this conduct amounted to a marked and substantial departure from the standard of care of a reasonable driver in the circumstances and that the accused showed a wanton or reckless disregard for the lives or safety of other persons in operating his motor vehicle in this manner while his ability to operate a motor vehicle was significantly impaired by alcohol.

[104] In the result, I find the accused guilty of Counts 7, 8 and 9.

[105] I will now hear argument from counsel on the effect of multiple convictions following the principles outlined in ***R v Kienapple***, [1975] 1 SCR 729 and ***R v Prince***, [1986] 2 SCR 480.



Heard on the April 14th, 28th and 29th and May 1st, 2nd, 5th, 6th, 8th, 9th, 12th and 13th.
Delivered orally on the 15th day of May, 2014.
**Dated** at the City of Edmonton, Alberta this 28th day of May, 2014.

**R. Paul Belzil**
**J.C.Q.B.A.**

**Appearances:**

G.K. Hatch
R.J. Pollard
for the Crown

T.J. Dunlap
for the Accused

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**Corrigendum of the Reasons for Judgment**
**of**
**The Honourable Mr. Justice R. Paul Belzil**

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Changes were made to the following paragraphs:

[51] The case name was changed to read ***R v Lifchus***, [1997] 3 SCR 320.

[72] Bolus thinking was changed to read bolus drinking.