Citation: *R. v. Odgers*, 2009 ONCJ 287

Ontario Court of Justice
(East Region)

Between:

Her Majesty the Queen

V.

Patricia Ann Odgers

Before Justice Robert N. Fournier – Ottawa, ON
Heard on February 8th - 9th & 20th, 2007 & November 6, 2008
Reasons for Judgment released May 11th, 2009

Walter Devenz - for the Crown
Michael Edelson - for the Accused

Fournier J.

[1] The accused was charged under sections 253(a) and (b) of the Code following her involvement in a relatively minor accident on or about the 14th of January, 2006. In the course of proceedings from February 8th and 9th 2007, the Court received evidence from a civilian witness Samantha Pacheco and two investigating officers. According to this civilian witness, the collision occurred around 3:00 PM at the intersection of Merrivale and Viewmount, in the City of Ottawa. It seems the defendant was driving a *dark green Chrysler* and proceeded into a left-turn lane at this intersection. Reportedly there was *regular heavy traffic* and the defendant had advanced into the intersection, in anticipation of making a left hand turn. However when the light turned red and she could no longer effect such a turn, it seems the accused began to reverse. The vehicles behind her were trapped in traffic

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and could not move. In the process, the defendant's vehicle struck a *beige vehicle* immediately behind her, with sufficient force as to *rock the vehicle* in question. Ms. ***Samantha Pacheco*** was immediately behind the aforesaid beige vehicle, thus enjoying an excellent vantage point from which to observe the whole incident.

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[2] She remained at the scene, later providing a statement to the authorities. She testified that this was a *sunny cold day* and indicated that the Esso parking lot where she attended later was *extremely icy*. She had also been present when the police were called. The next Crown witness was ***Constable Jason Bond*** of the Ottawa Police Department. He had been dispatched to the scene around 3:03 PM arriving there at approximately 3:13 PM. He was a passenger in the cruiser driven by Constable Brian Dodds. Constable Bond candidly admitted that the *dispatch message* received, informed that the driver involved in the collision was *possibly intoxicated*. On arrival he observed the two vehicles and noted damage consistent with the testimony of the civilian witness, as to how the collision took place.

[3] According to Constable Bond, it was Constable Dodds who first went to speak with the driver of the *green Neon*. The latter returned a bit later indicating that he *suspected* the driver was *intoxicated* and that she had *slurred speech*. Apprised of those observations and suspecting the driver might be *impaired*, Constable Bond went to speak to her himself. He noted that the defendant was still occupying the driver's seat, her 4-way flashers had been activated and the keys were in the ignition. He asked her *"what happened"* to which she replied: *"I got hit from behind"*. He asked her if she *"normally slurred her speech"* - to which she replied: *"no"*. He then asked her if she had anything to drink – to which she replied: *"yes…I had lots"*. At that point Constable Bond explained that they were still in the intersection and in the roadway. It occurred to him that *in order to further conduct the investigation in safer manner*, the vehicle might have to be towed or removed from the roadway. He would then conduct the investigation across the way at the Esso parking lot. Thus he requested the driver exit her vehicle. This passage from Bond's testimony is noteworthy:

> *"…once she exited the vehicle, her green Neon, I do recall* ***getting an odour of alcoholic beverage****. To satisfy my knowledge if it was coming from Ms. Odgers, I asked her to breathe in my direction and indeed…I believed the odour of alcoholic beverage to be* ***coming from her****…from her facial area…****mouth****…"*

The evidence establishes that subsequently he and Constable Dodds both accompanied her across the roadway. The following quotes from his testimony are à propos:

"…at one point I do remember Mrs. Odgers standing there and she appeared dizzy upon exiting the vehicle…and then subsequent to that, the walking over to the gas station… it continued…the unsteadiness…and balance was…was off and if…I believe if I had not supported her, then she would have fallen…in my opinion.
…I just took it upon myself to grab her and support her arm, so that we could walk across the street safely…"

[4] Constable Bond elaborated that he had not identified any *physical problems* which might explain the *unsteadiness* alluded to, other than what he referred to as *signs of intoxication*. As for the road surface he later described it as wet and covered with salt and though he did not pay particular attention to the footwear of Ms. Odgers, he clearly did not attribute her apparent *unsteadiness* to the road conditions. Also in his view the accident was *minor* and injury would not be an explanation either. Once across the street into the parking lot and by the cruiser, this officer had evidently formed an *opinion*, that this person was *intoxicated* and that her *ability to drive* was *impaired*. She had verbally identified herself as *Ann Odgers* and later, information taken from her driver's licence corroborated her identity. Though trained and qualified in the use of *approved screening devices* and apparently aware that one such instrument was readily available to him, in this instance, he opted not to resort to it. He explained that in his view she was *clearly intoxicated* and *displaying several signs of that*. From his perspective this was a case of *straight impaired driving*. Thus once across the street, the officer reportedly informed the defendant that *she was under arrest for intoxicated driving* at 3:24 PM or thereabouts. She was searched, cuffed and placed in the rear of the cruiser. *Her rights* and *customary cautions* were not read to her at that particular point in time. Constable Bond explained his normal practice was to perform those duties once a suspect was seated in his cruiser. However in this instance, he purported to *transfer the investigation over to Constable Dodds due to the training officer/recruit relationship*. He did so because Dodds *had not yet conducted an intoxicated driver investigation while with the Ottawa Police Service*. He went on to other investigative duties, believing Constable Dodds *would assume the responsibility for " rights to counsel"*.

[5] Between 3:27 PM and 3:45 PM there was a great deal of police activity. For one - a dialogue ensued between Bond and Constable Dodds.

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As well Officer Bond was going about his investigation, discussing traffic issues with Constable Heaton in regards to the collision, and deciding what to do with the vehicles. Witnesses were being interviewed by Seaton as well. At times Bond was seated in the cruiser making notes. At one point he overheard some of the exchanges between the accused and Constable Dodds who was administering *rights to counsel*. Specifically he overheard Ms. Odgers indicate she wanted to speak with her husband. It was during dialogue and exchanges between Bond and Dodds - that it had been agreed *custody of the suspect*, would be turned over to the latter. According to his notes this *actual transfer* occurred around 3:45 PM. It would appear that between 3:27 PM and 3:45 PM during this *police activity*, the *suspect* remained in the police cruiser. Arrangements were being made for the removal of damaged vehicles from the busy intersection, so as to re-establish regular traffic. There was an explanation as to why these two officers worked rather closely. Constable Dodds though an experienced officer in Scotland - had recently taken up employment with the Ottawa Police Department. As a result he was *training* under the supervision of Constable Bond - hence the sharing and delegation of duties alluded to earlier. Ultimately it wasn't until 3:47 PM or thereabouts, that the accused was *read her rights*. When asked if she understood she allegedly replied: *"I understand …I just want to talk to my husband"*. There were further delays in leaving the scene, as the officers were busy interviewing witnesses and documenting their observations and findings.

[6] In any event it appears that by 4:00 PM, they were en route to the detachment, with Constable Dodds driving. Shortly after their arrival around 4:16 PM and as they proceeded to remove the accused from the cruiser, the officers detected a definite odour of feces. By virtue of a stain in the seat area of her pants, it became obvious to them, that she had defecated in transit and *soiled herself*. Arrangements were made with the special constables to address this predicament. A notation in the officer's notebook documenting this event was made around 4:25 PM. It was only afterwards, that attempts to contact a lawyer could be facilitated. In that regard it seems the accused had *mixed feelings* about contacting counsel. To put it mildly, she did not appear to have a very good opinion of lawyers. At one point she opined that *they were insensitive…and she hated them all…* or words to that effect. It seems the defendant's husband was allowed to participate in the selection process and he asked one of the officers if he could *recommend* someone. Eventually Ms. Calvinho was selected from a list and the accused spoke with her from 4:46 PM until 5:01 PM. Around 5:02 PM the *intoxilyzer technician*

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was provided with the officer's *grounds* and by 5:11 PM the defendant was turned over to the technician who would ultimately conduct the tests.

[7] During the course of his testimony, ***Constable Dodds*** for the most part re-iterated, albeit from his own perspective, how they had dealt with the defendant in this instance. He confirmed that a *dispatch* had been received around 3:03 PM. They had been informed of a collision with no injuries but involving one person who was possibly intoxicated. Upon his arrival he noted Constable Heaton was already there and was helping with traffic control. Constable Dodds' first impression incidentally, was that the *beige Honda* had possibly run into the rear of the accused's vehicle. In any event for his part, he proceeded towards the driver of this *green Neon*, where he encountered the person ultimately charged in this instance. He asked her for her *documents* and noted that *she seemed confused* and that her speech was *slurred*. She said she could not find her insurance documents. From all appearances it seemed she had been looking for them, as there were documents strewn all over the front seat. The officer also noted a *strong odour of alcohol coming from her breath.* He didn't recall if the engine was still running, but did observe that the keys were still in the ignition. He bent down to the driver's level to better observe her. He testified that at that time…*"I am thinking she was impaired"*. While it was obvious to him she had been drinking, he didn't yet *know if she was impaired*. Constable Dodds then went to share his observations with Constable Bond. In the circumstances he wished to obtain a *second opinion* from his *coaching officer*. Reportedly he told Constable Bond that he *believed she might be intoxicated* and that she had *slurred speech*. Then as Constable Bond proceeded towards the accused's vehicle, Constable Dodds for his part ran the accused *on the system* and ascertained her licence was in order. Meanwhile he remained in close enough proximity as to observe the action taken by Constable Bond.

[8] From his vantage point he saw the accused get out of her vehicle and witnessed her breathing into the officer's face. He claims to have overheard Constable Bond advising the suspect that she would be arrested. Thereafter Dodds and Bond both accompanied the defendant to the parking lot area. They *escorted her* to the adjacent garage (Esso) where Constable Heaton had relocated police cruisers. Constable Dodds testified that: *she was unsteady on her feet…and I was concerned she was going to fall*. For his part he *supported her by the elbow* as they proceeded towards the parking lot. This officer testified that this *"…re-assured my belief she was intoxicated"*. From

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his perspective there were no *apparent environmental reasons* to explain her *unsteadiness*. It seems that for a time the accused remained with Constable Bond while other officers collaborated in removing vehicles from the busy intersection. For his part Constable Dodds indicated that around 3:25 PM, Constable Bond informed the driver she was under arrest. She was cuffed and placed in the rear of their cruiser. Constable Dodds was informed that *custody* of the accused was being turned over to him. He indicated that he had not considered using a *roadside screening device*, in part because he was not *qualified* to operate such an instrument. He added that in any event, he was *happy in his own mind she was intoxicated and impaired*. He also believed the accused had been driving just prior to the officers being dispatched to the scene of this minor collision. Subsequently he entered his cruiser and for a time Constable Bond was occupying the passenger side seat. For his part, Officer Dodds read the defendant *her rights*. He had obtained her name from a driver's licence. There is every indication these *rights* were read around 3:40 PM. A *notice on arrest and rights* were read at 3:47 PM. This officer testified that when asked if she understood, the accused responded that she did, but wanted to speak to *her husband and a lawyer*. It was related to her that efforts were already being made to contact her husband. At 3:52 PM she was *cautioned* and stated she understood *but didn't want to say anything*. A *secondary caution* followed at 3:53 PM and an official *breath demand* was made at 3:54 PM – all of which she understood. At 4:00 PM they left the scene on their way to the detachment and arrived there around 4:16 PM. He also confirmed the accused had *soiled herself* en route and that this situation had been addressed by the s*pecial constables.* After their arrival at the detachment, Constable Dodds related his observation that the accused was still *unsteady on her feet* and that he noted *nothing new* as pertains to indicia of impairment.

[9] Constable Dodds then testified as to the *rights to counsel* issue in some detail. The matter of contacting counsel was again raised with the accused at the detachment. She indicated that *she didn't have a preference*. Reportedly she was shown a list and picked one at random. When contact was attempted there was no reply. The process continued while the defendant expressed her dissatisfaction with lawyers generally, commenting that they were *money grabbers*. It seems she never expressly chose a specific lawyer to contact. She seemed more preoccupied with the choice her husband might want to make. At one point she pointed a finger as if *sticking a pin at the list* before her, in an attempt to select a lawyer. Ultimately according to Constable Dodds, she spoke with Ms. Calvinho from about

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4:48 PM to 5:01 PM. Afterwards this officer provided *his grounds* to Constable Jacques – a *qualified intoxilyzer technician* and ultimately the defendant was turned over to the latter's custody for intoxilyzer tests to be conducted. At 5:37 PM the defendant was returned to Constable Dodds' custody along with *documentation*. Readings of 221 and 216 milligrams of alcohol per 100 millilitres of blood were obtained at 5:13 PM and 5:32 PM respectively. A *Certificate* prepared accordingly was filed as Exhibit #6

[10] On the 9th day of February 2007 the trial proceeded with ***Constable K. Heaton*** testifying. He confirmed receiving a *dispatch* at 3:02 PM on the date in question. He arrived at the scene at 3:16 PM and from his perspective it was a *minor collision*. He spoke with *Eugene Adamo* believed to be the driver of the beige 2001 Honda Accord. Mr. Adamo indicated the vehicle operated by the defendant in front of him - had *backed up and hit him*. Constable Heaton then noticed other officers had already initiated an investigation and were talking with Ms. Odgers. As he began to arrange for the removal of the vehicles from the intersection, he observed two other officers with the suspect, as *she was walked over* to his cruiser parked in the vicinity of the *Esso Station* nearby. On occasion Constable Heaton was in close proximity to the defendant. At one point he indicated that from about a foot away - he could smell an *odour of alcohol coming from her mouth*. He also observed that she was *visibly upset and crying*. He noted that she *staggered* and was *unsteady* as the officers appeared to be *holding on to her arms* to assist her. In his words there was an *unsteady balance to her* and in cross-examination he resorted to the expression *jello legs*. As to *road conditions* Constable Heaton testified it was *wet and a little slippery*. He was quick to add he didn't have any problem walking, even though the area was *slick and wet*. Comparing her manner of walking on this day - to that on the date in question - he opined that on this day – Ms. Odgers walked in a *normal* fashion. While at the Esso Station parking lot, it seems the defendant had provided Constable Heaton with her husband's name (*William Shearing)* presumably to facilitate contact with him and the pick-up of their vehicle. When Mr. Shearing did show up ultimately, he was apprised of Ms. Odgers' predicament. It was during his brief contact with the suspect that Constable Heaton observed that she had *glassy eyes* and that upon exiting her vehicle, she *did a teeter totter*. At that point he had observed that an officer had *steadied her*. Constable Heaton was ultimately responsible for the preparation of the *accident report*.

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[11] ***Constable Kevin Jacques*** then testified in his capacity as a *qualified technician*. He arrived at the detachment around 4:30 PM on the date in question and ascertained that the *approved instrument* to wit, an *Intoxilyzer 5000*-C was ready to administer the desired tests. He obtained *grounds* from the investigating officer and began *inputting* the necessary data into the instrument. He then received custody of Ms. Odgers and noted that she was *swaying and her walking was unsteady*. At the time she had socks on and was not wearing shoes. After the usual explanations and demonstrations, the defendant provided adequate samples of her breath. Ultimately the reading of **221 milligrams** of alcohol per 100 millilitres of alcohol was obtained at **5:13 PM.** During the next (17) minutes or so, the officer interacted with Ms. Odgers and made a number of *observations*. He noted a *strong odour of alcohol on her breath*. Her *eyes were glassy* and her *pupils were dilated*. Her *speech* at that time was described as *fair* and her general demeanour was *cooperative*. At **5:32 PM** the defendant provided a second sample yielding the result of **216 milligrams** of alcohol per 100 millilitres of blood. In the end this officer noted, that in his opinion, the *signs of impairment* were obvious. Cross-examination of this witness was essentially uneventful.

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Intervening Issues

[12] The prosecution then called upon ***Mr. Brian Hodgson*** to testify as an *expert witness* in his capacity as *Forensic Toxicology Consultant* in these proceedings. I should point out that his expertise is widely recognized and accepted in this region, such that counsel took no issue whatsoever with his *qualifications* and familiarity with the *Intoxilyzer 5000 C.* However I propose to discuss the *admissibility* of this expert's evidence, the *specific nature* of his evidence and the *relevance* or use that this court might be able to make of it, later in these deliberations. The reason for this is that following *Mr. Hodgson's* testimony, counsel agreed to avail themselves of the balance of the day, to present their respective arguments on some of the issues at hand. I should point out that initially, the defence had filed a *charter motion* enumerating a number of *breaches* - essentially contesting the entirety of the Crown's case. Later into the proceedings, counsel for the defence confirmed that the issue of *rights to counsel* was being abandoned. Similarly while this hearing ultimately dragged on literally for months, most of the delays were occasioned when the defence, for valid reasons I might add, requested several adjournments or remands which were granted. Consequently and for all intents and purposes, the defence waived its s. 11(b) rights and accordingly I need not concern myself with *unreasonable*

delay issues. However the issue of *reasonable & probable grounds* remained a very live issue. In fact this court received very lengthy submissions in that regard on February 9, 2007. Subsequently on February 20th, 2007 after due consideration of the aforesaid submissions, I indicated briefly and orally to the parties in open court, that my *ruling* in that regard would not favour the defence. Succinctly I indicated that in this court's view, the officers did in fact have *reasonable & probable grounds* to arrest the defendant. I confirmed that in my view, both on a *subjective* and *objective basis*, they had formulated the necessary *grounds*. However I undertook to provide more elaborate reasons in writing at a later date, to coincide with my final judgment - hence my *reasons* on that question and at this juncture. Before I begin to elaborate on the evidence and the reasons which led me to the aforesaid conclusion, it may be useful to review ever so briefly, the legal principles which govern us in this context.

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Reasonable & Probable Grounds

[13] The *test* to be applied in the determination of *reasonable and probable grounds* has been established long ago by the Supreme Court of Canada. Such that nowadays it is trite to state that an officer can only make an *intoxilyzer demand* once she/he believes on *reasonable and probable grounds* that an offence has been committed - in this instance, pursuant to s. 253 of the Code. The following passage perhaps best illustrates the *task at hand* and it reads as follows:

> *"In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are* ***not required to establish a prima facie case for conviction*** *before making the arrest". (my emphasis).*[1]

Since *Bernshaw* [2] the courts have continued to elaborate on the meaning of those *operative words*. This too is a fairly well known principle but it bears repetition perhaps. Essentially the *belief of the officer* should stand up to the *objective scrutiny* of the courts.[3] This latter concept has been expressed in

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[1] *R. v. Storrey [1990] 53 C.C.C. (3d) 316 at p. 324 (S.C.C.)*
[2] *R. v. Bernshaw (1994) 95 C.C.C. (3d) 193 (S.C.C.)*
[3] *R. v. Balla [1992] 36 M.V.R. (2d) 259 at p. 264*

many different ways and at various court levels. However the gist of the message has remained constant, though the courts have gradually expanded the duty to be discharged by investigating officers. In short officers have been directed to *consider all relevant information,* including evidence which *supports* the notion of impairment and that which *undermines* it. That too has been expressed many times and in many ways. On that topic here is an illustrative passage, emanating originally from our Quebec tribunals:

"For a peace officer to have reasonable and probable grounds for believing in someone's guilt, his belief must take into account all the information available to him. He is entitled to disregard only what he has good reason for believing not reliable." [4]

The same message aptly put in yet another way, reads as follows:

"It is the totality of the circumstances known to the officer – those which undermine the belief as well as those which support it – which must be assessed to determine if the requirement of reasonable and probable grounds has been met".[5]

The best phraseology I have found to express that notion is as follows:

"This standard would not be met if the officer, before making the demand, did not at least make such efforts as are practicable to investigate whether the symptomatology on which he relies might just as well have resulted from factors other than alcohol consumption when the circumstances present some reasonable possibility of that being the case". [6]

[14] In dealing with this issue within the context of the law revisited above, I propose to rely on the facts elaborated upon earlier in the first several pages of this decision. Therein I have outlined and commented upon the *evidence* of the various witnesses. I may also refer to other evidence adduced in the course of these proceedings, which I deem pertinent. Essentially Counsel for the defence argued that arresting Officer Jason Bond did not have *reasonable and probable grounds* to cause the arrest in the first place. Likewise he argued that Constable Brian Dodds, who made the *intoxilyzer demand*, did not have the *reasonable and probable grounds* to make such *demand*. Counsel suggested these officers had essentially attended the scene with a *predetermined state of mind… a sort of institutional bias,* based on the *dispatch* they had received around 3:01 PM that day, prior to their arrival at the scene at approximately 3:13 PM. He

[4] *See Chartier v. Quebec (A.G.) (1979) 48 C.C.C. (2d) 34 at 55-56 (S.C.C.)*
[5] *See R. v. Cooper (1993) 46 M.V.R. (2d) at 237 (Ont Prov Ct)*
[6] *See R. v. Gavin [1993] P.E.I.J. No 136 at (P.E.I. C.A.)*

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went on to state categorically that both officers *acted in a rush-to-judgment… in a premature formulation both of the RPG to arrest and to make the demand*. He went on to point out that there had been a *minor collision* and that neither officer had tried to ascertain whether Ms. Odgers was at fault in that matter. Thus he suggested the *accident* was at best a *neutral fact*. As for the *odour of alcohol* and other common *indicia of impairment*, counsel mounted a broad and concerted attack on the officers' notes - purporting to demonstrate significant discrepancies. In my view the defence has gone to such great lengths to challenge the adequacy and integrity of officers' notes in this case - that I feel compelled to comment specifically on that issue at this time.

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Police Officers' Notes

[15] In some instances counsel purported to highlight serious *inconsistencies* pertaining to the observations of these officers. In other instances it was suggested the *absence* of notes pertaining to certain observations or investigative developments, should cast serious doubt as to the reliability of the evidence adduced by these officers. Counsel for the defence was quick to point out that the *observations of police officers deserved no special deference* citing *Regina v Graat* [7]. However in the process he went so far as to suggest that - *when dealing with the opinions expressed by investigating police officers who have a stake in the proceedings, in fact, less weight rather than more weight should be attributed to that evidence*. This is not an accurate statement of the law of course, nor does it reflect accurately, comments attributed to *Dickson J.* in that case. In short *Graat* stands for the simple proposition that the views of police officers are not to be afforded *any greater weight* than might be attributed to the evidence of ordinary persons - but absolutely not less!

[16] Generally speaking in the matter of ***police officers' notes*** – the law has indeed evolved over time. No longer are the notes of an officer a simple *aide-mémoire* generated for the sole purpose of that officer to assist in refreshing his/her memory. While the *notebook* continues to be an important investigative tool, it has also evolved into a fairly significant evidentiary document of sorts. Their use as a source of reference in the course of a trial can play a significant role in a court's assessment of the evidence. The quality of such *record keeping* can indeed impart far reaching consequences

[7] *See R. v. Graat [1982] 2 C.C.C. (3d) 365 at p. 381*

on occasion. It cannot be said that the adequacy of an officer's notes is of little consequence. Accordingly the courts have recognized that there is an inherent duty placed on officers, to prepare *complete and accurate notes*. In the normal course of disclosure, *officers' notes* invariably find their way into the hands of defence counsel, who will of course rely on them. This has become an even more significant reality, since the advent of *Stinchcombe*.[8] It can be of particular concern in instances, when events or observations of obvious relevance and importance, are omitted or not adequately documented in the notebooks of officers. In such instances, the courts have demonstrated a heightened awareness of the evidentiary dangers, such deficient notes present to a trier of fact. When *serious inadequacies* are demonstrated, the credibility of police officers can in fact be discounted. It goes without saying that *the absence of notes on an important factor is relevant to an officer's credibility*.[9] As a result the courts have on occasion, been reluctant to attribute much *weight* to evidence adduced viva voce by an officer, in the absence of corroborating written references in that officer's notebook. I am aware of a large body of case law[10] on the subject. Ultimately however, this is often a matter of common sense and as usual each case, must be determined on its merits.

[17] Specifically in this case, the defence purported to challenge the integrity of *Constable Bond's* evidence, by pointing out the general paucity of his notes. I agree that this officer's notes were somewhat sparse, in light of the role he played in this investigation and the observations he alluded to in the course of his testimony. However this investigation was unique in the sense that Constable Bond was delegating many of the tasks to Constable Dodds. Ultimately Constable Dodds was able to corroborate much if not all of the evidence elicited from Bond. In my view this reaffirmed the reliability of the latter's evidence, even in the glaring absence of specific notations in Bond's notebook. Furthermore some of his observations were corroborated by Constable Heaton as well. The defence also took particular issue with a *late entry* and I will comment on that shortly. In the end but for one specific discrepancy upon which I propose to comment on later, there were the *usual discrepancies* which creep into officers' notebooks, but nothing that would cause me to seriously question the integrity of Constable Bond's evidence.

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[8] *R. v. Stinchcombe v. The Queen 68 C.C.C. 1 (S.C.C.)*
[9] *See R. v. Fisher [2005] O.J. No. 1899 (Ont C.A.)*
[10] *See also R. v. Farrell [2007] No. 06-5600 Nadelle J. (O.C.J)*
as well as R. v. Eagle [1996] O.J. No. 2867 (Ont. Gen. Div) citing report of A.G.'s Advisory Committee

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[18] *Constable Dodds* was also assailed on the adequacy and accuracy of his notes. There was a particular concern perhaps because he had sought a *second opinion* from Constable Bond, before formulating his *belief* on *reasonable and probable grounds*. Dealing with the *late entry* issue this officer explained, that observations in that regard pertained to the *unsteadiness* of the accused and her *needing assistance* crossing the road. Practically speaking, it seems rather obvious that officers would not be able to write anything down simultaneously as they walked. In addition Constable Dodds explained that he was occupied for a brief period of time as they arrived at the cruiser and that his *late entry* was as contemporary as he could make it. That occurred around 15:43 PM whereas Constable Bond's similar *late entry* was recorded at 15:51 PM. Defence counsel pointed to the fact both officers had made such *late entries* suggesting perhaps the two officers were *in collusion* somehow, so as to improperly *accord* their notes. Both officers acknowledged the sharing of information in light of the special *coach-trainee relationship* they had that day but denied fowl play in this regard. In the end I was satisfied that this occurrence was the product of coincidence. I attached very little significance to it in terms of the reliability of their notes, not to mention the reliability and integrity of their evidence.

[19] Otherwise as might be expected with any of the officers' notes in this case, there were the usual number of *discrepancies*. Some of the differences pointed out, reflected the differing perspectives of the officers. On occasion an *observation* not recorded in the *notes* showed up in an *occurrence report* prepared by that officer or vice versa. In short I do not propose to elaborate on such to any greater extent. On the whole such *discrepancies* could be attributed to human frailty. They were not indicative of bad faith or neglect on the part of the officers. It could not be said the officers in this instance, committed such egregious breaches in the course of their note-taking, as to arouse judicial concerns or merit intervention on my part, in terms of their reliability and credibility. Police officers are not to be cast in the roles of accomplished literary artists. We can only expect them to be reasonably diligent and intellectually honest in their *record keeping*. The fact that a particular observation is not specifically noted in writing on occasion, does not necessarily negate the existence of what was observed and remembered by an officer. As judges we must guard against exercises in flawed logic. For instance while an officer may not have noted particular indicia of impairment, the absence of such notation does not advance or support the notion that the suspect was in fact sober! Specifically I have not found anything in the way of officers' *notes or testimony*, which would lead me to

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question their collective observations as pertains to the *odour of alcohol*. Granted that would be indicative of *consumption* and not necessarily *impairment*. Invariably where there has been *consumption*, the presence of an *odour of alcohol* only makes sense. As such this reality cannot so easily be eradicated from these officers' list of *considerations*, in the course of my assessment of their performance in this case. To find that officers did not detect an odour of alcohol would be one thing. To disregard the observations of three officers on this point, because their respective notes show minor discrepancies, would be ludicrous indeed. Similarly I did not find that the alleged deficiencies in the officers' notes should play a very significant role in my findings as pertains to the accused's *unsteadiness* and *slurred speech*.

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[20] Not so much related to the topic of *officers' notes*, the defence also took issue with the notion of *confusion* on the part of the accused at the time she was approached by officers. Counsel suggested Ms. Odgers was alert enough to realize *documentation* would be requested of her. And so it seems she had begun the process of locating her insurance papers. However she was unable to locate them, perhaps because they were not in the vehicle to be found. Yet the significance of that in the context of the defendant's sobriety, seemed to elude counsel. Alternatively I might point out, that for any licensed driver, the realization that the police are likely to ask for *driving documentation*, does not require a particularly high degree of alertness. I would venture to say that most highly intoxicated suspects could easily come to that realization. Hence the fact Ms. Odgers had already strewn out the contents of her glove box onto the front seat of her vehicle, does not automatically speak favourably to her state of alertness. Quite to the contrary, the very necessity of spreading papers all over the seat, in order to locate those that are pertinent, speaks to poor thought processes and perhaps confusion indeed. Objectively speaking from the perspective of the officer, her apparent failure to readily produce the documents requested, in fact supports his perception, that this was indicative of the state *of confusion*, he claimed to have observed. How could the officers reasonably conclude that she was *confused* counsel asked? The answer to that question is rather obvious in my view.

[21] Moving on to other *factors*, the fact that she was visibly *upset* and *crying* was observed and noted by Constable Heaton but not specifically noted by the other two constables - according to their notebooks. Again these *inconsistencies* were advanced as reasons to disregard the said observations. On those lines, counsel also went on to challenge the notion that Ms.

Odgers' eyes were *glassy* and that her speech was *slurred*. An equally consistent broad brush approach was undertaken by the defence, as pertains to officers' observations that she was *unsteady on her feet*- so much so as to require assistance from the officers. The road conditions were described as icy in spots, wet and in places covered with salt. The footwear of the officers and of Ms. Odgers became an issue in light of the alleged *slippery conditions* and unsteadiness on her feet. On this very issue I found the evidence and explanations of Officer Dodds entirely reliable and acceptable. Here is how he described the situation:

> *"I actually noted that the roadway was smooth…although it was wet but it wasn't slippy and that she was wearing flat shoes, which would give me no reason for her to be unsteady".*

[22] Whether Ms. Odgers had a *chronic leg aliment* of sorts became an issue, for it might explain her difficulty in walking. It should be noted however that she never disclosed this supposed condition until they had arrived at central cells. Accordingly at the time when the officers were forming their *reasonable and probable belief,* they would not have had the benefit of that explanation, seemingly offsetting the *unsteadiness* observed. The fact that she admitted to *drinking a lot* - also seemed to be lost on the defence. Of course there could be any number of reasons, including the wearing of contact lenses on a cold day, to explain Ms. Odgers' glassy eyes. But how were the officers to know about that, let alone take it into consideration? The fact remains that this was but one factor observed by the officers. It is a *given* that when police officers make observations of various *indicia of impairment,* they have a corresponding duty to investigate whether there are causes other than impairment which might explain, what it is they are observing. However as a condition precedent, there must exist some equally palpable indicators or telltale signs, to trigger an investigation into those alternative reasons. Finally it goes without saying that many *signs of impairment* standing on their own, can often be discounted fairly easily on that basis. But ultimately it is the *constellation* of numerous indicia of impairment, which must be taken into consideration, when reviewing the propriety of a police officer's *reasonable and probable grounds*. Strictly speaking, an investigating officer must firstly articulate how he/she came to a *subjective opinion*, that there existed *reasonable and probable grounds* to make an arrest. Subsequently a court must review those *grounds*, so as to ascertain whether such a belief is *objectively* sustainable in that light.

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Scrutiny of Reasonable & Probable Grounds

[23] With those principles in mind – here are the *indicia* to be considered in this instance. Firstly it all started with a *dispatch* sending police officers to a scene, where it was said an accident had occurred. Granted someone was suspected of driving while his/her ability is impaired. Upon their arrival the police gradually began to unravel the puzzle so to speak. They ascertained that Ms. Odgers had been *involved in an accident*. Whether or not she was at fault, was not something the police could ascertain immediately. Even if they purported to assign some degree of blame to the accused, that fact would remain relatively neutral for often, completely sober persons cause accidents, for reasons other than *impairment*. She appeared to be *confused* according to one officer who observed her. There was an *odour of alcohol* emanating from her breath according to (3) separate officers. She presented as *confused, upset and crying*. When questioned about *consumption* she blurted out - *"yes I had lots"*. Of course this latter comment would only be admissible to the extent it might be relied upon by officers, in the formation of *reasonable and probable grounds*. Nevertheless in the process, the officer detected *slurred speech* – though he was unable later to state specifically, what words she was slurring. In my view it would be ludicrous if not futile, to expect an officer to relate precisely, *which words were slurred*. This is a general observation of a state of affairs and the *degree of precision* seemingly expected from defence counsel - is simply unreasonable.

[24] In this instance before they took formal action and for the reasons alluded to earlier, the two investigating officers consulted with one another. Though reasonably certain Ms. Odgers was *intoxicated*, Constable Dodds chose to speak to his *training officer*. Admittedly he was seeking a *second opinion* before proceeding further. Apprised of Dodds' concerns, Constable Bond for his part then went and approached the defendant who was still sitting in her vehicle. He spoke with her briefly and detected a general odour of alcohol. At that point it appears he formulated a plan to have her exit the vehicle and cross the street, so as to pursue his investigation at a cruiser nearby. He asked her to exit the vehicle and observed her to be *unsteady on her feet.* He then asked her to breath into his face and as she did, he confirmed the *odour of alcohol* on her breath. In chief he testified that Ms. Odgers was assisted across the road and that he observed further *unsteadiness* on her part. Once they had reached the cruiser across the way, in light of his own observations and aware of those Dodds had shared with him, Constable Bond formed his own *reasonable and probably grounds* or

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belief. He advised Ms. Odgers she was under arrest. It seems all officers observed this *unsteadiness* and Constable Heaton we will recall, described the manoeuvre he observed as a *teeter totter*. He too detected the odour of alcohol when he had occasion to wander into close proximity to the accused.

[25] Coming back to Constable Dodds, I now wish to comment on his perspective of the events at this particular point, for it differs somewhat from that of his colleague. This constitutes the only *meaningful discrepancy* I alluded to earlier. His evidence was discussed in paragraphs [6] [7] and [8] earlier. We will recall that having gone to his *training officer* for a second opinion, this officer remained in close proximity. He claimed to have performed certain duties such as verifying Ms. Odgers driver's licence on the system. In chief he recalled seeing Constable Bond going over to the defendant's vehicle. He observed the defendant blow into Bond's face and thereafter - is where his perspective of the events differs somewhat. This indeed is a *discrepancy* of sorts - for Constable Dodds is of the view that Ms. Odgers was advised then and there - that she was under arrest. Specifically and at least from this officer's perspective, it seems Ms. Odgers was advised she was under arrest and then accompanied across the road by both officers. Constable Bond testified that they crossed the road and then she was placed under arrest. However he admitted in cross-examination, that by the time the defendant had breathed into his face, he had *pretty much made up his mind* to arrest her. Again in passing, while Ms. Odgers might be suffering from some *chronic leg ailment*, this was not communicated to the officers then and they had no hint of ascertaining, if this was related to her *unsteadiness*.

[26] Returning once again to the aforesaid *discrepancy*, it seems Constable Bond for his part may well have already formed his *belief* and advised the accused she was under arrest, before they crossed the road and before he had observed *more unsteadiness*. One thing is certain and that is a *formal arrest* had not been perfected, before they crossed the road. In that regard, the evidence irrefutably establishes that both officers escorted her across the road, providing her with some support. It seems she required such assistance to proceed in safety and I accept the evidence of the officers in that regard. I have no way of knowing whether or not, her perceived *difficulty* in crossing the road influenced the officers' decision to bypass the *roadside screening test*. Certainly for what it's worth, the *unsteadiness while crossing the roadway* seems to have assisted Constable Dodds in the formation of his personal *belief* for he stated: *"…having seen her attempt to cross the road, I was happy in my own mind that she was intoxicated and impaired"*.

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Thereafter custody of the defendant was officially turned over to Dodds and he proceeded with the *formalities of arrest, rights to counsel* and such. It is a fact the officers opted to proceed directly to an *intoxilyzer demand*. In the circumstances, I am of the view that her *unsteadiness* could not simply be attributed to, or explained by, the so-called *icy conditions* or the alleged *chronic leg ailment*. Whether or not Constable Bond formulated his grounds and arrested Ms. Odgers prior to crossing the road, without the benefit of observing her reported unsteadiness in that later context, I cannot determine. However in the event that he did, I am not persuaded that his actions would constitute a *premature arrest without reasonable grounds*. Objectively speaking, he had already observed several indicia of impairment in my view and this further observation of even *more unsteadiness* would merely constitute *icing on the cake* so to speak. Should I be in error on this point, I am of the view that the resulting breach would not be so serious, as to warrant an exclusion of evidence, pursuant to *section 24 of the Charter*. Also I came to that conclusion in light of the fact that the *investigative duties* were being shared in this instance with Constable Dodds. The evidence clearly supports the notion that at least he did not formulate his *belief on reasonable and probable grounds*, until he had assisted the accused across the road and observed her apparent *difficulty and unsteadiness*. Hence the constitutional safeguards were observed as Constable Dodds took custody of Ms. Odgers, proceeding with the formalities of *arrest* and *rights to counsel*.

[27] In the end on the totality of the evidence adduced herein, I categorically disagree with the notion that the two officers sharing investigative duties on this date, acted in a *rush-to-judgment… in a premature formulation both of the RPG to arrest and to make the demand*. Such a position is preposterous and untenable. In my view the officers as best they could practically, took the time to ascertain the nature of the situation unfolding before them. They proceeded in a fair, deliberate, cautious and disciplined fashion. Constable Bond was the first to formulate *reasonable and probable grounds*. He was perhaps of a mind to proceed with the arrest of Ms. Odgers after his brief contact with her following an exchange of information with Dodds. However the latter for his part, also came to the same *reasonable belief* shortly after they had crossed the road. In my view they both came to a reasonable and logical realization, they were dealing with a very intoxicated person, who had been driving while her ability to do so, was significantly impaired! In my view any *reasonable person* standing in their shoes, would have come to that same realization on the facts of this case. Taken in their totality and not separately, the

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constellation of factors and indicia supporting the notion of *impairment* on the part of this driver was quite preponderant! Any other conclusion would defy common sense. Subjectively and/or objectively speaking, the officers' belief that they had *reasonable and probable grounds* to arrest Ms. Odgers and to make a demand for an intoxilyzer test, surely stands up to the *objective scrutiny* of this court. It is for those reasons that I ruled against the defence in this regard, back on the 20th day of February, 2007.

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Completion of the Evidence

[28] At this juncture I now wish to go back to the evidence adduced at this trial. Following the testimony of *Mr. Hodgson* and counsel's motion pertaining to reasonable and probable grounds, which I have just elaborated upon, I should point out that on or about the 6th day of November 2008, we were finally able to complete the hearing of evidence in this matter. On that date, the defence called upon ***William J. Sherring*** to testify on behalf of his life's partner. He confirmed his involvement with the Ottawa Fire Department and recounted some of his work's experiences. He and the defendant have apparently cohabited since 2001. As such he spoke of a *medical condition* of sorts, from which she apparently still suffers due to an old injury to her leg and across the front of her knee. Accordingly he opined that *her gait isn't the utmost stable if she's been sitting too long*. It seems that *in the cold she will have difficulty walking* and that *at night while she sleeps, she will get pain, extreme pain*. The purpose of this testimony presumably was an attempt to explain the *unsteadiness* observed by the police during this investigation. Mr. Sherring also attempted to explain the *glassy* appearance of Ms. Odgers eyes, commenting that she wore contact lenses. Finally he confirmed that on the date in question, he was contacted by the authorities and ultimately found his way to the detachment, where Ms. Odgers had been taken.

[29] On cross-examination by the Crown attorney, Mr. Sherring confirmed that upon his attendance at the detachment, he was *not there to assess her sobriety*. Of course he knew she was being charged for *impaired driving*. Later in the evening he confirmed taking her home in a taxi. According to him the defendant was not showing *signs of impairment* but it should be noted that this was a significant period of time after the incident. Pressed to outline the activities of the day, Mr. Sherring testified that he and Ms. Odgers had been at the *Kelsey Restaurant* for lunch. Afterwards he claims he drove to the *LCBO* to purchase some wine. While he did that, he was under

the impression the defendant was to attend at *Staples*. On exiting the *Liquor Store*, he eventually came to the realization Ms. Odgers had driven away with the family car, leaving him without transportation and so he walked home! To the best of his recollection this was around 2:00 PM on the date in question. They had gone for lunch and been there for *maybe an hour and a half, two hours*. When questioned by the Crown, Mr. Sherring was reluctant to estimate how tall the defendant was or for that matter, how much she might have weighed at the time. Getting back to their attendance at *Kelsey's Restaurant*, he was asked about consumption of alcoholic beverages. He admitted to consuming two glasses of wine and alleged that Ms. Odgers had consumed liquor – *"several glasses over the two hours"*. He could not state what kind of liquor nor specify the quantities more specifically. As for Ms. Odgers she opted not to testify.

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Necessity of Expert Evidence

[30] At this juncture and for the sake of clarity, I should state that in my view the *actual time of driving* for our purposes can fairly be situated around 3:00 PM. I draw this inference on the basis of evidence which clearly establishes the officers were *dispatched* at 3:03 PM. We can presume that by the time the authorities were being notified - the accident had already taken place. The evidence of civilian witness *Samantha Pacheco*, indicating the accident happened around 3:00 PM also supports this notion. Ultimately this is as accurate a *time of driving* as any, for any time fixed within (15) minutes of that time either way, would neither favour nor prejudice the accused's legal position in this case. In the circumstances it becomes rather evident that *intoxilyzer test results* were obtained more than two hours after the *time of the incident*. As might be expected the Crown provided the defence with the customary *notice of intent* to adduce *expert evidence*. That notice contained a *general indication* of the evidence it proposed to elicit from Mr. Hodgson. The practice of consulting *experts* in this context was established years ago and ever since, they have played an important role in *drinking and driving* trials. It has oft been said that *measuring the blood alcohol concentration of an accused clearly falls outside a judge's experience and knowledge*. As a corollary to that concept, the courts have also recognized that the *effect of alcohol* in the blood is yet another factor, the Crown has been required to establish through *expert testimony*. I gather this principle is at least (50) years old as I refer to a pertinent passage in *Ostrowski*. [11]

[11] *Ostrowski v. The Queen (1958) 122 C.C.C. 196 at p. 197*

"In this case evidence was given as to the alcoholic content of the appellant's blood but no ***opinion*** *was given* ***as to the effect*** *of the presence of such an amount of alcohol****. It may well be that the physiological effect*** *of an alcoholic content of 2.4 parts per thousand, (as indicated by the breathalizer machine)* ***would have an extremely prejudicial effect*** *upon the behaviour of the appellant but I am of opinion that* ***this fact is not one of universal notoriety*** *and that* ***therefore no judicial notice*** *should have been taken* ***of the likelihood of impairment*** *following the* ***consumption of such an amount of intoxicating liquor****". (my emphasis)*

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While it is not unusual for the prosecution to proceed in this fashion in the circumstances of this case, it must be remembered that the onus remains on the Crown to prove its case *beyond a reasonable doubt*. In this instance the defence argued that the Crown had failed to prove some of the necessary elements, which are essential to support the admissibility of this *expert evidence*. The law is quite clear that absent a proper foundation for the expert's opinion, then its evidentiary value is nonexistent.

Admissibility of Expert Evidence

[31] At this stage it will be useful to re-iterate the *assumptions* that Mr. Hodgson relied upon, in order to arrive at his conclusions. For all intents and purposes they are as follows:

i) No consumption of alcohol between the time of the incident and the time of the breath test
ii) The allowance of a one-hour plateau following *time of the incident*
iii) An *average rate of elimination* of 18 milligrams in 100 millilitres of blood per hour - bearing in mind this rate can vary between 10 and 25 depending on the individual
iv) No consumption of large quantities of alcohol within ½ hour prior to the *time of the incident* referred to as "*bolus drinking*".

The first of such assumptions is not difficult to address. In my view it is well established and evident, that no consumption of alcohol took place between the *time of the incident* and the time of the breath test. This leaves me with the last (3) *assumptions* to address in the same chronological order. That the Crown bears the onus of proving the aforesaid *elements* is not so much the issue, as the *method* the Crown might resort to in discharging its duties. I have had the benefit of ample case law provided me on the subject.

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Matters of Science

[32] Accordingly let me firstly deal with the matters of an *average rate of elimination* as well as the so-called *one-hour plateau* simultaneously. In my view identical legal considerations apply to those two *assumptions*. It has oft been suggested that these ***are really matters of science*** upon which an expert should be able to rely. [12] There has been much discussion on the *science* which forms the basis for the provisions which now exist in the Criminal Code. In *R. v. Gibson* [13] the following passage is attributed to Charron J. in a Supreme Court decision, where the concept is addressed:

"…I also conclude, on the basis of the undisputed scientific fact that ***absorption and elimination rates vary continuously****, that post-offence testing of the accused's own elimination rate will rarely if ever, add anything of value to the expert opinion evidence and, for obvious policy reasons, should not be encouraged, let alone required.*

It is undisputed that the human body absorbs and eliminates alcohol over time and that absorption and ***elimination rates vary, not only from person to person, but also from time to time*** *for the same individual, depending on a number of factors, some of which concern the person's digestive process at the relevant time. It is therefore impossible to ascertain the precise rate at which the accused was metabolizing alcohol at the time of the alleged offence.* ***Parliament can be assumed to have known that blood alcohol levels are subject to these inherent variations****. Yet it saw fit to implement the presumption. The legislative scheme must be interpreted in this context.*

Because absorption and elimination rates continually vary, it is readily apparent that a breathalyser reading of 95 mg for example, ***may not reflect the actual concentration of alcohol*** *in the accused's blood at the time of the alleged offence – it would depend on the rate at which the particular accused is metabolizing the alcohol during the relevant time period on the day in question. Yet it can be no defence for an accused to say that the actual alcohol concentration at the material time may have been less than the legal limit based on the variable alone. To admit such a defence would obviously fly in the face of the presumption itself. It is because of these inherent variations in absorption and elimination rates that the presumption of identity is needed in the first place. In order to facilitate proof of the offence, the* ***presumption treats all persons as one person with a fixed rate of elimination and absorption. (my emphasis)***

Consequently it seems the *underlying science* has been deemed reliable enough by the Supreme Court of Canada, to approve of Parliament's founding upon it, a basis for its *impaired driving legislation*. Thus why can I

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[12] *See R. Calabretta [2008] O.J. No 4188 (Ont S.C.J. at para 10*
[13] *See R. v. Gibson 2008 SCC 16 in Overview para [3] and [4] per Charron J.*

not assume it to be *equally reliable*, for an *expert* to similarly base an opinion on it, in cases where *readings* must be extrapolated, because *conventional presumptions* are not available - for strictly technical reasons? Similar discussions can also be found in *R. v. Heideman* [14] as to the *science* and the *knowledge attributed to Parliament*, in the enactment of such laws.

[33] Recently I have had the benefit of reading the decision of *Kiteley J*. in the matter of *Paszczenko* [15] which deals with the admissibility of an *expert toxicologist's report*. As alluded earlier, it goes without saying that *before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.* [16] I have also had the benefit of reading the decision of *G. Sparrow J.* in the matter of *Lipovetsky.* [17] She concedes the decision of Paszczenko aforementioned, may well be a binding decision. However she also notes that the latter decision appears to contradict an even higher authority. She founds this opinion on the reading of two Ontario Court of Appeal decisions. First she refers to *R. v. Phillips* [18] wherein she quotes the following passage which speaks of a *two-hour plateau*, though that precise terminology is not utilized. It reads as follows:

"…scientists have established that the blood alcohol concentration rising rapidly, as stated in paragraphs 5 and 6 of the agreed statement of facts, to a maximum or near-maximum within approximately 30 minutes of the last drink. Therefore, it remains relatively constant for a period of two hours after the alleged offence and then declines as alcohol is eliminated from the blood at the rate of 10 to 20 milligrams per 100 millilitres of blood per hour".

Sparrow J. then coupled her reading of the aforementioned passage with a consideration of the law enunciated in *R. v. Koh* [19] which is also an Ontario Court of Appeal decision. In that case it seems…

"… judicial notice was taken of the existence of racism against all visible minorities in Ontario. Further, it directed trial courts to proceed on the basis of this fact in considering the issue of suitable questions for prospective jurors. In so doing, the Court specifically added prior judicial findings of fact to the list of matters appropriate to judicial notice."

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[14] *See R. v Heideman (2002) 168 C.C.C. (3d) 542 at paras 12-14*
[15] *See R. v. Paszczenko 2009 CanLII 45 (On S.C.)*
[16] *See R. v. Lavallee CanL II 95 (S.C.C.) [1990] 1 S.C.R. 852 at para 66*
[17] *R. v. Daniel Lipovetsky per G.Sparrow Ont Ct of Justice, Mar 03-09 at Toronto*
[18] *See R. v. Phillips 1988 42 C.C.C. (3d) 150 at p. 161*
[19] *See Regina v. Koh 1998 131 C.C.C. (3rd) 257 (Ont C.A.)*

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Sparrow J. then went on to state:

"In my view, in Phillips, the Court of Appeal has either made or adopted prior findings of fact that the blood alcohol concentration rises rapidly after the last drink for two hours. According to Koh, I can take notice of judicial findings of fact. In my view, given that the assumption of factor in question has been recognized as a finding of fact by the Ontario Court of Appeal, the highest authority in the province, I am entitled to accept it as a finding of fact in this case, despite the ruling in Paszczenko. I note that Phillips was not referred to in Paszczenko."

The reasoning of *Sparrow J*. it seems to me, clearly resonates with an equally binding decision from Langdon J. in *R. Calabretta*. [20] In short I find support for this notion and accept that the aforesaid *assumptions* are indeed *matters of science* and I am prepared to take judicial notice of that fact. In this instance Mr. Hodgson made reference to a *one-hour plateau* and briefly explained what he meant by that. Again I reiterate that his *qualifications* in this field were never challenged. Accordingly I find that the Crown has adequately discharged its duty in this aspect of the *second assumption* in this case. Similarly as pertains to Mr. Hodgson's assumption of an *average rate of elimination*, I am equally of the view that this is a *matter of science* of which I can take judicial notice. Thus I find that the Crown has discharged its evidentiary burden once again as pertains to this *third assumption*.

Bolus Drinking

[34] This leads me to a consideration of the final *assumption* surrounding the issue of *bolus drinking*. While the prosecution is entitled to rely on that assumption, nevertheless the onus remains on them to prove the *absence of bolus drinking*. As a corollary to that notion it goes without saying there is no onus on the accused to show she in fact did engage in *bolus drinking.* [21] As indicated earlier, how the Crown goes about proving that evidentiary element is yet another issue here. For starters in this case, there is no preponderant or direct evidence either way in this regard. However it is trite law that as a trial judge, I can base that determination on *the totality of all the evidence before the court whether circumstantial or direct*. In this case there was no evidence of alcohol found within the vehicle following the collision. Granted Ms. Odgers had the *odour of alcohol* emitting from her breath. But that is invariably the situation with any driver intercepted for

[20] *Again see R. Calabretta [2008] O.J. No 4188 (Ont S.C.J.) at para 10*
[21] *See R. v. Grosse [1996} O.J. No 1840 (Ont C.A.)*

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impaired driving. Generally speaking the presence of an *odour of alcohol* is merely consistent with some degree of *consumption*. In and of itself it most definitely is not indicative of so-called *bolus drinking*. There was no evidence that the defendant had just left from a *drinking establishment*. On the contrary, evidence received from *Mr. Sherring* her common law spouse, established they both had lunch at the *Kelsey Restaurant* and reportedly left those premises around 2:00 PM or thereabouts. This might actually constitute circumstantial evidence - suggesting an absence of bolus drinking.

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[35] To reiterate - I estimate that the *actual time of driving* can safely be inferred to be around 3:00 PM in light of the time of the *dispatch* and police arrival at the scene. Such a finding does not necessarily support the notion of *bolus drinking* nor does it negate it for that matter. In the end there is no direct evidence either way. Mr. Hodgson's definition of *bolus drinking* suggests the ingestion of copious amounts of alcohol, consumed *rapidly…one after the other* and *within ½ hour of the said time of the incident*. It is a fairly common definition for this phenomenon and one which I can readily accept, even if ultimately, I were to rule that Mr. Hodgson's other expert opinion evidence is not admissible at this trial. On that issue and to borrow the phraseology - this is an *inherently unlikely scenario* and I concur with that view. The Ontario Court of Appeal has opined that *bolus drinking* though a *theoretical possibility is extremely rare and in fact constitutes a very abnormal scenario*. In *Bulman* [22] the Court discussed the issue at some length. I quote relevant passages as follows:

"… whether Mr. Wigmore's underlying assumption was proven was a question of fact for the jury to decide. In making this finding, the jurors were entitled to ***rely upon their common sense and to draw inferences about how normal people behave****. A reasonable inference is that* ***normal people do not consume large quantities of alcohol shortly before, or while, driving.***

In any event, the jury had evidence that bolus drinking was "abnormal". Mr. Wigmore repeatedly referred to the bolus drinking and post-offence drinking scenarios as "abnormal". ***In the absence of any evidence suggesting*** *that the appellant's* ***drinking pattern*** *on this occasion* ***was abnormal or unusual****, the jury was* ***entitled to conclude*** *that the underlying assumptions of Mr. Wigmore's* ***opinion had been proven beyond a reasonable doubt****.*

In addition to Mr. Wigmore's evidence concerning the rarity of bolus drinking, the jury was entitled to ***consider the inherent implausibility*** *of the appellant exhibiting indicia of*

[22] *See R. v. Bulman {2007] O.J. No 913 paras 13 - 16*

impairment within as little as ten to fifteen minutes after the accident if he had not been impaired when he was driving. (my emphasis)

[36] In this case applying the reasoning adopted by *Sparrow J*. in Lipovetsky [23] I am also prepared to take judicial notice of the findings of the Court of Appeal in *Bulman* to this effect - *a reasonable inference is that normal people do not consume large quantities of alcohol shortly, before, or while, driving*. Then again coming to such a conclusion is not so much *a matter of taking judicial notice of a drinking pattern but merely applying common sense as to how ordinary people behave"*.[24] In addition, it must be remembered that Ms. Odgers did not testify on her behalf - much less to the issue of *bolus drinking*. The best available evidence adduced on this subject was elicited from her common law spouse as alluded to earlier. Also for what it's worth, he indicated that she had consumed liquor – *"several glasses over the two hours"* but then leaving *Kelsey's* around 2:00 PM. He could neither state what kind of liquor she consumed nor in what quantities more specifically.[25] I am also guided by the most instructive comments of *Langdon J*. in the matter of *Calabretta*. [26] It reads as follows:

"If I dare to suggest a ratio for Grosse, it would be that, while there is no common law presumption that an accused has not engaged in bolus drinking immediately before the incident under examination, ***very slight circumstantial evidence suggesting the absence of such bolus drinking will suffice*** *to place upon the accused an evidentiary burden to explain unusual facts uniquely within his knowledge. If he fails to do so, the trier of fact may draw an inference adverse to the accused that tends to support the circumstantial evidence negating bolus drinking".(my emphasis)*

In all the circumstances in this case, I find there exists at the very least, slight circumstantial evidence to suggest the absence of bolus drinking.

Issue of Adverse Inference

[37] However what am I to make of Ms. Odgers' failure to testify on this issue? In the matter of *Grosse* [27] the court made reference to the comments of *Arbour J.A.* in the matter of *R. v. Johnson* [28] wherein she commented as follows and I quote:

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[23] *R. v. Daniel Lipovetsky per G.Sparrow Ont Ct of Justice, Mar 03-09 at Toronto*
[24] *Again see R. v. Grosse [1996] O.J. No 1840 (Ont C.A.) at para 15*
[25] *See para [29] hereof*
[26] *R. Calabretta [2008] O.J. No 4188 (Ont S.C.J. at para 23*
[27] *R. v. Grosse (1996) 107 C.C.C. (3d) 97 (Ont C.A.)*
[28] *R. v. Johnson (1993) 79 C.C.C. (3d) 42 at p. 51*

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"*In the face of proven facts calling out for an explanation, the failure of the accused to testify has evidentiary significance when the accused is in a unique position to provide such an explanation. It cannot be used to relieve the Crown of its burden of proving guilt beyond a reasonable doubt. However, when an innocent explanation for an incriminating set of facts is not offered by the accused, or when his explanation comes solely from an out-of-court statement which has been introduced as evidence, if he does not submit to cross-examination, the judge or jury may properly draw from that an inference unfavourable to the accused.*"

On the strength of that precedent the Court in <u>*Grosse*</u> agreed that the trial judge *was entitled to draw an adverse inference unfavourable to the respondent from his failure to testify to such an unusual drinking pattern*.[29] However there followed the case of <u>*R. v. Noble*</u> [30] wherein the Supreme Court of Canada revisited the notion of *adverse inferences*. In that instance it is clear that *Lamer J.* and *Sopinka J.* embarked upon on an extensive philosophical discussion on the subject. But it was *Sopinka J.* who wrote for the majority ultimately. Finally in the matter of <u>*R. v. Hall*</u> [31] the Ontario Court of Appeal also had the opportunity to revisit its own decision and commented as follows in the following paragraphs:

> ***25*** *"**Grosse has since been overtaken in some respects by R. v. Noble** (1997, 114 C.C.C. (3d) 385 (S.C.C.), which Sopinka J. writing for the majority, at para. 68 described as an appeal concerning the evidentiary significance of the failure of an accused to testify at trial. At paragraph 89 he sets out the basic principle that; "**the silence of an accused person at trial is neither inculpatory nor exculpatory evidence**". He then goes on to express some basic rules **regarding** the appropriateness of a trial judge adverting to the silence of an accused person.*
>
> > *1. Where the trial judge is **satisfied that the Crown has proven its case** beyond a reasonable doubt, the **silence** of an accused may be referred to as **evidence of the absence of an explanation** which could raise a reasonable doubt. (para. 78)*
> >
> > *2. Where the level of the Crown's proof **falls short of proof beyond a reasonable doubt**, the **silence** of an accused **may not be referred** to as bridging any part of that burden. (para. 81)*
> >
> > *3. Because the term **"inference"** can be taken to indicate that the trier of fact used silence to help establish the case for guilt beyond a reasonable doubt, courts **should generally avoid** using the term in discussing the silence of an accused. (para. 90)*

[29] *R. v. Grosse (1996) 107 C.C.C. (3d) 97 (Ont C.A.) at p. 104*
[30] *Regina v. Noble (1997) 114 C.C.C. (3d) 385*
[31] *R. v. Hall [2007] O.J. No. 49*

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> ***26*** *He notes that where silence is mentioned by the trial judge as confirmatory of guilt given the totality of the evidence, but not as a "make-weight", there is no reversible error. That, is the case before us.*
>
> ***27*** *It would, since Noble, have been* ***preferable*** *had the trial judge in the case before us* ***not used the term "adverse inference"****, even though she fairly relied on this court's comments in Grosse to do so. However, as I have illustrated, those comments must be considered and assessed in light of Sopinka J's pronouncements in Noble.*

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[38] With those principles of law to guide me in this instance, I will certainly refrain from the use of the dreaded phrase *"adverse inference"*. I will note however that Ms. Odgers in fact did not testify on her behalf. I reiterate that there was no preponderant or direct evidence adduced on the issue of *bolus drinking* in these proceedings. For reasons alluded to earlier I find that there is in fact slight circumstantial evidence pointing to the *absence of bolus drinking*. On the other hand there was a conspicuous absence of evidence which might otherwise undermine the common-sense inference of drinking at a normal pace, on which I can obviously rely. Finally in this instance the silence of Ms. Odgers constitutes evidence of the absence of an explanation as pertains to bolus drinking, which could raise a reasonable doubt.[32] As such I find once again that the prosecution has discharged its onus as pertains to the *fourth and final assumption*, upon which Mr. Hodgson proposes to base his opinion - as there was *no bolus drinking*! Accordingly I find that the expert's opinion is admissible in this instance and I propose to rely upon it to the extent I deem necessary.

Expert's Opinion Evidence

[39] I now propose to review Mr. Hodgson's expert evidence. He advanced an opinion in two *hypothetical situations*. However as I have already situated the *time of driving* at 3:00 PM. Thus I only propose to consider those opinions and calculations, based on a *time of incident* of 3:01 PM. In all instances in any event, *Mr. Hodgson* was asked to relate to the actual *intoxilyzer test results* alluded to earlier. For the sake of convenience we will recall that readings of 221 and 216 milligrams per 100 millilitres of blood were received at 5:13 PM and 5:32 PM respectively. As is the practice *our expert* was then asked to *extrapolate or read back* the readings so obtained. In passing, his *calculations* were said to be valid for a period of (15) minutes either side of the *time of the incident*. In my view this would lend even more

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[32] *Borrowing the phraseology of Sopinka J. in the matter of Noble supra*

support to the notion that my earlier inference as to *time of driving* was not only reasonable and fair but also quite appropriate. In the context of *bolus drinking* Mr. Hodgson was also asked to assume he was dealing with a female approximately 5'9'' in height and weighing from 165 to 170 pounds. These characteristics were arrived at on the basis of estimates provided by an officer who had observed Ms. Odgers. As is customary this expert relied on the four *assumptions* discussed earlier. It should also be noted that his estimates were based on the *lowest reading*, while applying the *conventions* aforementioned. Finally as I have already found that the prosecution established the *absence of bolus drinking* for the purposes of these deliberations, consequently factors such as *height, weight and gender* of the accused alluded to above, in fact become rather academic. As Mr. Hodgson indicated such factors are only relevant in the context of *bolus consumption* and hence have little or no bearing on his other calculations.

[40] Consequently focussing on *expert evidence* based on a *time of driving* fixed at 3:01 PM - Mr. Hodgson opined that the average reading would be *243 milligrams of alcohol per 100 millilitres of blood*. In his opinion there might be a span ranging from 232 to 254 milligrams per 100 millilitres of blood. He indicated that his calculations would still be reliable given a *window* of (15) minutes either way - to wit either 2:46 PM or 3:16 PM. Obviously that assumption clearly encompasses the *probable or actual time of driving* in this instance. Though this is not of particular relevance to us, this *expert* was nevertheless asked to *extrapolate* on a *bolus drinking scenario* again based on a *time of incident* of 3:01 PM. For what it's worth, he opined that in this scenario, had Ms. Odgers in fact indulged in *bolus drinking* - she would have had to consume (5) to (6) regular bottles of beer or alternatively 7 to 7¼ ounces of *spirits* - this presumably within the last ½ hour of her involvement in this collision. That prospect alone, clearly demonstrated the highly unlikely possibility of the defendant having indulged in *bolus drinking*. The inherent implausibility of such a scenario is obvious. Ultimately on the basis of this expert's opinion evidence, I find that the accused's *blood alcohol concentration level* could be said to have been between 232 and 254 milligrams of alcohol per 100 millilitres of blood, hence on **average 243 milligrams** at the time of the accident and driving.

Relevance of Extrapolated Readings

[41] This brings us ultimately to the question: what can we make of this expert's evidence? While Mr. Hodgson was allowed to extrapolate readings

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for the court's consideration, in this particular instance he was not allowed to express an *opinion as to the impact* such a blood alcohol concentration might have on her ability of operate a motor vehicle. I hasten to point out that Mr. Hodgson was clearly qualified to provide such an opinion. His *Curriculum Vitae* clearly outlines the areas of his expertise including in particular – *the effects of alcohol on human performance and behaviour, including the ability to operate motor vehicles*. This was the result of a ruling I made perhaps erroneously, on February 9, 2007. In hindsight I might have been a little too prompt if not stringent, as I ruled against the Crown and upheld defence counsel's objection on that issue. As I recall counsel argued that the *notice* provided him by the Crown was too *general or vague*, for me to permit the expert to advance an opinion in this specific context. Nevertheless I stand by my earlier ruling and hence, what evidence Mr. Hodgson's might have been able to provide in that specific area, was not received and cannot be taken into consideration in my determination of the *impairment issue*.

[42] Invariably in this regard and to borrow the usual terminology, it is common place for the courts to receive *opinion evidence* indicating that *some of the effects of alcohol would include a decrease in alertness, increase in choice reaction time, impairment of visual tracking and of divided attention tasks.* On the strength of such evidence arguably, Ms. Odgers' ability to operate a motor vehicle might well be *impaired* by alcohol. Especially so should her *blood alcohol concentration*, fall within the range calculated by the Crown's expert. In short it might explain the accident, not to mention the *symptoms displayed* by Ms. Odgers in this instance. However as my ruling stands I may be left to consider other evidence in my deliberations on the *issue of impairment* but certainly without the benefit of what Mr. Hodgson's opinion might have been, along the lines alluded to above. I should add however that subject to the usual tests of admissibility, the *readings extrapolated* by Mr. Hodgson related back to the time of driving, would still be valid and admissible as pertains to the charges under s. 253(b) of the Code.

Intoxilyzer Results - Indicia of Impairment

[43] At this juncture I should state that in my view the prosecution has indeed made out a solid case against this accused, as pertains to the *over 80* charge pursuant to s. 253(b) of the Code. In fact all things being equal, I would be of a mind to find the accused guilty on that count. However rather

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than take the *easy way out* so to speak, I feel compelled to consider the prosecution's case in its entirety and in that process address the allegations of *impaired driving* pursuant to s. 253(a) of the Code. In this instance there were several *indicia of impairment* upon which I propose to elaborate in due course. For the time being however, my initial *question* still remains on the table in my view - *what can we make of this expert's evidence?* In that context, I return briefly to the issue of expert witnesses. It appears that for decades now, our courts have relied on experts to repeatedly tell us about the *physiological effects* which alcohol has on the human body. Collectively as judges, we have sheepishly continued to rely upon those experts to tell us what by now is the rather obvious - that the ingestion of copious amounts of intoxicating alcoholic beverages, can have extremely prejudicial effects on a person's behaviour, not to mention the *ability to operate* a motor vehicle. This leads me to my next question: Collectively as judges, how many times must we be told and reminded of that scientific fact, before we finally get the message? Surely after (50) years of such *expert testimony*, this fact has by now *become so* ***notorious*** *as not to be the subject of dispute among reasonable persons*.

[44] Surely in this computer age we live in, with ready access to much scientific information, this notion - **that high levels of alcohol in the blood *impair* a person's abilities** - *is capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy* [33]…on the internet for instance? Absent expert opinion on the subject, can I not take *judicial notice* of the *scientific fact*, that high levels of *blood alcohol concentrations* in the human body, are at least *likely to contribute to the impairment* of that person's ability to operate a motor vehicle? Put another way, can I not take *judicial notice* of the fact that *intoxilyzer readings exceeding the legal limit*, constitute yet another *indicia of impairment*, which I might weigh in my determination of the *impairment issue*? In fact I would venture to say that even our least sophisticated citizens, including those who do not readily access the internet, have come to that realization at least a decade ago. I would equally venture to say that juries have been coming to that conclusion and drawing inferences accordingly for quite some time, without too much rebuke from our courts. In my view it is now an *irrefutable fact of science* that elevated blood alcohol concentrations, will impact adversely on the average person's ability

[33] *The Law of Evidence in Canada (Sopinka, Lederman and Bryant pp. 976-979*

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to drive. I appreciate the court's reluctance to take *judicial notice* of such a fact in the matter of *Ostrowski* [34] in light of the following passage:

"In passing, it is interesting to note that in the reports of the International Conferences of Road Traffic and of the National Research Council, many examples have been given of persons having what to the normal individual would be an ***astounding amount of alcohol*** *in their blood stream* ***displaying no clinical evidence of impairment****. As I have pointed out elsewhere it is therefore difficult, if not impossible, and certainly* ***illogical to assume any rule of general application****". (my emphasis)*

Obviously the court in that matter was reluctant to establish a *rule of general application* on the basis that some *exceptional people*, at least differentiated from *normal people*, could presumably consume *astounding amounts* of alcohol *without displaying any clinical evidence of impairment*. To put it in basic colloquial terms, some hardened drinkers can really hold their liquor and exhibit very few signs of impairment.

[45] It may well be that *elevated blood alcohol concentrations* do not have the same physiological impact on *seasoned drinkers*, as they might on other *normal* individuals. Hence high intoxilyzer results as pertains to them, might not constitute a very significant indicator of impairment, particularly so in the absence of other more common indicia. With respect, I am of the view that the rationale in *Ostrowski* is somewhat flawed, for it appears to be unduly focussed on those individuals, who by virtue of some physiological trait, are able to *hold their liquor* and display no *clinical evidence of impairment*. Such an approach overlooks the fact that most ordinary mortals, will in fact exhibit significant clinical indicia of impairment, consistent with the high levels of blood alcohol concentrations, as evidenced in their high *intoxilyzer results*. In the end those who show no signs of impairment can be acquitted of *impaired driving* irrespective of their relatively high intoxilyzer readings. Meanwhile those who do exhibit indicia of impairment which incidentally correlate with their elevated *intoxilyzer readings*, can be convicted, when a trier of fact deems it appropriate, having regard to the *constellation of indicia* presenting in that case. Ultimately there is no valid reason to exclude *intoxilyzer readings* as *indicia of impairment*, only because an *expert* has not bestowed, his *not so novel scientific wisdom* upon the presiding judge. Much akin to the *common sense reasoning* that normal people do not indulge in the practice of *bolus drinking*, in my opinion it is equally abnormal for ordinary persons to consume *astounding amounts of*

[34] *Ostrowski v. The Queen (1958) 122 C.C.C. 196 at p. 197*

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alcohol, without displaying *clinical evidence of impairment*. Though it is clearly a *theoretical possibility*, particularly so in the case of *seasoned drinkers*, again I would venture to say that it is extremely rare and in fact, would constitute an exception to the general rule for most of society.

[46] In this context it should also be noted that by virtue of *s. 255.1 of the Code*, Parliament has legislated that *the concentration of alcohol in the blood exceeding 160 milligrams of alcohol per 100 millilitres of blood, shall be deemed to be* ***aggravating circumstances*** *relating to the offence that the court shall consider under paragraph 718.2(a)* of the Code. Surely Parliament in contemplating an appropriate legislative scheme - can be assumed to have known that a concentration of 80 milligrams of alcohol per 100 millilitres of blood, for one thing, constituted a *threshold of sorts* where normal persons begin to exhibit indicia of intoxication and in fact begin to experience the phenomenon referred to as *"impaired ability to drive"*. In my view it is no coincidence that *legislators* chose to establish a *legal limit* at that level. Similarly Parliament can be assumed to have known that *twice* the legal limit represented *twice* the potential for impairment. Again it is not a coincidence that they declared a *blood alcohol concentration* exceeding 160 milligrams of alcohol per 100 millilitres of blood, to be an *aggravating factor* in the context of *s. 718.2(a) of the Code*. It is not a coincidence that traditionally in our tribunals *elevated intoxilyzer results* have attracted elevated fines. Finally it is common knowledge amongst the general population, that high levels of blood alcohol concentration are more likely than not, indicative of an impaired ability to operate a vehicle. Obviously the notion that **elevated intoxilyzer results constitute a very reliable indicator of impairment** has been a *very poorly kept secret* indeed, in both the general population and the legal community. Quite frankly it is high time we collectively *came out of the closet*, abandoned our state of denial in this regard and acknowledged this obvious truth. It does not constitute a big leap in faith - in fact it is simply a matter of common sense! As such I am prepared to ***take judicial notice of the fact that elevated levels of alcohol in a person's blood incrementally impair their ability to operate a vehicle.*** Consequently in my view, *intoxilyzer results which exceed the legal limit*, at the very least constitute yet another *sign of impairment*, to be considered along with other conventional *indicia*, in the determination of the *issue of impairment*. It only stands to reason that the higher the intoxilyzer result, the more significant a *sign of impairment* it constitutes! It goes without saying however, that in and of themselves, such *results* cannot automatically be equated to *impairment* nor is it to say that anyone *over the legal limit* is

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necessarily *impaired*. For ultimately the issue of *impairment* is to be determined by the trier of fact, on the merits of each and every case!

Test of Impairment

[47] The test to be applied in this case is commonly known and can be found in the seminal case of ***R. v. Stellatto*** [35] a decision of the Ontario Court of Appeal, which ultimately received the approval of the Supreme Court. In that case *Labrosse J.* stated as follows:

"In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out".

In passing *Labrosse J.* also commented that if Parliament had intended to proscribe impaired driving only where accompanied by a *marked departure* from the norm, it could have done so. Obviously he was alluding to the previous seminal case of ***R. v. McKenzie*** [36] with which he disagreed. He went on to write as follows:

"Specifically, I agree with Mitchell J.A. in Campbell that the Criminal Code does not prescribe any special test for determining impairment. In the words of Mitchell J.A., impairment is an issue of fact which the trial judge must decide on the evidence and the standard of proof is neither more nor less than that required for any other element of a criminal offence: courts should not apply tests which imply a tolerance that does not exist in law". [37]

Determination of Impairment

[48] Having addressed all of the evidentiary issues and outlined the legal principles applicable in this instance, I now propose to consider the issue of *impairment*. In this case there is the usual array of *indicators*, which I propose to consider in my determination of this issue. These are rather

[35] *R. v. Stellatto 78 C.C.C. (3d) 380 at p. 384*
[36] *R. v. McKenzie (1955) 111 C.C.C. 317*
[37] *Stellatto supra*

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numerous in fact and taken collectively amount to an overwhelming body of evidence in my view. From my judicial perspective this accused began to exhibit *indicia of impairment* from the moment she and her husband parted at the *Kelsey Restaurant*. This would be approximately one hour before her ultimate involvement in the minor collision, which occasioned police attendance at the scene on the date in question. Whereas Ms. Odgers' statements at the roadside as pertains to consumption are not admissible in this context, the evidence of Mr. Sherring certainly is. He informed us that in the two-hour period or so he spent with her over lunch at *Kelsey's Restaurant*, the accused consumed *"several glasses of liquor over the two hours"*. I have taken this evidence into consideration. Then there is the fact that Ms. Odgers for some reason, went about her business and ultimately left with the family car, abandoning Mr. Sherring at this Mall thus forcing him to walk home. From the latter's evidence, that certainly was not part of the plan! This speaks to a state of confusion or forgetfulness on the part of Ms. Odgers. It certainly does not speak to rational judgment and sober thought! Then around 3:00 PM there was the collision which in retrospect can be attributed to Ms. Odgers lack of attention if not carelessness. The police ultimately determined that she had backed into another vehicle and not the other way around, as she initially purported to indicate. In terms of *indicia of impairment* at this stage, this is no longer the *neutral factor* it might have been, in the context of *reasonable and probable grounds*.

[49] And then the situation really began to deteriorate from the perspective of this defendant. First of all as Constable Dodds approached her, she had a strong odour of alcohol on her breath and slurred her speech. She appeared confused in part, because her documents were strewn all over the front seat. When Constable Bond was consulted for his *second opinion* and approached the accused, he first detected a general odour of alcohol but verified it was in fact coming specifically from Ms. Odgers' mouth, by having her breathe into face. He also detected the slurred speech and later observed the dizziness and unsteadiness of the accused, as she stepped out of the vehicle. He and Constable Dodds had to assist her across the roadway for safety reasons. She was very unsteady and in my view, the road conditions and her alleged chronic leg injury did not explain the degree of unsteadiness observed by no less than three officers. En route to the detachment, she defecated and soiled herself, indicative of her loss of control over basic bodily functions, a phenomenon which was never accounted for and which I attribute to her high degree of intoxication. Once at the detachment she continued to exhibit the same signs of impairment. In her dealings with the Intoxilyzer

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Technician she was still unsteady, her eyes were glassy and pupils were dilated. She still had an odour of alcohol on her breath as detected by that officer. Constable Jacques provided an opinion that she was impaired and that the signs of that impairment were *"obvious"* – this some two hours after the alleged incident. Coming back to the scene of this collision, it might not have been readily obvious to the officers when they first arrived, how the accident had in fact taken place. Ultimately however the evidence clearly indicated Ms. Odgers backed into the car behind her. Hence it could be said she was *responsible for this accident*.

[50] Finally *last but not least* or should I say…*not really necessary*, are the *extrapolated intoxilyzer results* indicating a blood alcohol concentration approaching a range three times the legal limit. Evidently in this regard I accept the *expert opinion and evidence* of Mr. Hodgson as indicated earlier and find that at the time of driving, Ms. Odgers would have had readings ranging from 232 to 254 milligrams of alcohol per 100 millilitres of blood, thus the average of 243 milligrams. I have already taken judicial notice of the fact that this constitutes a significant indicator of impairment. Should I be in error on that issue, it matters very little in fact, for in my view the aforesaid results essentially amount to *icing on the cake*. Absent those readings the *constellation of factors* pointing to impairment is very compelling. In fact it might be more appropriate in terms of semantics, to refer to the indicia of impairment as a *galaxy of factors* in this instance. In my view the Crown has not only met its burden of establishing impairment beyond a reasonable doubt in the context of the *Stellatto test*. In fact in this instance the Crown has discharged this burden in the context of the outdated *"marked departure"* test, endorsed in the previous seminal case of *McKenzie*[38]. All this to say the Crown proved an exceptionally strong case!

[51] In summary here is the list of *"factors"* or *"indicia"* I considered:

- Evidence of Sherring that she had *several glasses of liquor* over the two hours they spent over lunch.
- The fact she *abandoned her husband* at the Mall, relegating him to walking home and this without consultation with him.
- Constable Dodds' observations that she appeared *confused, slurred her speech* and had a *strong odour of alcohol* emanating from her breath.
- Constable Dodds' *opinion* that she was *intoxicated*.

[38] *R. v. McKenzie (1955) 111 C.C.C. 317*

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- Constable Bond's observation that she *slurred her speech, smelled of alcohol*, appeared *dizzy* as she exited the car, was so *unsteady* as to require *intervention of the officer to stabilize her*.
- Constable Heaton's observation/confirmation that she was *unsteady on her feet* (*teeter totter manoeuvre*), that she *required assistance* from officers, and emitted an *odour of alcohol*.
- Police observation that she was extremely *upset and crying*.
- Ultimate determination that she was essentially at fault in the collision..
- The fact she had *strewn her documents* all over the seat in efforts to locate and identify the pertinent ones.
- The fact she *needed assistance* (from two officers) across the roadway and that *unsteadiness was not related to the road conditions or footwear*.
- *Opinion of officers Bond and Dodds* that she was in fact *impaired*.
- The fact she *defecated and soiled herself* en route to detachment – indicative of a loss of control over bodily functions – unexplained.
- The fact she *required assistance* to exit the cruiser once at the detachment although *explained somewhat* by her alleged chronic leg injury.
- The fact she was *still unsteady* and *smelling of alcohol* at detachment.
- Her *flippant approach* in the process of *selection of counsel*.
- *Opinion of Technician* that she was still *impaired* two hours later.
- Extrapolated *intoxilyzer readings* indicating a blood alcohol concentration *three times the legal limit* (judicial notice taken of effects of alcohol)

[52] Consequently I am satisfied beyond a reasonable doubt, that at the *time of the incident* between 3:00 PM and 3:13 PM Ms. Odgers was operating a motor vehicle, while her ability to do so was *impaired by alcohol*. The extrapolated readings speak of a *blood alcohol concentration* which not only exceeded the *legal limit* but in effect presented in a range approaching *three times the prescribed legal limit*. These results were consistent with the wide-ranging *symptomology* observed by the several police officers on the date in question. I find her guilty pursuant to the provisions of *s. 253(a) of the Code*. Hence charges pursuant to s. 253(b) will be stayed by virtue of the ***Kienapple*** [39] principle. Effective immediately Ms. Odgers' driving privileges will be automatically suspended by virtue of the provisions of the Highway Traffic Act. *Sentence* and incidental *prohibition orders* are to be addressed later, on a date to be agreed upon by both sides.

Delivered at Ottawa this 11th day of May, 2009
Robert N. Fournier J.
Ontario Court of Justice

[39] *R. v. Kienapple [1975] 1 S.C.R. 729 per Laskin J. on principle of res judicata*

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