CITATION: R. v. Ramage, 2010 ONCA 488
DATE: 20100709
DOCKET: C48219

COURT OF APPEAL FOR ONTARIO

Doherty, Laskin and Goudge JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Robert Ramage

Appellant

Brian Greenspan and Seth P. Weinstein, for the appellant

Philip Perlmutter, for the respondent

Heard: March 1, 2010

On appeal from the convictions entered by Justice Alexander Sosna of the Superior Court of Justice, sitting with a jury, on October 10, 2007, and the sentences imposed on January 17, 2008, with reasons reported at (2008), 53 C.R. (6th) 342.

Doherty J.A.:

I

Overview

[1] On December 15, 2003, the appellant's motor vehicle crossed four lanes of traffic on a busy four-lane road and struck two oncoming vehicles. The passenger in the

appellant's vehicle was killed. Michelle Pacheco, the driver of one of the vehicles struck by the appellant's vehicle, suffered significant debilitating injuries. The appellant was charged with five offences:

- Impaired driving causing death;
- Dangerous driving causing death;
- Impaired driving causing bodily harm;
- Dangerous driving causing bodily harm; and
- Operating a motor vehicle with a blood alcohol level exceeding .08 ("over .08").

[2] The jury returned guilty verdicts on all counts. The trial judge stayed the over .08 charge and entered convictions on the other charges. He subsequently sentenced the appellant to a jail term totalling four years and imposed a five-year driving prohibition under art. 259 of the *Criminal Code*.

[3] The appellant appeals from his convictions and seeks a new trial. If that appeal fails, he requests leave to appeal and, if leave is granted, appeals the sentences imposed.

[4] Counsel for the appellant raises three issues on the conviction appeal. First, he argues that the trial judge, having properly determined that the seizure of samples of the appellant's urine violated his constitutional rights under s. 8 of the *Charter*, erred in not excluding the urinalysis results from evidence pursuant to s. 24(2) of the *Charter*. Second, counsel submits that the trial judge's instructions to the jury misstated and denigrated crucial features of the case for the defence, rendering the trial unfair. Third, counsel submits that in the circumstances of this case, the rule against multiple convictions arising out of the same delict set down in *R. v. Kienapple*, 1974 CanLII 14 (SCC), [1975] 1 S.C.R. 729 precluded convictions on both the dangerous driving charges and the impaired driving charges. Counsel submits that the dangerous driving charges should have been stayed.

[5] On the sentence appeal, counsel for the appellant acknowledges the seriousness of the offences. He submits, however, that having regard to the appellant's truly exemplary background and the heartfelt plea for mercy made by members of the deceased's family, a four-year penitentiary term is harsh and grossly disproportionate.

[6] I would dismiss the conviction appeal. The trial judge did not err in concluding that the urinalysis results should not be excluded under s. 24(2) of the *Charter*. The charge to the jury was fair and, in my view, accurately put the case for both the Crown and the defence. I agree with the trial judge's finding that the rule in *Kienapple* did not preclude a conviction both for impaired driving and for driving in a manner that was dangerous to the public. The former speaks to the risk posed by the impairment of accused's ability to drive, while the latter addresses the risk caused by the manner in which the accused actually drove.

[7] I would dismiss the sentence appeal. The trial judge was faced with a very difficult sentencing problem. Having read his reasons and given the matter anxious consideration, I would defer to his conclusion that a four-year penitentiary term was necessary to properly

reflect the competing, if not irreconcilable, interests at stake in the sentencing phase of these proceedings.

II

The Facts

[8] Different parts of the evidence presented starkly different pictures of the appellant's sobriety at the time of the accident. On the one hand, there was evidence - particularly the results of the urine and blood analyses - indicating that the appellant was very drunk when he drove his vehicle across four lanes of traffic with disastrous consequences. On the other hand, there was evidence from several witnesses that the appellant was not impaired and that he had little, if anything, to drink in the six hours before the accident. The appellant did not testify. The jury had the difficult task of examining the conflicting evidence and deciding whether the Crown had proved its case beyond a reasonable doubt.

[9] On December 15, 2003, the appellant, a former professional hockey player and an active member of the National Hockey League Alumni Association, attended the funeral of a friend and former colleague. After the funeral, he went to a reception at a local golf course. He was there for several hours. At about 4:30 p.m., the appellant left the reception, intending to drive to a meeting of the Alumni Association. Keith Magnuson, the appellant's good friend, a former professional hockey player and a member of the Alumni Association, accompanied the appellant. The meeting was several miles southeast of the golf course where the reception was held. The defence called seven witnesses who had had contact with the appellant at the reception following the funeral. None observed any signs of impairment. One witness, Andy Bathgate, spoke with the appellant at some length around one half hour before the accident. He noticed that the appellant had a glass of wine in his hand, but saw nothing to indicate any degree of impairment.

[10] At about 5:00 p.m., the appellant's vehicle was travelling eastbound in the curb lane on Rutherford Road, a four-lane east/west roadway. The weather was clear. It was dusk but visibility was good. The road was dry. Traffic was steady but not heavy.

[11] At a gentle curve in the road, the appellant's vehicle travelled straight across both eastbound lanes into the westbound lanes of Rutherford Road. It struck a Honda, sheering off the back bumper. No one in the Honda was hurt. The appellant's vehicle then struck a Nissan Pathfinder head on, virtually destroying that vehicle. Ms. Pacheco, the driver of the Nissan, suffered significant but not life-threatening injuries. The appellant's vehicle ricocheted off the Nissan and came to rest at the guardrail. The front half of the appellant's vehicle was demolished. Both the appellant and Mr. Magnuson were trapped inside. Mr. Magnuson died at the scene. The appellant suffered significant lower body injuries and a concussion.

[12] The Crown contended that the path taken by the appellant's vehicle across the four lanes of traffic suggested that he was intoxicated. On the evidence, particularly that of the witness driving behind the appellant, the appellant's vehicle took a straight diagonal path across the four lanes. He did not apply the brakes and did not take any evasive action.

[13] The defence led evidence that the path of the vehicle could be explained by a mechanical problem that caused the left front wheel to lock. I need not set out the specifics of that evidence. A Crown expert, who examined the vehicle shortly after the accident and well before the defence expert, concluded that it was in good mechanical condition. The Crown expert also testified that even if the front left wheel had locked, the appellant would not have been prevented entirely from steering the vehicle. The expert also indicated that any problem there may have been with the left front wheel would not explain the appellant's failure to apply the brakes.

[14] A number of emergency responders and police officers arrived at the scene shortly after the accident. The appellant was initially unconscious but soon regained consciousness, although he seemed confused. He was in obvious physical distress and had to be extracted from the vehicle. The appellant was concerned about his passenger, whom he mistakenly identified as Gary Leeman. There was expert evidence that the concussion suffered by the appellant could explain his apparent confusion, especially as to the identity of his passenger. He apparently confused Mr. Magnuson with Mr. Leeman, a friend and former teammate who, like Mr. Magnuson, had red hair and had attended the reception earlier that day.

[15] Several of the first responders noted the smell of alcohol in the vehicle. The appellant had purchased some beer earlier that day. There were two or three unopened but empty beer cans in the vehicle. It would appear that the cans exploded on impact inside the vehicle.

[16] Several witnesses also noted the smell of alcohol on the appellant's breath. The odour of alcohol on one's breath is some indication of the consumption of alcohol, but no indication of the amount consumed.

[17] Two of the police officers at the scene noted that the appellant's eyes were glassy and red, and that his pupils were dilated. The emergency responders who attended to the appellant made no such observations. Counsel for the appellant vigorously challenged the reliability of the officers' testimony.

[18] The police officer who accompanied the appellant to the hospital in the back of the ambulance testified that the appellant made two statements that indicated he had been drinking. At one point after stating that he needed to urinate, he said, "[I]t's all the drinking". Later, as the appellant was going into the hospital on a stretcher, he said, "Oh no, this shouldn't be, this is the booze". The paramedics who were in the back of the ambulance with the police officer and the appellant did not hear the appellant make the remarks attributed to him by the police officer, nor did they hear him say anything about "the booze" on the way into the hospital. They testified that their concern was the appellant's physical well-being, not what he may have said.

[19] Once the appellant was in the hospital, Ms. Ramsay, an emergency room nurse, performed a full neurological assessment. Ms. Ramsay was concerned about any possible head injury. She was also concerned about alcohol consumption, which could impact on

subsequent medical decisions. Nothing in either her observations of the appellant or her interactions with him suggested to Ms. Ramsay that he had consumed alcohol. She drew a blood sample for medical purposes but saw no need to request a blood alcohol analysis of that sample. A request for a blood alcohol analysis was made by the hospital personnel sometime after Ms. Ramsay drew the blood sample.

[20] Ms. Ramsay took the blood sample at about 7:25 p.m. It was taken exclusively for medical reasons. Part of that blood sample was analyzed for blood alcohol content at the hospital laboratory. The police later seized the results of that analysis. The analysis done in the hospital lab produced a blood alcohol content reading of .224. According to the expert testimony, this reading would indicate a blood alcohol level between .229 and .274 at the time of the accident, about two and one half hours earlier.

[21] The unused portion of the blood sample taken from the appellant for medical reasons was lawfully seized with a warrant by the police and analyzed at the Centre of Forensic Sciences. That analysis produced a blood alcohol level of .242, indicating a blood alcohol level at the time of the accident between .247 and .292. The expert testified that the readings produced by the analyses at the hospital lab and the Centre of Forensic Sciences were consistent "considering it's two different people analyzing the results using two different types of instruments".

[22] Around 8:50 p.m., the appellant urinated into a plastic container provided by the hospital staff. P.C. Cole, who had custody of the appellant at that time, transferred some of the urine from the container into two vials. He seized the vials of urine and later delivered them to the Centre of Forensic Sciences for analysis. That analysis yielded a reading of 282 milligrams of alcohol per 100 millilitres of urine. That reading is the equivalent of a blood alcohol reading of .217 at the time of urination.

[23] At 10:38 p.m., the appellant, who was still in P.C. Cole's custody, urinated a second time. P.C. Cole also seized two vials of that urine and delivered them to the Centre of Forensic Sciences for analysis. That analysis produced a reading of 237 milligrams of alcohol per 100 millilitres of urine. Taken together, the two samples indicated that around 9:46 p.m., the mid-point between the two collections, the appellant had a blood alcohol reading of .182. That reading translates to a blood alcohol level between .212 and .282 at the time of the accident.

[24] James Wigmore, a toxicologist called by the Crown, testified that the analyses of the blood samples and urine samples indicated a significant level of impairment at the time of the accident (about 5:00 p.m.). According to Mr. Wigmore, the anticipated level of impairment would disrupt vision and slow one's ability to react. He also testified that at the levels indicated by the various analyses, individuals would usually, but not inevitably, display obvious signs of impairment such as slurred speech and a staggered gait. Mr. Wigmore testified that the indicia of impairment such as slurred speech could be less apparent in a person who had developed a high tolerance for alcohol, but that the driving ability of that person would be substantially impaired at the blood alcohol levels indicated by the analyses of the various samples taken from the appellant.

[25] Mr. Wigmore was presented with various hypothetical situations concerning the amount that an individual would have had to consume to produce blood alcohol readings like those found in this case. He opined that a person with the appellant's physical characteristics and an average rate of alcohol elimination would have had to consume between 15 and 20 bottles of beer between 11:30 a.m. and 4:30 p.m. to produce the blood alcohol levels indicated in the analyses of the blood and urine samples taken from the appellant.

[26] The defence contended that all of the samples were tainted. Mr. Wigmore acknowledged that the alcohol swab used to clean the area before the blood sample was taken could, if a "sloppy technique" was used, contaminate the subsequent blood alcohol readings obtained from the sample. The defence pointed out that when Ms. Ramsay took the blood sample she had not requested a blood alcohol analysis and, therefore, had no reason to be careful in using the alcohol swab to prepare the area around the injection.

[27] There was also the possibility that both of the containers into which the appellant urinated were somehow contaminated. As the Crown points out in its factum, however, the defence contamination theory suffered in light of the consistency among the four analyses of three different samples – one blood sample and two urine samples – taken at three different times and analyzed in two different laboratories.

III

The Admissibility of the Urinalysis Results

(a) The Evidence

[28] The Crown conceded at trial that the urine samples taken by P.C. Cole constituted a warrantless seizure and violated the appellant's rights under s. 8 of the *Charter*. The issue was whether the urinalysis results should be excluded under s. 24(2).

[29] The *voir dire* evidence consisted of transcripts of the testimony of witnesses heard at the preliminary inquiry. The crucial evidence came from P.C. Cole. He testified that he arrived at the hospital at about 7:32 p.m., some two and one half hours after the accident. P.C. Cole was a qualified breathalyzer operator and had a portable breathalyzer machine with him. He hoped to be able to obtain a sample of the appellant's breath.

[30] When P.C. Cole arrived at the hospital, he was told that the appellant had been given morphine and that a blood sample had been taken from him for medical purposes. P.C. Cole took steps to locate and preserve that sample for the purposes of seizure at some subsequent point. Shortly after arriving at the hospital, P.C. Cole was told that because of the appellant's condition, it would not be possible for him to obtain a breath sample from the appellant.

[31] P.C. Cole spoke with the other officers who had custody of the appellant when P.C. Cole arrived. He was told that the appellant had been given his s. 10(b) *Charter* rights

twice, once before he was notified of Mr. Magnuson's death and once afterwards. P.C. Cole was also given the name of the appellant's lawyer.

[32] P.C. Cole took custody of the appellant at 7:45 p.m. As was his practice whenever he assumed control of an accused person, P.C. Cole advised the appellant of his right to counsel pursuant to s. 10(b) of the *Charter*. Some discussion with the appellant ensued, during which the appellant said that he did not understand the rights that had been given to him by P.C. Cole. P.C. Cole testified that, after some questioning of the appellant, he became satisfied that the appellant did understand what he had been told. It is unnecessary to explore this part of the evidence as there was no allegation at trial, and there is no allegation on appeal, of any breach of the appellant's rights under s. 10(b) of the *Charter*.

[33] At about 8:50 p.m., the appellant told hospital personnel that he had to urinate. He urinated into a green plastic container given to him by the hospital personnel. [1] P.C. Cole watched the appellant urinate directly into the container. He asked the appellant, "Do you mind if I have some of your urine?" The appellant replied, "Yeah, yeah." P.C. Cole obtained two vials from the hospital personnel and transferred some of the urine from the green plastic container into the vials.

[34] P.C. Cole testified that he believed that he had the appellant's consent to take a sample of his urine. [2] The Crown did not attempt to rely on that consent to justify the seizure of the urine samples. The Crown acknowledges, quite properly, that the words uttered by the appellant could not in the circumstances constitute an informed consent by the appellant to the police seizure of a sample of his urine.

[35] P.C. Cole advised the appellant of his right to counsel a second time, shortly after seizing the sample of his urine. P.C. Cole thought that the appellant seemed more coherent than he had seemed when P.C. Cole had initially told him of his right to counsel. The appellant asked for his address book, and told P.C. Cole that his lawyer's information was in that book.

[36] P.C. Cole testified that he spoke to the appellant's wife around 9:26 p.m. He later spoke to the appellant's brother, who had arrived at the hospital. P.C. Cole, with the brother's help, was able to locate a cell phone number for the appellant's lawyer. The appellant spoke with his lawyer for about three minutes, beginning at 10:46 p.m.

[37] Shortly before the call was placed to the appellant's lawyer, the appellant indicated that he had to urinate a second time. As on the first occasion, he urinated into a plastic container given to him by the hospital personnel. Again, as on the first occasion, P.C. Cole transferred samples of that urine into two vials. However, on this occasion, P.C. Cole did not ask the appellant whether he could take a sample of the urine. P.C. Cole testified that he believed the prior consent given by the appellant still applied.

[38] As outlined above, the urine samples seized by P.C. Cole at about 8:50 p.m. and 10:38 p.m. were eventually analyzed at the Centre of Forensic Sciences. The results of those analyses indicated that the appellant had a very high blood alcohol level at the time of the accident. The results were consistent with the results obtained from the blood

alcohol analyses of the blood samples taken from the appellant. There was no challenge to the admissibility of the blood samples and the analyses of those samples.

(b) The Ruling

[39] The trial judge considered the admissibility of the urine samples and the urinalysis results using the three-part test set down in a series of cases from the Supreme Court of Canada beginning with *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265. He also relied on the then recent pronouncement of this court in *R. v. Grant* (2006), 2006 CanLII 18347 (ONCA), 81 O.R. (3d) 1 (C.A.).

[40] For the purposes of considering trial fairness, the first factor identified in *Collins*, the trial judge characterized the samples as conscriptive evidence, but went on to hold that the samples would inevitably have been obtained by non-conscriptive means, namely, a search warrant. The trial judge observed that the urinalysis results were reliable evidence and that their admission would not adversely affect the truth-seeking function at trial. Relying on the analysis undertaken by this court in *Grant*, he concluded that trial fairness would not be adversely affected despite the conscriptive nature of the evidence.

[41] In addressing the seriousness of the breach, the second of the three *Collins* factors, the trial judge rejected P.C. Cole's testimony that he believed the appellant had genuinely consented to P.C. Cole's taking of samples of his urine. The trial judge described himself as "skeptical of this explanation." He went on, however, to indicate that P.C. Cole was entitled to be in the room with the appellant, that he had done nothing to cause the appellant to urinate, and that P.C. Cole had merely collected and preserved what he knew could be potentially relevant evidence. The trial judge described this intrusion upon the appellant's bodily integrity as "minimal".

[42] Finally, with respect to the third factor identified in *Collins*, the impact on the administration of justice of excluding the evidence, the trial judge noted that the evidence was "highly probative". The trial judge ultimately held:

> Given the seriousness of the charges, the importance of the evidence to the Crown case, and the less intrusive nature of the s. 8 breach, excluding the results of the urine sample would bring the administration of justice into disrepute.

(c) Analysis

[43] After the trial but before this appeal, the Supreme Court of Canada, in *R. v. Grant*, 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353, reformulated the approach to be taken when determining the admissibility of evidence under s. 24(2) of the *Charter*. That reformulation applies on appeal: *R. v. Blake* (2010), 2010 ONCA 1 (CanLII), 251 C.C.C. (3d) 4 (Ont. C.A.). In addressing this ground of appeal, however, I bear in mind that while the approach to the determination of admissibility has been reworked in *Grant*, the factors relevant to the admissibility inquiry have not changed: *R. v. Beaulieu* (2010), 2010 SCC 7 (CanLII), 251 C.C.C. (3d) 455 (S.C.C.) at para. 7. Further, even though the s. 24(2)

analysis on appeal is somewhat different in light of *Grant*, deference is still owed to the trial judge's fact-finding and balancing of the relevant factors: *Beaulieu* at para. 5; *R. v. Wong* (2010), 2010 BCCA 160 (CanLII), 253 C.C.C. (3d) 315 (B.C.C.A.) at para. 55.

[44] Under the approach outlined in *Grant*, the court must consider:

- The seriousness of the *Charter*-infringing state conduct;
- The impact of the breach on the *Charter*-protected interests of the accused; and
- Society's interest in the adjudication of the case on its merits.

[45] Before applying the *Grant* criteria, it is necessary to accurately describe the nature of the police conduct in issue. This is not a case involving the seizure of anything from the appellant's person, much less from inside his body. Neither the appellant nor the medical personnel ever asked P.C. Cole to leave the room. There is no suggestion that P.C. Cole's presence interfered with the appellant's medical treatment or his privacy. P.C. Cole also did nothing to cause the appellant to urinate or to remove the urine from the appellant's body. P.C. Cole stood by and allowed nature to take its course. Because the appellant was in custody, P.C. Cole was able to secure the appellant's bodily waste product after the appellant had urinated but before the urine was discarded.

[46] The seizure of the urine sample by P.C. Cole is comparable to the seizure of the discarded tissue in *R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607. In that case, the accused, while in police custody, blew his nose and then threw the tissue away. The police seized the tissue from the garbage and ultimately retrieved DNA from that tissue. In ruling that the tissue and the subsequent analysis were admissible, Cory J., for the majority, contrasted the seizure of the tissue containing the accused's mucus with the forced seizure from the accused of hair samples, dental impressions, and a sample of his saliva. He said at para. 128:

> In contrast to the hair samples, teeth impressions and buccal swabs, the police did not force, or even request, a mucous sample from the appellant. He blew his nose of his own accord. The police acted surreptitiously in disregard for the appellant's explicit refusal to provide them with bodily samples. However, the violation of the appellant's *Charter* rights with respect to the tissue was not serious. The seizure did not interfere with the appellant's bodily integrity, nor cause him any loss of dignity. [Emphasis added.]

[47] My characterization of the nature of the police conduct in seizing the urine samples is not intended to suggest that the appellant did not have a legitimate privacy interest in the urine samples. Clearly, the appellant had a legitimate interest in preserving the privacy of information embedded in his urine samples, including information pertaining to his blood alcohol level: see *Stillman* at paras. 52-63; *R. v. Patrick*, 2009 SCC 17 (CanLII), [2009] 1

S.C.R. 579 at para. 13. The Crown recognizes this privacy interest by acknowledging the s. 8 breach.

[48] The first component of the *Grant* analysis, the seriousness of the *Charter*-infringing state conduct, looks both at what the police did and their attitude when they did it. Respect for the justice system must suffer in the long term if courts routinely admit evidence gathered by state conduct that disregards individual rights.

[49] P.C. Cole took samples of the appellant's urine on two occasions without any authority for doing so. He could have secured those samples by requesting that the hospital hold them pending the production of a warrant. I have no doubt that if P.C. Cole had applied for a search warrant, the application would have been granted, and P.C. Cole could then have secured the samples in a manner that respected the appellant's constitutional rights. Had he done so, those samples would have been analyzed and would have produced exactly the same evidence relied on by the Crown. Looking strictly at what P.C. Cole failed to do, I do not think his conduct demonstrates the kind of disregard for individual rights that would be seen, in the long term, as posing a significant threat to the public confidence in the due administration of criminal justice.

[50] P.C. Cole's attitude towards the appellant's rights does raise concerns. P.C. Cole said he acted on the authority of the appellant's consent. The ineffectiveness of that consent was so obvious that the Crown did not attempt to rely on the consent at trial. The trial judge, somewhat charitably, described himself as "skeptical" of P.C. Cole's evidence that he believed he had the necessary informed consent. It seems obvious to me that P.C. Cole, who was alert to the need to obtain evidence relating to the appellant's blood alcohol level, simply decided to take a shortcut to get the urine samples. He took advantage of the appellant, who was under his control and in significant physical discomfort. P.C. Cole's attitude shows little respect for the appellant's individual rights and renders the *Charter*-infringing state conduct more serious than it would otherwise have been.

[51] The second component of the *Grant* inquiry, the impact on the *Charter*-protected interests of the accused, requires that the court bear in mind that the long-term respect for the administration of justice will be undermined if the court appears to ignore significant intrusions upon individual rights when deciding whether the evidentiary fruit of a *Charter* breach should be received at trial. The trial judge found that the intrusion into the appellant's *Charter*-protected interests was relatively minimal. The appellant's continued privacy interest in the information to be gleaned from his discarded bodily waste is well-removed from the essential core of personal privacy. The appellant gave up his waste product without any state compulsion or interference. The appellant's privacy interest is further diminished in that P.C. Cole could have segregated the sample of the appellant's urine and obtained a warrant to seize that sample. Had he done so, the appellant's privacy interest in that sample would inevitably have yielded to the state's more powerful investigatory interest. The police would have obtained and analyzed the sample, resulting in exactly the same evidence that was adduced at trial. The second component of the *Grant* inquiry favours admissibility.

[52] The third criteria identified in *Grant*, society's interest in an adjudication on the merits, clearly favours admissibility. The urinalysis results provided reliable evidence that was potentially significant to the prosecution. The exclusion of the urinalysis results would inevitably have hindered the search for the truth in this case. That cost is high given the relatively minor adverse effect on the appellant's *Charter*-protected interests.

[53] In summary, while the first of the *Grant* factors slightly favours exclusion of the evidence, the second and third factors strongly favour admission of the evidence. I am satisfied that in this case - as in many cases - the *Grant* analysis yields the same result as the *Collins* analysis. The evidence was properly admitted.

IV

The Charge to the Jury

[54] Counsel for the appellant launched a far-reaching and strenuous attack on the trial judge's instructions to the jury. He contends that, read as a whole, the instructions do not fairly or accurately present the various arguments put forward by the defence or the evidence supporting those arguments. Counsel submits that the instructions were tilted in favour of the Crown in various ways, including the trial judge's use of rhetorical questions to denigrate evidence relied on by the defence.

[55] The law is not in issue here. The applicable principles are well-known: see, for example, *R. v. Daley*, 2007 SCC 53 (CanLII), [2007] 3 S.C.R. 523 at paras. 54-58. I have read and reread the charge and the recharge. Counsel's submissions are not borne out by an examination of the charge and recharge.

[56] I do not propose to examine each of the complaints relating to the instructions individually. I will, however, address the submissions made concerning the trial judge's treatment of the evidence of Ms. Ramsay, the emergency room nurse. These submissions are representative of the other submissions made in support of the contention that the charge was unfair.

[57] Ms. Ramsay was an important witness for the defence. I have summarized her evidence earlier in these reasons (see paras. 19-20). At the end of the charge, counsel for the appellant raised various factual errors that the trial judge had made in his instructions. Some involved Ms. Ramsay's evidence. The trial judge recharged the jury. He specifically drew the jury's attention to the factual errors he had made in respect of Ms. Ramsay's evidence. He then accurately reviewed those parts of her evidence with the jury. By the end of the recharge, the jury had an accurate summary of Ms. Ramsay's evidence and, I am sure, a full appreciation of its importance to the defence.

[58] The other complaints concerning the trial judge's instructions to the jury are without merit and need not be examined in any detail. Some were specifically addressed in the trial judge's recharge. For example, the appellant complains that the defence theory concerning the contamination of the containers used to collect the urine was not put to the jury. The

trial judge specifically reminded the jury of the defence theory concerning contamination in his recharge. Other complaints raised on this appeal go to the extent to which the trial judge repeated the arguments made by counsel. No doubt, the trial judge could have said more about any particular defence argument, or referred in more detail to the evidence relied on by the defence. The same could be said about his description of the Crown's arguments and the evidence relied on by the Crown. The failure to put the defence case or the Crown case exactly the way counsel want it put, and the failure to refer to all of the evidence that could assist one side or the other is not reversible error. The important point is that the instructions were fair and balanced, and fully armed the jury with the information needed to decide the difficult questions that lay between the jury and a verdict.

V

The Application of the Rule in *Kienapple*

[59] In *Kienapple*, the court declared that the *res judicata* principle would in some circumstances preclude multiple convictions arising out of the same delict. Since that pronouncement, the courts have struggled with the scope of the rule in *Kienapple*: see, for example, *R. v. R.K.* (2005), 2005 CanLII 21092 (ONCA), 198 C.C.C. (3d) 232 (Ont. C.A.) at paras. 41-56. That struggle, as pointed out by Martland J. in his dissent in *Kienapple* at p. 731, is often of academic interest only, as its outcome has no impact on the actual sentence to be served by the accused. This case is typical in that the appellant's sentence will not be affected, even if the rule in *Kienapple* applies.

[60] It is common ground that the appellant is properly convicted of at least one offence in relation to each victim. The question is whether he should be convicted of both a dangerous driving related offence and an impaired driving related offence in respect of both victims. If *Kienapple* applies, the appellant should have two, instead of four, entries in his criminal record. However, because the trial judge imposed concurrent sentences on the two charges relating to each victim, the application of *Kienapple* would have no effect on the total length of the sentence.

[61] Counsel referred the court to three appellate decisions that have considered the application of *Kienapple* to charges involving dangerous driving (or criminally negligent driving) and impaired driving: see *R. v. Colby* (1989), 1989 ABCA 285 (CanLII), 52 C.C.C. (3d) 321 (Alta. C.A.); *R. v. Galloway* (2004), 2004 SKCA 106 (CanLII), 187 C.C.C. (3d) 305 (Sask. C.A.); and *R. v. Andrew* (1990), 1990 CanLII 11057 (BCCA), 57 C.C.C. (3d) 301 (B.C.C.A.). *Colby* supports the appellant's position. In *Colby*, the court applied *Kienapple* to charges of dangerous driving causing death and impaired driving causing death. The court reasoned at p. 332:

> In the present case, the act of the accused which amounts to dangerous driving is operating her motor vehicle while her ability to do so was substantially impaired by alcohol. In the tragic circumstances, that delict founds the conviction for

> dangerous driving causing death. Precisely the same wrongful act founds the further count of impaired driving causing death. There are no "additional distinguishing features" of that count as compared to the other. In my view, the *Kienapple* principle applies and convictions cannot be entered on both counts. [Emphasis added.]

[62] In *Galloway*, the accused faced the same charges faced by the appellant in this case. The trial judge declined to apply *Kienapple* and entered convictions on both the dangerous driving charges and the impaired driving charges. The appeal court distinguished *Colby* on its facts, noting at para. 123 that, in *Colby*, there was "no evidence of erratic driving other than the fact of the accident". In *Galloway*, there was evidence of very erratic driving prior to the accident. The court in *Galloway* also observed that the offences of dangerous driving and impaired driving were legally distinct. The court held at para. 125:

> On a clear reading of the statutory provisions creating the separate offences under s. 249 and s. 253, we find that Parliament intended to punish two different acts. There is no doubt that a factual nexus exists with respect to proof of the certain elements in each offence in this case. But when one comes to the legal nexus there are distinguishing elements which preclude application of the *Kienapple* principle. Although the manner of driving can assist in proof of impairment, the offence is "driving while impaired". This does not necessarily involve dangerous or erratic driving. Conversely dangerous driving can be demonstrated by evidence of the manner of driving without proof of impairment.

[63] In *Andrew*, the British Columbia Court of Appeal struck a five-judge panel to consider conflicting decisions from that court as to the application of *Kienapple* in situations involving criminally negligent or dangerous driving, and impaired driving. The court had no difficulty determining that, on the facts in *Andrew*, there were two discrete offences. The accused drove erratically, causing at least one accident well before hitting a vehicle and causing significant injuries to the occupant of that vehicle. The court also emphasized the distinction between offences based on the manner in which a person drives and offences based on the impairment of one's capacity to drive. The court said at p. 307:

> Those facts establish that there was not just one wrongful act in this case. The reason is that impairment of capacity followed by driving, which is the wrongful act in impaired driving, does not encompass the manner of driving, which in this case formed a part of the sequence of actions which

> constituted criminal negligence. Nor, in this case, considering the offences in the context of the facts, can the element of driving after becoming impaired be considered merely as a particularization of the element of wanton and reckless conduct underlying criminal negligence. [Emphasis added.]

[64] I agree with the distinction between the offences of impaired driving and dangerous driving (or criminal negligence) drawn in *Galloway* and *Andrew*. An impaired driving charge focuses on an accused's ability to operate a motor vehicle or, more specifically, on whether that ability was impaired by the consumption of alcohol or some other drug. A dangerous driving charge focuses on the manner in which the accused drove and, in particular, whether it presented a danger to the public having regard to the relevant circumstances identified in s. 249 of the *Criminal Code*. The driver's impairment may explain why he or she drove the vehicle in a dangerous manner, but impairment is not an element of the offence. Both impaired driving and dangerous driving address road safety, a pressing societal concern. They do so, however, by focussing on different dangers posed to road safety. Impaired driving looks to the driver's ability to operate the vehicle, while dangerous driving looks to the manner in which the driver actually operated the vehicle.

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

[66] In any event, on the version of events that the jury must have accepted, the appellant committed the crime of impaired driving when he got into his vehicle at the golf course where the reception was held and drove off towards his meeting many miles away. The driving that precipitated the allegation of dangerous driving occurred about a half an hour later, when the appellant drove across four lanes of traffic into oncoming vehicles. This criminal conduct cannot be described as a single delict. To the extent that *Colby* suggests that it can be described in this manner, I must, with respect, disagree. Even if one could imagine a case where the factual allegations supporting the charge of impaired driving are the same as the factual allegations supporting the charge of dangerous driving, that is not this case. The trial judge correctly held that *Kienapple* had no application.

VI

The Sentence Appeal

[67] At the end of his careful and detailed reasons for sentence, the trial judge aptly described the difficult task he faced in sentencing the appellant:

> My responsibility in this matter is to impose a sentence on an offender who is an exemplary citizen, who has committed a serious crime with tragic consequences .... It is not an easy task but the message of general deterrence must be met.

[68] The trial judge proceeded to impose sentences totalling four years. He also imposed a five-year driving prohibition.

[69] This court's power to vary a sentence on appeal is found in s. 687(1) of the *Criminal Code*. That section tells the court to examine the "fitness" of the sentence imposed at trial. The controlling jurisprudence directs that an appellate court must defer to the sentencing decision made at trial unless the appellate court is convinced that there is an error in principle or that the sentence is demonstrably unfit: *R. v. M.(C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500 at para. 90; *R. v. L.M.*, 2008 SCC 31 (CanLII), [2008] 2 S.C.R. 163 at para. 14. Counsel for the appellant focussed primarily on the second of the two bases upon which this court can interfere with the sentence imposed at trial. Counsel submitted that while a four-year sentence was within the appropriate range for these offences, the sentence was "entirely disproportionate" given the appellant's exemplary background and the position taken by the Magnuson family. I take this to be an argument that, in the circumstances, the sentence was manifestly unreasonable.

[70] Appellate deference to the trial judge's sentencing decision makes good sense. Sentencing is a fact-specific exercise of judicial discretion. It is anything but an exact science. In the vast majority of cases, there is no single sentence that is clearly preferable to all others. Instead, there is a range of reasonable options from which the trial judge must make his or her selection. That selection is driven by the judge's evaluation of the sentence that best reflects his or her assessment of the combined effect of the many variables inevitably at play when imposing a sentence. Absent the discipline of deference, sentence appeals would invite the appellate court to repeat the same exercise performed by the trial judge, with no realistic prospect that the appellate court would arrive at a more appropriate sentence. Appellate repetition of the exercise of judicial discretion by the trial judge, without any reason to think that the second effort will improve upon the results of the first, is a misuse of judicial resources. The exercise also delays the final resolution of the criminal process, without any countervailing benefit to the process.

[71] A deferential standard of review on sentence appeals also recognizes that a trial judge has an advantage over the appellate court when it comes to balancing the competing interests at play in sentencing. The trial judge gains an appreciation of the relevant events and an insight into the participants in those events - particularly the accused - that cannot be revealed by appellate review of a transcript. For example, in this case, the appellant's remorse was accepted as genuine; however, at no time did he offer any explanation for what had happened. The trial judge was much better positioned than this court to evaluate these arguably inconsistent features of the appellant's response to the tragic events.

[72] Deference is justified for a third reason. The sentencing judge represents and speaks for the community that has suffered the consequences of the crime. He or she is much better placed to determine the sentence needed to adequately protect the community than is an appellate court sitting at a distant place often years removed from the relevant events. As explained in *M. (C.A.)* at para. 91 :

> Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community.

[73] I would think the trial judge's ability to gauge the interests of the community was particularly important to his decision that a conditional sentence would be inappropriate. Counsel for the appellant made a forceful argument that with the appropriate terms, a conditional sentence could meet the needs of general deterrence and denunciation. The trial judge was in the best position to assess the merits of that submission, having regard to his perception of the community's legitimate expectations. I would add that the trial judge's determination that a sentence of more than two years was required rendered moot any consideration of a conditional sentence.

[74] In imposing sentence, the trial judge identified general deterrence as the predominant concern. In doing so, he correctly applied this court's judgment in *R. v. McVeigh* (1985), 1985 CanLII 115 (ONCA), 22 C.C.C. (3d) 145 (Ont. C.A.). In that judgment, now almost 25 years old, this court made it clear that drinking and driving related offences were serious crimes and must be treated as such by the courts. In the memorable words of MacKinnon A.C.J.O. at p. 150, "every drinking driver is a potential killer". Unfortunately, that potential was realized in this case.

[75] *McVeigh* also recognizes that many persons who commit serious crimes while drinking and driving will be otherwise good citizens who have never been involved with the criminal law. Even in those cases, however, *McVeigh* indicates that general deterrence is of primary importance. The result in *McVeigh* demonstrates the court's commitment to general deterrence in all cases involving drinking and driving, especially those in which a death occurs. McVeigh, a 31-year old first offender, had his sentence increased from 21 months to three years.

[76] As noted by the trial judge, there were aggravating factors in this case. The appellant's blood alcohol level was very high, well beyond the blood alcohol level of .160

deemed by statute to be an aggravating factor: s. 255.1 of the *Criminal Code*. The readings leave no doubt that the appellant was significantly impaired. As he drove along the road, he presented an immediate and very real danger to hundreds of people. Given the appellant's very high blood alcohol level and his inevitable degree of impairment, the appellant must have known of the risk he posed to all around him when he chose to leave the reception and drive to his destination. The danger created by the appellant's conduct is not unlike that created by a drunken man who walks down a busy street firing a handgun at random. The community, quite properly, demands that the courts denounce and deter such reckless and dangerous conduct. Significant incarceration is the remedy that most emphatically achieves those goals.

[77] The sentencing process is, of course, not just about the offence. It is also about the offender. The trial judge was alive to the many mitigating factors in this case. Not only is the appellant a first offender, but he is also an outstanding member of the community. The letters filed on his behalf on sentencing are a tribute to a life well led by the appellant. He is a dedicated father and husband. The appellant's remorse is real and deep. He will probably never forgive himself for what has happened to his friend, Mr. Magnuson, although the Magnuson family has forgiven him and asked the trial judge to not incarcerate the appellant. The trial judge fully canvassed the "moving and rare" position taken by the Magnuson family and properly considered their request as one of the many factors that were relevant to his determination of an appropriate sentence. He likewise gave full and proper consideration to the victim impact statement of Ms. Pacheco.

[78] The appellant's convictions and resulting sentence will also have a significant impact on his ability to continue to live and work in the United States, where he has lived for many years. The trial judge was advised that once sentenced, the appellant, who is not an American citizen, will be barred from re-entry into the United States subject to gaining re-entry through a complicated and difficult process. The appellant's future may not be in the United States, where he has lived and raised a family for many years.

[79] I have read and reread all of the material filed on sentencing. As the trial judge observed, counsel for the Crown and counsel for the appellant both made excellent presentations on sentencing.

[80] Initially, I was inclined to the view that the sentence appeal should be allowed on the basis that the appellant's exemplary life, other than this event, entitled him to the lowest possible period of incarceration that would adequately reflect the need for general deterrence and denunciation. I thought that a penitentiary sentence of less than four years would achieve that purpose. Further consideration has, however, led me to conclude that were I to take that approach, I would not be giving the trial judge's decision the deference it is due. There is no error in principle here. Nor, in light of *McVeigh* and the relevant jurisprudence, can it be said that a four-year sentence is manifestly unreasonable. This court must yield to the trial judge's determination as to the appropriate sentence absent an error in principle or a manifestly unreasonable decision. I would add that deferring is made much easier by the trial judge's thorough reasons, which demonstrate a keen appreciation

of all of the factors relevant to the determination of the appropriate sentence in this very difficult case.

VII

Conclusion

[81] I would dismiss the appeal from conviction and affirm the convictions. I would grant leave to appeal sentence and would dismiss the appeal from sentence.

RELEASED: "DD" "JUL 09 2010"

"Doherty J.A."
"I agree J.I. Laskin J.A.
"I agree S.T. Goudge J.A."

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[1] In his reasons for admitting the urine samples, reported at (2007), 57 M.V.R. (5th) 235 (Ont. S.C.), at para. 6(v), the trial judge mistakenly indicates that P.C. Cole provided the appellant with the container into which the appellant urinated.

[2] The trial judge, at para. 6(iv) of his reasons, indicates that P.C. Cole was told that the appellant would not voluntarily provide a blood sample. This finding is not supported by the evidence. However, this has no impact on the finding by the trial judge that there was no valid consent to the seizure of the appellant's urine.