NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Gardner and Fraser*, 2021 NSCA 52

Date: 20210624
Docket: CAC 495561
CAC 495793
CAC 500442
Registry: Halifax

Between:

Cheryl Gardner

Appellant

v.

Her Majesty the Queen

Respondent

Between:

Dan Fraser

Appellant

v.

Her Majesty the Queen

Respondent

Between:

Her Majesty the Queen

Appellant

v.

Cheryl Gardner and Dan Fraser

Respondents

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	January 28, 2021, in Halifax, Nova Scotia
Subject:	Criminal law: adequacy of jury instructions for the offence of criminal negligence causing death

Summary: Three police officers arrested Corey Rogers for public intoxication. On the way to the police station, he threatened and spit at them. When he would not stop, they put a spit hood on him. Mr. Rogers refused to get out of the police car or walk into the station. They carried him inside. The appellants, Special Constables Fraser and Gardner, were on duty in the Prisoner Care Facility. They had previous experience with Mr. Rogers as a prisoner, frequently for public intoxication violations. The arresting officers told the appellants that Mr. Rogers was playing possum and deciding to be uncooperative. The arresting officers put Mr. Rogers into a "dry cell", which contained no water facilities or bed. They did not remove the spit hood. Prisoners usually do so themselves once the handcuffs are removed. Mr. Rogers did not. The PCF policy mandated what are referred to as 4R cell checks. The appellants did cell checks, but not to the level set by the policy. Mr. Rogers vomited. The spit hood was impermeable, causing Mr. Rogers to suffocate. The trial judge refused to charge the jury about the appropriate standard of care or the role policies play in determining it. The jury said they could not decide if the appellants' conduct amounted to a marked and substantial departure from the requisite standard of care. The trial judge reformulated his jury charge, but again did not relate any of the evidence to the issues the jury had to decide.

Issues: Did the trial judge adequately charge the jury?

Result: The trial judge failed to instruct the jury on the issue of what was the standard of care a reasonable Booking Officer owed and how to determine if the identified omissions by the respective appellants not only amounted to a failure to meet that standard of care but amounted to a marked and substantial departure from it. At no time did the trial judge instruct the jury to: consider the appellants' respective perceptions; were they reasonably held; and, whether a reasonable Booking Officer would have appreciated the risks associated with the acts or omissions said to have caused Mr. Rogers' death. Nor did the trial judge ever refer to the evidence that could inform the jury about the standard of care of a reasonable Booking

Officer and the appropriate role for the policies relied upon by the Crown. The jury obviously struggled with their decision. They sought help. Unfortunately, the re-charge was not complete, comprehensive, or correct. It failed to review the evidence and relate it to the re-defined issues. Importantly, it did not provide an instruction on the modified objective test to decide if the conduct of the appellants were a marked and substantial departure from the standard of care of a reasonably prudent Booking Officer in all of the circumstances.

The appeals from conviction were allowed and a new trial ordered, at the discretion of the Crown.

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Cheryl Gardner and Dan Fraser

Respondents

Judges:	Beveridge, Farrar and Derrick, JJ.A.
Appeal Heard:	January 28, 2021, in Halifax, Nova Scotia
Held:	Appeals from conviction allowed, per reasons for judgment of Beveridge, J.A.; Farrar and Derrick, JJ.A. concurring
Counsel:	Joel Pink, Q.C., Ronald Pizzo, and George Franklin, for Ms. Gardner David J. Bright, Q.C., for Mr. Fraser Christian Vanderhooft, for Her Majesty the Queen

Reasons for judgment:

INTRODUCTION

[1] Corey Rogers should not have died in police custody. Mr. Rogers suffocated on his own vomit, alone in a cell. Special Constables Dan Fraser and Cheryl Gardner were the Booking Officers on duty when he died. A jury convicted them of criminal negligence causing Mr. Rogers' death.

[2] Special Csts. Gardner and Fraser appealed from their respective convictions. The sole issue was the adequacy of the trial judge's jury instructions.

[3] The trial judge, the Honourable Justice Kevin Coady, imposed a three-year suspended sentence on each of the appellants and placed them on probation with a number of conditions. The Crown sought leave to appeal from this sentence, and the appellants cross-appealed to challenge the constitutionality of the *Criminal Code* provisions which denied them the availability of a conditional sentence order.

[4] At the conclusion of the conviction appeals, the Court announced its unanimous view that the appeals from conviction must be allowed and a new trial ordered. As a consequence, there was no need to address the Crown's application for leave to appeal nor the appellants' cross-appeal. Written reasons would follow. These are they.

[5] I will set out the trial evidence, how the trial unfolded, and the trial judge's jury charge. But first, in order to understand the significance of certain evidence (or its absence) and the charge's deficiencies, I will start with an overview of the appropriate analytical framework for the offence of criminal negligence causing death.

GENERAL ANALYTICAL FRAMEWORK

[6] The common law imposes a duty on everyone to use the care of a reasonably prudent individual where a failure to do so will foreseeably cause harm to another. If that duty is breached and harm results, the person harmed can sue to be put back in the same position, as far as money damages can, as they were before the harm.

[7] The *Criminal Code* contains a number of offences that criminalize negligent behaviour. The offences that have generated the most legal debate are dangerous

driving and criminal negligence. I will refer to both offences because the law for each has developed hand in hand.

Dangerous driving

[8] Section 249 of the *Code* made it an offence to operate a motor vehicle in a dangerous manner having regard to all of the circumstances at the time or which might reasonably be expected (s. 249(1)) [now s. 320.13]. Penalties augment if the dangerous driving caused bodily harm or death (s. 249(3),(4)).

[9] The Supreme Court of Canada, after considerable debate, reserved penal consequences under s. 249 for those whose driving conduct was objectively dangerous and amounted to a marked departure from the standard of care of a reasonable person. But as the Court stressed in *R. v. Hundal*, [1993] 1 S.C.R. 867, the fault element is not an entirely objective question. Instead, the Court endorsed what is known as the modified objective test.

[10] *Hundal* was a case of dangerous driving causing death. Cory J. wrote the majority reasons for judgment. He acknowledged the existence of confusing and contradictory cases (paras. 19-21). Negligent driving spans a continuum, from momentary inattention to carelessness to dangerous driving. What separates dangerous driving from other wrongs is the requirement for the conduct to be a *marked* departure from the acceptable standard of care:

> [35] Thus, it is clear that the basis of liability for dangerous driving is negligence. The question to be asked is not what the accused subjectively intended but rather whether, viewed objectively, the accused exercised the appropriate standard of care. It is not overly difficult to determine when a driver has fallen markedly below the acceptable standard of care. There can be no doubt that the concept of negligence is well understood and readily recognized by most Canadians. **Negligent driving can be thought of as a continuum that progresses, or regresses**, **from momentary lack of attention giving rise to civil responsibility through careless driving under a provincial Highway Traffic Act to dangerous driving under the *Criminal Code***.
>
> [Emphasis added]

[11] Drawing on Supreme Court of Canada jurisprudence on criminal negligence, which I will discuss later, Cory J. proposed a modified objective test:

> [38] Although an objective test must be applied to the offence of dangerous driving it will remain open to the accused to raise a reasonable doubt that a

> reasonable person would have been aware of the risks in the accused's conduct. **The test must be applied with some measure of flexibility. That is to say the objective test should not be applied in a vacuum but rather in the context of the events surrounding the incident**.
>
> …
>
> [40] A modified objective test was aptly described by McIntyre J. in *R. v. Tutton*, *supra*, at p. 1413. Although he was dealing with criminal negligence, his words, at p. 1432, are apt in considering the dangerous driving section which is essentially concerned with negligent driving that constitutes a marked departure from the norm:
>
> > The application of an objective test under s. 202 of the *Code*, however, may not be made in a vacuum. Events occur within the framework of other events and actions and when deciding on the nature of the questioned conduct surrounding circumstances must be considered. The decision must be made on a consideration of the facts existing at the time and in relation to the accused's perception of those facts. Since the test is objective, the accused's perception of the facts is not to be considered for the purpose of assessing malice or intention on the accused's part but only to form a basis for a conclusion as to whether or not the accused's conduct, in view of his perception of those facts, was reasonable. . . . If an accused under s. 202 has an honest and reasonably held belief in the existence of certain facts, it may be a relevant consideration in assessing the reasonableness of his conduct. For example, a welder, who is engaged to work in a confined space believing on the assurance of the owner of the premises that no combustible or explosive material is stored nearby, should be entitled to have his perception, as to the presence or absence of dangerous materials, before the jury on a charge of manslaughter when his welding torch causes an explosion and a consequent death.
>
> [41] In summary, the *mens rea* for the offence of dangerous driving should be assessed objectively but in the context of all the events surrounding the incident.
> […]
>
> [Emphasis added]

[12] Despite the seeming clarity provided by the Court in *Hundal*, the Supreme Court has had to twice revisit and rearticulate the analytical framework for juries and trial judges. The first was *R. v. Beatty*, 2008 SCC 5, the second, *R. v. Roy*, 2012 SCC 26.

[13] In *Beatty*, Charron J., for the majority, emphasized how the modified objective test serves to punish only the morally blameworthy. It requires not just proof of the *actus reus* of dangerous driving but also the attendant *mens rea*. She

explained how the modified objective test distinguishes criminal from civil liability:

> [7] The *modified* objective test established by this Court's jurisprudence remains the appropriate test to determine the requisite *mens rea* for negligence-based criminal offences. As the label suggests, this test for penal negligence "modifies" the purely objective norm for determining civil negligence. It does so in two important respects. **First, there must be a "marked departure" from the civil norm in the circumstances of the case. A mere departure from the standard expected of a reasonably prudent person will meet the threshold for civil negligence, but will not suffice to ground liability for penal negligence. The distinction between a mere departure and a marked departure from the norm is a question of degree. It is only when the conduct meets the higher threshold that the court may find, on the basis of that conduct alone, a blameworthy state of mind.**
>
> [8] Second, unlike the test for civil negligence which does not concern itself with the mental state of the driver, **the modified objective test for penal negligence cannot ignore the actual mental state of the accused**. Objective *mens rea* is based on the premise that a reasonable person in the accused's position would have been aware of the risks arising from the conduct. The fault lies in the absence of the requisite mental state of care. Hence, the accused cannot avoid a conviction by simply stating that he or she *was not thinking* about the manner of driving. **However, where the accused raises a reasonable doubt whether a reasonable person in his or her position would have been aware of the risks arising from the conduct, the premise for finding objective fault is no longer sound and there must be an acquittal. The analysis is thus contextualized, and allowances are made for defences such as incapacity and mistake of fact. This is necessary to ensure compliance with the fundamental principle of criminal justice that the innocent not be punished.**
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> [Bold emphasis added]

[14] Charron J. noted confusion in cases about the modified objective test that required a trier of fact to be satisfied the accused's conduct amounted to a marked departure from the standard of care of a reasonable person in their situation (para. 42). This led her to restate both the *actus reus* and *mens rea* as follows:

> [43] As we have seen, the requisite *mens rea* for the offence of dangerous driving was the sole issue before the Court in *Hundal*, and the test was expressed accordingly. In order to clarify the uncertainties I have mentioned, it may assist to restate the summary of the test in terms of both the *actus reus* and the *mens rea* of the offence**. I respectfully disagree with the Chief Justice that the test for the *actus reus* is defined in terms of a marked departure from the normal manner of driving (para. 67). The *actus reus* must be defined, rather, by the**

> **words of the enactment. Of course, conduct that is found to depart markedly from the norm remains necessary to make out the offence because nothing less will support the conclusion that the accused acted with sufficient blameworthiness, in other words with the requisite *mens rea,* to warrant conviction**. In addition, it may be useful to keep in mind that while the modified objective test calls for an objective assessment of the accused's manner of driving, evidence about the accused's actual state of mind, if any, may also be relevant in determining the presence of *sufficient mens rea*. I would therefore restate the test reproduced above as follows:
>
> (a) The *Actus Reus*
>
> The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place".
>
> (b) The *Mens Rea*
>
> The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Moreover, if an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.
>
> [Emphasis added]

[15] *Beatty* was a case of a momentary lapse of attention with tragic consequences. *Mens rea* was not made out and the acquittals were reinstated.

[16] *Roy, supra*, was also a case of a lapse of judgment. The appellant committed a dangerous act by pulling out onto a highway at a difficult intersection into the path of an oncoming tractor-trailer. A passenger died. The trial judge convicted the appellant of dangerous driving causing death.

[17] Cromwell J., for the unanimous Court, allowed the appeal and entered an acquittal. He stressed that dangerous driving causing death is a serious criminal offence. It consists of two components: the prohibited conduct of operation of a motor vehicle in a dangerous manner causing death; and, a marked departure from

the standard of care that a reasonable person would observe in all the circumstances (para. 1).

[18] What differentiates civil and criminal fault is the degree of the departure from the requisite standard of care:

> [30] A fundamental point in *Beatty* is that dangerous driving is a serious criminal offence. It is, therefore, critically important to ensure that the fault requirement for dangerous driving has been established. Failing to do so unduly extends the reach of the criminal law and wrongly brands as criminals those who are not morally blameworthy. The distinction between a *mere* departure, which may support civil liability, and the *marked* departure required for criminal fault is a matter of degree. The trier of fact must identify how and in what way the departure from the standard goes *markedly* beyond mere carelessness.
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> [Emphasis in original]

[19] As mentioned above, the analytical framework for the offence of criminal negligence causing death or bodily harm developed hand in hand with that of dangerous driving. I will now turn to the offence of criminal negligence causing death.

Criminal negligence

[20] Cromwell J. observed in *R. v. Roy*, dangerous driving causing death is a serious criminal offence. Criminal negligence causing death is decidedly more so. Historically, the potential penalty was higher—life imprisonment for criminal negligence as opposed to 14 years for dangerous driving causing death[1]. This is also borne out by the fact that if the alleged criminal negligence involved a conveyance, dangerous driving is by statute a lesser and included offence (s. 662(5) of the *Criminal Code*).

[21] The offence is committed where an accused does anything, or omits to do anything it is their duty to do, which causes bodily harm or death if the conduct was so egregious as to demonstrate wanton or reckless disregard for the lives or safety of others. These elements are found in ss. 219 and 220 of the *Criminal Code*:

> 219. (1) Every one is criminally negligent who

[1] The maximum penalty for dangerous driving causing death was just recently increased from 14 years to life imprisonment (S.C. 2018, c. 21, s. 15).

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law.

220. Every person who by criminal negligence causes death to another person is guilty of an indictable offence and is liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

[22] Cory J.A., as he then was, set out the history of the offence in *R. v. Waite* (1986), 15 O.A.C. 215, and the jurisprudential debate whether culpability could rest solely on an objective standard. For allegations of driving misconduct, an objective test governs, as well as for acts of commission. But, based on *R. v. Tutton* (1985), 6 O.A.C. 367, where the allegation of criminal negligence is based on omission (a failure to act), a subjective test governs. Cory J.A., in *R. v. Waite*, *supra*, summarized the law as follows:

> [55] From these cases it is possible to set out the current position in this province. **In cases where allegations of criminal negligence are based upon the manner of driving or some other act of commission by the accused, an objective test should be applied to determine whether the requisite *mens rea* has been established**. That is to say, the *mens rea* or requisite intent can be inferred from the driving or act of commission itself. If the driving or the act of commission constitutes a marked and substantial departure from the conduct that could be expected of a reasonable man in the same circumstances, then, in the absence of some explanation, the act itself may determine culpability.
>
> [56] **If, on the other hand, an omission or failure to act is the basis of the charge of criminal negligence, then an objective test will not suffice. Rather, a subjective test must be applied to determine whether the accused displayed a wanton and reckless disregard for the life and safety of others.**
>
> [Emphasis added]

[23] The Supreme Court of Canada heard *Tutton* and *Waite*[2] together. Although the full Court sat, only six judges took part in the Court's judgments. Unfortunately, the Court divided evenly on whether a subjective or objective test should govern.

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[2] Reported as [1989] 1 S.C.R. 1392 and [1989] 1 S.C.R. 1436 respectively.

[24] *Tutton* involved parents who deliberately withheld insulin from their young child because of their sincere belief faith had cured his diabetes. The jury convicted them of manslaughter by criminal negligence. The Ontario Court of Appeal ordered a new trial as the jury were improperly instructed on the Crown's burden. Dubin J.A., as he then was, for the Court, accepted that the objective test applied generally, but if the conduct were acts of omission, a subjective test applied.

[25] The Supreme Court unanimously agreed with the Ontario Court of Appeal's new trial order. However, the Court divided on the issue of the exact nature of the test to determine liability for criminal negligence.

[26] Wilson J., for herself, Dickson C.J. and La Forest J. insisted the offence of criminal negligence required "advertent" negligence—that is a conscious awareness or wilful blindness to the risk to the lives or safety of others posed by their conduct. In other words, a subjective test. Her approach is best summed up by the following:

> [15] … Conduct that displays a wanton or reckless disregard for the lives or safety of others will constitute the *actus reus* of the offence under s. 202 [now 219] and be *prima facie* evidence of the accused's blameworthy state of mind. It can be assumed that a person functioning with normal faculties of awareness and engaging in conduct which represents such a grave departure from the norm is either aware of the risk or is wilfully blind to the risk. Proof of the conduct will, in other words, cast an evidential burden on the accused to explain why the normal inference of conscious awareness or wilful blindness should not be drawn. The inference will arise in most cases because the intent requirement under s. 202 is the minimal intent requirement of awareness or advertence or wilful blindness to the prohibited risk. […]

[27] McIntyre J. for himself and L'Heureux-Dubé J. opted for an objective test as described by Cory J.A. in *R. v. Waite*, *supra*, without any distinction between acts of omission and those of commission (para. 42). However, Justice McIntyre cautioned the objective test must not be applied in a vacuum. All of the circumstances surrounding the conduct must be considered, including the accused's perception of those facts:

> [45] The application of an objective test under s. 202 [219] of the *Code*, however, may not be made in a vacuum. Events occur within the framework of other events and actions and when deciding on the nature of the questioned conduct surrounding circumstances must be considered. The decision must be made on a consideration of the facts existing at the time and in relation to the

> accused's perception of those facts. Since the test is objective, the accused's perception of the facts is not to be considered for the purpose of assessing malice or intention on the accused's part but only to form a basis for a conclusion as to whether or not the accused's conduct, in view of his perception of the facts, was reasonable. This is particularly true where, as here, the accused have raised the defence of mistake of fact. If an accused under s. 202 [219] has an honest and reasonably held belief in the existence of certain facts, it may be a relevant consideration in assessing the reasonableness of his conduct. For example, a welder, who is engaged to work in a confined space believing on the assurance of the owner of the premises that no combustible or explosive material is stored nearby, should be entitled to have his perception, as to the presence or absence of dangerous materials, before the jury on a charge of manslaughter when his welding torch causes an explosion and a consequent death.

[28] Although Justice McIntyre did not call his description of the test a "modified objective test," that is the label by which it is known.

[29] Lamer J., as he then was, agreed with McIntyre J., subject to the caveat of a generous allowance for factors particular to an accused, such as youth, mental development and education.

[30] The same members of the Court in *R. v. Waite* were also unanimous in result, but demonstrated the same philosophical divide.

[31] The Supreme Court of Canada seems to have been content to ignore the stalemate. Eventually, it has become accepted that the modified objective test is the law.

[32] In *R. v. Anderson*, [1990] 1 S.C.R. 265, the appellant had a blood alcohol concentration of 200 mg per 100 ml of blood. For no apparent reason, he drove through a red light, collided with another vehicle, and killed a passenger. The trial judge acquitted the appellant of criminal negligence causing death. The Manitoba Court of Appeal discerned legal error and ordered a new trial. Sopinka J., for the unanimous Court, allowed the appeal and reinstated the acquittal.

[33] Sopinka J., acknowledged the existence of the subjective/objective test dichotomy, but declined to resolve it. After reference to the difficult and uncertain nature of the law of criminal negligence, he commented:

> [11] The use of the word "negligence" suggests that the impugned conduct must depart from a standard objectively determined. On the other hand, the use of the words "wanton and reckless disregard" suggests that an ingredient of the

> offence includes a state of mind or some moral quality to the conduct which attracts the sanctions of the criminal law. The section makes it clear that the conclusion that there is a wanton or reckless disregard is to be drawn from the conduct which falls below the standard. The major disagreement in the cases centers around the manner in which this conclusion is to be drawn.
>
> [12] On the one hand, there are the cases that hold that it is to be done on an objective basis. If the conduct is a marked departure from the norm, then, based on the standard of an ordinary prudent individual, the accused ought to have known that his actions could endanger the lives or safety of others. On the other hand, there are cases that apply a subjective standard and require some degree of advertence to the risk to be proved. This may be done by inferring advertence from the nature of the conduct in the context of the surrounding circumstances. A refinement on the latter view is that a marked departure constitutes a *prima facie* case of negligence. The trier of fact may but is not obliged to infer the necessary mental element from the conduct which is found to depart substantially from the norm.

[34] However, the dichotomy did not need to be resolved because the trial judge found the appellant's conduct did not amount to a wanton or reckless disregard for the lives or safety of others. Sopinka J. explained:

> [17] The conduct relied on in this case is (a) the combination of drinking and driving, and (b) the breach of a traffic light regulation. Clearly the trial judge considered both. He concluded that the conduct was not a marked departure from the norm. **That being the case, a conclusion that the appellant had a wanton or reckless disregard for the lives and safety of others could not be drawn on either a subjective or objective basis**.
>
> [Emphasis added]

[35] The Court has since confirmed that objective assessment of criminal conduct for unlawful act manslaughter and a failure to provide necessities survives constitutional challenge (see: *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Naglik*, [1993] 3 S.C.R. 122). However, the Court declined to deal with the offence of criminal negligence.

[36] Although perhaps it could be said it was not directly in issue, the Supreme Court in *R. v. J.F.*, 2008 SCC 60, appeared to have endorsed the modified objective test for all allegations of criminal negligence. A jury acquitted the appellant of manslaughter for his failure to provide necessaries of life, but convicted him of manslaughter by criminal negligence for the very same omission. As Fish J., for the majority explained, the verdicts were not only inconsistent, but incomprehensible because criminal negligence requires a higher fault element—a

marked and substantial departure from the norm of a reasonable person versus simply a marked departure for the failure to provide necessities of life (para. 11).

[37] Justice Fish explained the different fault elements for the two offences as follows, both to be assessed from an objective point of view:

> [7] The fault element required for conviction at trial was essentially common to both counts of manslaughter. On count 1, the requisite fault element was that of the underlying offence of criminal negligence; on count 2, the requisite fault element was that of failure to provide the necessaries of life. Neither criminal negligence nor failure to provide the necessaries of life requires proof of intention or actual foresight of a prohibited consequence. Under both counts, the jury was required to determine not what the respondent knew or intended, but what he *ought to have foreseen*.
>
> [8] On the count alleging failure to provide necessaries, the Crown was bound to establish that the respondent's failure to protect his foster child represented "a marked departure from the conduct of a reasonably prudent parent in circumstances where it was objectively foreseeable that the failure to provide the necessaries of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the child": *R. v. Naglik*, [1993] 3 S.C.R. 122, at p. 143 (emphasis added). It will later become apparent why I have emphasized the word "risk" in this description of the offence by the Chief Justice, speaking for the Court on this point.
>
> [9] On the count alleging criminal negligence, the Crown was bound to show that the respondent's very same omission represented *a marked and substantial departure* (as opposed to a *marked departure*) from the conduct of a reasonably prudent parent in circumstances where the accused either recognized and ran an obvious and serious risk to the life of his child or, alternatively, gave no thought to that risk: *R. v. Tutton*, [1989] 1 S.C.R. 1392, at pp. 1430-31; *R. v. Sharp* (1984), 12 C.C.C. (3d) 428 (Ont. C.A.).
>
> [10] The difference between a *marked departure* and a *marked and substantial departure* has been considered in several appellate decisions since *Naglik* and *Tutton*, mainly but not exclusively in the context of driving offences: See, for example, *R. v. Willock* (2006), 210 C.C.C. (3d) 60 (Ont. C.A.); *R. v. L. (J.)* (2006), 204 C.C.C. (3d) 324 (Ont. C.A.); *R. v. Palin* (1999), 41 M.V.R. (3d) 11, 135 C.C.C. (3d) 119 (Que. C.A.); *R. v. Fortier* (1998), 41 M.V.R. (3d) 221, 127 C.C.C. (3d) 217 (Que. C.A.); *R. v. Brown* (2000), 134 O.A.C. 151; *R. v. Baker* (2006), 209 C.C.C. (3d) 508 (Ont. C.A.); *R. v. E. (A.)* (2000), 146 C.C.C. (3d) 449 (Ont. C.A.). This case does not turn on the nature or extent of the difference between the two standards.

[38] Also relevant to the appropriate analytical framework is *R. v. Javanmardi*, 2019 SCC 54. The appellant in that case was a naturopath. She had extensive

training and experience. One of her treatments involved intravenous injection of nutrients. She purchased nutrients from a reputable supplier in Ontario.

[39] Although intravenous administration of nutrients by a naturopath in Quebec was illegal, the appellant had almost twenty years' experience doing so. One day she administered intravenous nutrient injections to three patients. Unbeknownst to her, one of the vials she had used to prepare the nutrient injections was contaminated. Two of the three patients had no adverse reaction. The third died of endotoxic shock.

[40] The police charged the appellant with manslaughter by criminal negligence and manslaughter by means of her unlawful act of intravenous injection. The trial judge found: the appellant was qualified to perform intravenous injections; the contents were benign but potentially helpful; the appellant had observed the required protocols; and, she had taken sufficient precaution at every stage of the process.

[41] The trial judge concluded the appellant's conduct did not show a marked departure from the standard of care a reasonable person in her circumstances would have exercised. She was not satisfied a reasonable person would have been aware of any risk inherent in the appellant's conduct and therefore concluded the Crown had not proved beyond a reasonable doubt that the appellant's conduct showed wanton or reckless disregard for the victim's life or safety.

[42] The trial judge also acquitted the appellant of unlawful act manslaughter because she found a reasonable person in the appellant's circumstances would not have foreseen administration of a benign solution with proper procedure would create a risk of harm—hence the act was not objectively dangerous.

[43] The Quebec Court of Appeal reversed. It ordered a new trial on the criminal negligence charge on the basis that the trial judge had misapplied the "reasonable person" standard by referring to the appellant's training and experience with intravenous injections. The Appeal Court also entered a conviction on the charge of unlawful act manslaughter on the basis that intravenous injection was objectively dangerous.

[44] Abella J., for the majority, reinstated the acquittals. It is only necessary to discuss her reasons in relation to criminal negligence causing death. After quoting the words of the relevant sections, she wrote:

[19] The *actus reus* of criminal negligence causing death requires that the accused undertook an act – or omitted to do anything that it was his or her legal duty to do – and that the act or omission caused someone's death.

[20] The fault element is that the accused's act or omission "shows wanton or reckless disregard for the lives or safety of other persons". Neither "wanton" nor "reckless" is defined in the *Criminal Code*, but in *R. v. J.F.*, [2008] 3 S.C.R. 215, this Court confirmed that the offence of criminal negligence causing death imposes a modified objective standard of fault – the objective "reasonable person" standard (paras. 7-9; see also *R. v. Tutton*, [1989] 1 S.C.R. 1392, at pp. 1429-31; *R. v. Morrisey*, [2000] 2 S.C.R. 90, at para. 19; *R. v. Beatty*, [2008] 1 S.C.R. 49, at para. 7).

[21] As with other negligence-based criminal offences, the fault element of criminal negligence causing death is assessed by measuring the degree to which the accused's conduct departed from that of a reasonable person in the circumstances. For some negligence-based offences, such as dangerous driving, a "marked" departure satisfies the fault element (J.F., at para. 10; see also: *Beatty*, at para. 33; *R. v. Roy*, [2012] 2 S.C.R. 60, at para. 30; *R. v. L. (J.)* (2006), 204 C.C.C. (3d) 324 (Ont. C.A.), at para. 15; *R. v. Al-Kassem*, 2015 ONCA 320, 78 M.V.R. (6th) 183, at para. 6). In the context of criminal negligence causing death, however, the requisite degree of departure has been described as an elevated one -- marked *and* substantial (*J.F.*, at para. 9, applying *Tutton*, at pp. 1430-31, and *R. v. Sharp* (1984), 12 C.C.C. (3d) 428 (Ont. C.A.)).

[22] These standards have much in common. They both ask whether the accused's actions created a risk to others, and whether "a reasonable person would have foreseen the risk and taken steps to avoid it if possible" (see *Roy*, at para. 36; *Stewart*, at p. 248). The distinction between them has been described as a matter of degree (see *R. v. Fontaine*, 2017 QCCA 1730, 41 C.R. (7th) 330, at para. 27; *R. v. Blostein*, 2014 MBCA 39, 306 Man. R. (2d) 15, at para. 14). As Healy J.A. explained in *Fontaine*:

> These differences of degree cannot be measured by a ruler, a thermometer or any other instrument of calibrated scale. The words "marked and substantial" departure are adjectives used to paraphrase or interpret "wanton or reckless disregard" in section 219 of the Code but they do not, and cannot, indicate any objective and fixed order of magnitude that would have prescriptive value from one case to another. As with the assessment of conduct in cases of criminal negligence, the assessment of fault by the trier of fact is entirely contextual. [para. 27]

[23] In *J.F.*, Fish J. did not fully explain how to distinguish between a "marked" and a "marked and substantial" departure, as the case did not "turn on the nature or extent of the difference between the two standards" (paras. 10-11). In this appeal, as well, the differences in etymology are not dispositive and need not be resolved. In any event, the parties argued on the basis that the proper threshold for criminal negligence causing death is a "marked and substantial"

> departure, and that is the basis on which these reasons approach the issue. **A conviction for criminal negligence causing death therefore requires the Crown to prove that the accused undertook an act, or omitted to do anything that it was her legal duty to do, and that the act or omission caused the death of another person (the *actus reus).* Based on *J.F.*, the Crown must also establish that the accused's conduct constituted a marked and substantial departure from the conduct of a reasonable person in the accused's circumstances (the fault element).**
>
> [Emphasis added]

[45] Abella J. found no miscue by the trial judge's reference to the appellant's training and experience at the time she performed the allegedly negligent act or omission. This is because a court must take into account the activity in question and the standard of care associated with that activity:

> [38] *Creighton's* activity-sensitive approach to the modified objective standard has been applied in a variety of contexts, including in cases involving driving, hunting and parenting (*Beatty*, at para. 40; *R. v. Gendreau*, 2015 QCCA 1910, at para. 30 (CanLII); *J.F.*, at paras. 8-9). These decisions confirm that while the standard is not determined by the accused's personal characteristics, it *is* informed by the activity. In this case, the activity is administering an intravenous injection, and the standard to be applied is that of the reasonably prudent naturopath in the circumstances.

[46] A common framework for analysis of criminal negligence allegations is to require the Crown to prove beyond a reasonable doubt the *actus reus* of the offence and then consider the fault element—the *mens rea* (see for example: *R. v. Tayfel*, 2009 MBCA 124; *R. v. Harshbarger*, 2010 NLTD(G) 152; *R. v. Wood*, 2017 ONSC 3239; and, *R. v. Doering*, 2019 ONSC 6360). This approach defines the *actus reus* as:

1. The act or an omission to do something that it was their duty to do;
2. The act or omission demonstrated a wanton or reckless disregard for the lives or safety of other persons; and,
3. The act or omission caused death or bodily harm to someone.

[47] The *mens rea* or fault element requires proof that the accused's conduct was a marked and substantial departure from the requisite standard of care.

[48] This approach enjoys ample jurisprudential support from the judgment of Charron J. in *R. v. Beatty*. Although *Beatty* was a case about dangerous driving,

the difference between dangerous driving and criminal negligence is only one of degree—a marked departure is required for the former, while a marked and substantial departure from that of a reasonable and prudent driver for the latter. For convenience, I will repeat what she wrote about how to approach the elements of the offence of dangerous driving:

> (a) The *Actus Reus*
>
> The trier of fact must be satisfied beyond a reasonable doubt that, viewed objectively, the accused was, in the words of the section, driving in a manner that was "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place".
>
> (b) The *Mens Rea*
>
> The trier of fact must also be satisfied beyond a reasonable doubt that the accused's objectively dangerous conduct was accompanied by the required *mens rea*. In making the objective assessment, the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. […]

[49] As noted above, many courts have endorsed this framework for criminal negligence: the *actus reus* is found in the words of the section and the *mens rea* is assessed on whether the conduct amounted to a marked and substantial departure from the normal standard of care. In *R. v. Doering*, *supra*, Pomerance J. summarized it this way:

> [91] Criminal negligence is a more serious offence than failing to provide necessaries of life. It is at the "high end of a continuum of moral blameworthiness" and "punishes, not a state of mind, but the conduct of the accused... Thus the physical action of the ... [accused] ... is as critical to the determination of wanton or reckless conduct as the mental element." See *R. v. L. (J.)*, [2006] O.J. No. 131 (C.A.), at paras. 14 and 18. **The *actus reus* of the offence of criminal negligence is found in the language of the provision. It requires proof that the accused did something or failed to do something that was his legal duty to do that demonstrates a wanton and reckless disregard for the lives and safety of others**: see *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, at para. 43. **The *mens rea* requires proof that the accused's conduct was a marked and substantial departure from the standard of care that a reasonably prudent person would observe in the circumstances. The circumstances are those in which the accused either recognized and ran an**

> **obvious and serious risk to the life or safety of the victim or, alternatively, gave no thought to the risk.**
>
> [Emphasis added]

[50] This was the same approach laid out by Hamilton J.A., writing for the unanimous Court, in *R. v. Tayfel*:

> [80] As we know from *Beatty*, the *actus reus* of negligence-based offences is defined solely by the words of the applicable section of the *Code*. For criminal negligence it is s. 219(1), which I repeat for ease of reference:
>
> > **219(1)** Every one is criminally negligent who
> >
> > (a) in doing anything, or
> >
> > (b) in omitting to do anything that it is his duty to do,
> >
> > shows wanton or reckless disregard for the lives or safety of other persons.
>
> [81] Thus, to prove the *actus reus* of criminal negligence the Crown had to prove beyond a reasonable doubt that: 1) the accused was under a legal duty to do something; 2) he failed to fulfil that duty by his omissions, and 3) in failing to fulfil the duty he showed a wanton or reckless disregard for the lives or safety of other persons.

[51] I respectfully agree with Hamilton J.A. where she reasons that at this stage of the analysis, the *mens rea* or fault element (whether the conduct was a marked and substantial departure) is not relevant (para. 82).

[52] I say this despite the suggestion by Abella J. in *R. v. Javanmardi*, *supra*, that the *actus reus* only requires an accused commit an act—or omit to do anything it was their legal duty to do—and the act or omission caused someone's death (para. 19). This is because the suggestion by Abella J., with all due respect, is *obiter*, and contrary to the analytical framework for penal negligence offences established by the Supreme Court of Canada in its considered analysis in *R. v. Beatty*, *supra*, and consistently approved since (see: *R. v. Roy*, *supra* and *R. v. J.F.*, *supra*).

[53] In *Beatty*, Charron J., writing for the majority of five, made clear there is no point in dealing with the *mens rea* or fault element of a marked departure of a reasonably prudent driver when dealing with the *actus reus*:

> [45] I deal firstly with the *actus reus*. The offence is defined by the words of the legislative provision, not by the common law standard for civil negligence. In order to determine the *actus reus*, the conduct must therefore be measured as against the wording of s. 249. Although the offence is negligence-based, this is an

> important distinction. As we have seen, conduct that constitutes dangerous operation of a motor vehicle as defined under s. 249 will necessarily fall below the standard expected of a reasonably prudent driver. The converse however is not necessarily true – not all negligent driving will constitute dangerous operation of a motor vehicle. If the court is satisfied beyond a reasonable doubt that the manner of driving was dangerous to the public within the meaning of s. 249, the *actus reus* of the offence has been made out. Nothing is gained by adding to the words of s. 249 at this stage of the analysis.

[54] McLachlin C.J., for herself, Binnie and LeBel JJ., agreed in result, but took the view that the requirement of a "marked departure" from the norm applies to both the *actus reus* and *mens rea* of the offence (paras. 58-61).

[55] Fish J., also agreed with the result but sided with Charron J. that the *actus reus* consists of the elements of the offence set out in the *Code* and the *mens rea* can be inferred from that conduct where it represents a marked departure from the norm (paras. 84-89).

[56] In other words, by a clear majority (6-3), the *actus reus* is found in the words of the penal negligence offence and the *mens rea* can be inferred if the accused's conduct amounted to a marked departure from the norm.

[57] Furthermore, in 2008, the Court in *R. v. J.F.*, *supra*, was unanimous that the *mens rea* or fault element for criminal negligence requires the trier of fact to be satisfied beyond a reasonable doubt the accused's conduct or omission amounted to a marked and substantial departure from the norm.

[58] Recall that the issue in *R. v. J.F.* was whether the jury verdicts were inconsistent where there was an acquittal for not providing necessities of life but a conviction for criminal negligence causing death.

[59] Deschamps J. dissented. She was not satisfied the verdicts were inconsistent. Deschamps J. described the same approach to the *actus reus* and *mens rea* as found in *R. v. Beatty*:

> [66] The *actus reus* of failing to provide the necessaries of life will be established if it is proved (1) that the accused was under a legal duty to provide the necessaries of life to the person in question pursuant to s. 215(1)(a); (2) that, from an objective standpoint, he or she failed to perform the duty; and (3) that, again from an objective standpoint, this failure endangered the life of the person to whom the duty was owed, or caused or was likely to cause the health of that person to be endangered permanently. **Following Charron J.'s reasoning in *R.***

> ***v. Beatty*, [2008] 1 S.C.R. 49, 2008 SCC 5, the marked departure standard is not applied at this point, since "[n]othing is gained by adding to the words of [the statute] at this stage of the analysis"** (para. 45).
>
> [67] The *mens rea* of failing to provide the necessaries of life will be established if it is proved that the conduct of the accused represented a marked departure from the conduct of a reasonable parent, foster parent, guardian or family head in the same circumstances. The conduct must represent a marked departure because, as Lamer C.J. indicated: "Unlike negligence under civil law, which is concerned with the apportionment of loss, penal negligence is concerned with the punishment of moral blameworthiness" (*R. v. Gosset*, [1993] 3 S.C.R. 76, at p. 93). As Charron J. stated: "The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment" (*Beatty*, at para. 35). Thus, "penal negligence punishes a *marked* departure from an objectively reasonable standard of care" (*R. v. Naglik*, [1993] 3 S.C.R. 122, at p. 142 (emphasis in original)).
>
> [68] **Turning to the offence of criminal negligence, the *actus reus* will be established if it is proved (1) that the accused was under a legal duty to do something; (2) that, from an objective standpoint, he or she failed to perform the duty; and (3) that in failing to perform the duty, he or she showed, again from an objective standpoint, wanton or reckless disregard for the lives or safety of other persons.** Proof of the *mens rea* will flow from a finding that the conduct of the accused was wanton or reckless. Wanton or reckless behaviour has been equated with a marked *and substantial* departure from the norm (H. Parent, *Traité de droit criminel* (2nd ed. 2007), vol. 2, at p. 299), which necessarily includes behaviour that constitutes a marked departure.
>
> [Emphasis added]

[60] Fish J. for the majority of six, voiced no disagreement with Justice Deschamps' articulation of these principles. His analysis focussed instead on the uncontroverted fact that the same omission—the failure by the appellant to protect his foster child from harm—was the omission alleged for both manslaughter by a failure to provide necessities of life and manslaughter by criminal negligence.

[61] The fault element for the former required the Crown to establish the failure to protect amounted to a marked departure, while for the latter, it required the Crown to establish it amounted to a marked and substantial departure from the norm. Hence, the fault element or *mens rea* is assessed by reference to the degree of departure from the conduct expected of a reasonable person in the circumstances. The following comments by Fish J. illustrate:

> [7] The fault element required for conviction at trial was essentially common to both counts of manslaughter. On count 1, the requisite fault element was that of

the underlying offence of criminal negligence; on count 2, the requisite fault element was that of failure to provide the necessaries of life. Neither criminal negligence nor failure to provide the necessaries of life requires proof of intention or actual foresight of a prohibited consequence. Under both counts, the jury was required to determine not what the respondent knew or intended, but what he *ought to have foreseen*.

[8] On the count alleging failure to provide necessaries, the Crown was bound to establish that the respondent's failure to protect his foster child represented "a marked departure from the conduct of a reasonably prudent parent in circumstances where it was objectively foreseeable that the failure to provide the necessaries of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the child": *R. v. Naglik*, [1993] 3 S.C.R. 122, at p. 143 (emphasis added). It will later become apparent why I have emphasized the word "risk" in this description of the offence by the Chief Justice, speaking for the Court on this point.

[9] On the count alleging criminal negligence, the Crown was bound to show that the respondent's very same omission represented *a marked and substantial departure* (as opposed to a *marked departure*) from the conduct of a reasonably prudent parent in circumstances where the accused either recognized and ran an obvious and serious risk to the life of his child or, alternatively, gave no thought to that risk: *R. v. Tutton*, [1989] 1 S.C.R. 1392, at pp. 1430-31; *R. v. Sharp* (1984), 12 C.C.C. (3d) 428 (Ont. C.A.).

[10] The difference between a *marked departure* and a *marked and substantial departure* has been considered in several appellate decisions since *Naglik* and *Tutton*, mainly but not exclusively in the context of driving offences: See, for example, *R. v. Willock* (2006), 210 C.C.C. (3d) 60 (Ont. C.A.); *R. v. L. (J.)* (2006), 204 C.C.C. (3d) 324 (Ont. C.A.); *R. v. Palin* (1999), 41 M.V.R. (3d) 11, 135 C.C.C. (3d) 119 (Que. C.A.); *R. v. Fortier* (1998), 41 M.V.R. (3d) 221, 127 C.C.C. (3d) 217 (Que. C.A.); *R. v. Brown* (2000), 134 O.A.C. 151; *R. v. Baker* (2006), 209 C.C.C. (3d) 508 (Ont. C.A.); *R. v. E. (A.)* (2000), 146 C.C.C. (3d) 449 (Ont. C.A.). This case does not turn on the nature or extent of the difference between the two standards.

[11] **A brief comment on this branch of the matter will therefore suffice. If the fault element under both counts was the same – if a *marked departure* was sufficient in both instances – an acquittal on one and a conviction on the other would be plainly inconsistent because both counts alleged the identical *actus reus* as well.** It is undisputed, however, that criminal negligence, unlike failure to provide the necessaries of life, involves a marked *and substantial* departure from the norm of a reasonable person. In this light, the verdicts at trial – not guilty of failing to provide necessaries, yet guilty of criminal negligence – are not only inconsistent, but incomprehensible as well.

…

> [17] As I have already mentioned, the verdicts at trial signify that a lesser degree of fault was not established, while a greater degree of fault was proven beyond a reasonable doubt. Even if the jury treated the fault requirements as equivalent, the verdicts would remain inconsistent because, as we have seen, the *actus reus* for both offences was, on the facts of this case, identical. In either case, the respondent's conviction cannot stand.
>
> [Emphasis added]

[62] With this background, I turn to the issue of the appropriate analytical framework for this case.

ANALYTICAL FRAMEWORK FOR THIS CASE

[63] No one disputed the appellants owed a duty of care to Mr. Rogers. The existence of that duty is a pure question of law. It is well accepted the duty can be imposed by statute or by the common law (*Regina v. Coyne*, [1958] N.B.J. No. 11 (N.B.S.C.A.D.) (QL), 124 C.C.C. 176). Hence, the existence of a duty was not a question for the jury.

[64] What was for the jury to decide was whether the Crown had established beyond a reasonable doubt: the acts or omissions of the accused showed a wanton or reckless disregard for the life or safety of Corey Rogers; those acts or omissions caused his death; and, the acts or omissions of the accused were a marked and substantial departure from the standard of care of a reasonable and prudent Booking Officer in their circumstances. I will consider these in turn.

Wanton or reckless disregard

[65] Various terms have been used to describe what is meant by "wanton or reckless disregard". Cory J.A., in *R. v. Waite*, *supra*, whose decision was adopted as a correct statement of the law[3] by three members of the Supreme Court, described the term:

> [62] … The word "wanton" means "heedlessly". "Wanton" coupled as it is with the word "reckless", must mean heedless of the consequences or without regard for the consequences. If this is correct, then it is immaterial whether an accused subjectively considered the risks involved in his conduct as the section

[3] *R. v. Waite*, [1989] 1 S.C.R. 1436 at para. 12, except for the caveat by McIntyre J. that the objective test applied to both allegations of acts as well as omissions (para. 13).

> itself may render culpable an act done which shows a wanton or reckless disregard of consequences. …

[66] The Ontario Court of Appeal in *R. v. L.(J.)* (2006), 204 C.C.C. (3d) 324 referred, with approval, to the comments of Hill J. in *R. v. Menezes*, [2002] O.J. No. 551 (QL), where he wrote:

> [72] Criminal negligence amounts to a wanton and reckless disregard for the lives and safety of others: *Criminal Code*, s. 219(1). This is a higher degree of moral blameworthiness than dangerous driving: *Anderson v. The Queen* (1990), 53 C.C.C. (3d) 481 (S.C.C.) at 486 per Sopinka J.; *Regina v. Fortier* (1998), 127 C.C.C. (3d) 217 (Que. C.A.) at 223 per LeBel J.A. (as he then was). This is a marked and substantial departure in all of the circumstances from the standard of care of a reasonable person: *Waite v. The Queen* (1989), 48 C.C.C. (3d) 1 (S.C.C.) at 5 per McIntyre J.; *Regina v. Barron* (1985), 48 C.R. (3d) 334 (Ont. C.A.) at 340 per Goodman J.A. **The term wanton means "heedlessly" (*Regina v. Waite* (1996), 28 C.C.C. (3d) 326 (Ont. C.A.) at 341 per Cory J.A. (as he then was)) or "ungoverned" and "undisciplined" (as approved in *Regina v. Sharp* (1984), 12 C.C.C. (3d) 428 (Ont. C.A.) at 430 per Morden J.A.)) or an "unrestrained disregard for consequences" (*Regina v. Pinske* (1988), 6 M.V.R. (2d) 19 (B.C.C.A.) at 33 per Craig J.A. (affirmed on a different basis [1989] 2 S.C.R. 979 at 979 per Lamer J. (as he then was)). The word "reckless" means "heedless of consequences, headlong, irresponsible": *Regina v. Sharp, supra* at 30**.
>
> [Emphasis added]

Standard of care

[67] For any trier of fact to wrestle with the issue of whether the acts or omissions of an accused amounted to a marked and substantial departure from the requisite standard of care requires awareness of what that standard is and how it is established.

[68] Where criminal negligence is alleged to have been committed by a parent or a driver, expert evidence about the requisite standard of care is unnecessary since jurors do not need to be informed about what constitutes reasonable prudent conduct for a driver or a parent. Those are nontechnical matters of everyday common experience (see, for example: *R. v. Clark*, 2020 ABCA 356).

[69] In civil litigation that alleges negligent conduct by a member of a trade or profession, the general rule is evidence from someone with expertise in that

occupation or undertaking is usually necessary in order for the trier of fact to determine the parameters of the standard of care (see for example: *Krawchuk v. Scherbak*, 2011 ONCA 352 at para. 124 *et seq* (a real estate agent), leave to appeal refused [2011] S.C.C.A. No. 319; *Roy v. British Columbia (Attorney General)*, 2005 BCCA 88 (police officers); *Camaso Estate v. Saanich (District)*, 2013 BCCA 6 (police officers), leave to appeal dismissed [2013] S.C.C.A. No. 92; *Bergen v. Guliker*, 2015 BCCA 283 (police officers); *495793 Ontario Ltd. (Central Auto Parts) v. Barclay*, 2016 ONCA 656 (police officers).

[70] The same principles seem to apply where the charge is criminal negligence causing death or bodily harm (see for example: *R. v. Tayfel*, *supra* (a pilot); *R. v. Wood*, *supra* (an engineer); *R. v. Harshbarger*, *supra* (a hunter); *R. v. Swanney*, 2006 BCSC 1766 (a doctor); *R. v. Hoyeck*, 2019 NSSC 7 (a mechanic)).

[71] In this case, the Crown did not tender expert evidence about the standard of care of a reasonable and prudent Booking Officer. That omission forms no part of the appellants' complaint. I will say nothing more about it—particularly as there was certainly evidence that could have permitted the jury to draw inferences about what the standard of care was and hence whether the appellants' acts or omissions amounted to a marked and substantial departure from it.

[72] In civil cases, the failure to identify the appropriate standard of care constitutes legal error (see *Krawchuk v. Scherbak*, *supra* at para. 123; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 at para. 80). In criminal cases with the life and liberty of the accused at stake, it cannot be any less so.

[73] How then is a trier of fact to determine what the content of the standard of care is and whether it was breached? These are quintessentially questions of fact. They can be determined, as described above, by credible expert opinion evidence or other evidence that permits the trier to draw the necessary inferences. That evidence may include what others do or should do in similar circumstances and any policies or directives relevant to the conduct.

[74] In *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, the Supreme Court of Canada concluded that a police officer could be found civilly liable for the tort of negligent investigation. The Court approved the standard of care articulated at trial and on appeal as that of a reasonable police officer in like circumstances (para. 67). McLachlin C.J., for the majority, referred to the role of professional or statutory standards:

> [70] Third, the common law factors relevant to determining the standard of care confirm the reasonable officer standard. These factors include: the likelihood of known or foreseeable harm, the gravity of harm, the burden or cost which would be incurred to prevent the injury, external indicators of reasonable conduct (including professional standards) and statutory standards. (See *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, at p. 227.) These factors suggest a standard of reasonableness, not something less onerous. There is a significant likelihood that police officers may cause harm to suspects if they investigate negligently. The gravity of the potential harm caused is serious. Suspects may be arrested or imprisoned, their livelihoods affected and their reputations irreparably damaged. The cost of preventing the injury, in comparison, is not undue. **Police meet a standard of reasonableness by merely doing what a reasonable police officer would do in the same circumstances -- by living up to accepted standards of professional conduct to the extent that it is reasonable to expect in given circumstances. This seems neither unduly onerous nor overly costly. It must be supposed that professional standards require police to act professionally and carefully, not just to avoid gross negligence. The statutory standards imposed by the *Police Services Act*, R.S.O. 1990, c. P.15, although not definitive of the standard of care, are instructive (s. 1).**
>
> [Emphasis added]

[75] In *Roy v. British Columbia (Attorney General)*, *supra*, the Court reversed a trial judgment that had found police negligently caused the death of an intoxicated prisoner. The trial judge had focussed on the omission by the officers to seek medical assessment for the deceased, contrary to RCMP operational policy which mandated an assessment for anyone of "questionable consciousness". Southin J.A., for the majority, allowed the appeal and dismissed the action. As to the role of the operational policy, she observed that it is not to be read as if it were a statute:

> [36] I take the following propositions to be established:
>
> 1. A peace officer owes a duty to his prisoner to take reasonable care for the prisoner's safety but he is not an insurer.
>
> 2. "[A]n error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that a man, acting with ordinary care, might have made, then it is not negligence." [*Whitehouse v. Jordan*, [1981] 1 All E.R. 267 (C.A.) at 281,

> adopted by Craig J.A. in *Smith v. British Columbia (Attorney General)* (1988), 30 B.C.L.R. (2d) 356 (B.C.C.A.) at 363.]
>
> 3. **The policy of a police force is an important factor in determining the standard of care a peace officer must observe, but it is not determinative, nor is it to be treated as if it were a statute imposing civil obligations.**
>
> 4. Where, as here, at issue is the standard of a competent member of a trade or profession (and the occupation of peace officer falls within that rubric), evidence of those carrying on that occupation is necessary unless, in the words which McPherson C.J.M., in *Anderson v. Chasney*, [1949] 2 W.W.R. 337 (Man. C.A.) at 341, adopted from the American case of *Mehigan v. Sheeham*, 51 Atlantic Rep. 2nd series, 632, the matter is one of "non-technical matters or those of which an ordinary person may be expected to have knowledge."
>
> [Emphasis added]

[76] The role of employment policies and directives and how they inform the content of the standard of care was again addressed ten years later in *Bergen v. Guliker*, *supra*, where D.M. Smith J.A., for the Court wrote:

> [109] Translating the general standard into particular obligations imposed on a defendant in a given case (i.e., the content of the standard) and the determination of whether the defendant has met those obligations (i.e., whether there is a breach), are questions of fact that can only be interfered with on appeal if found to be based on palpable and overriding error (see: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10; *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at para. 55; *Krawchuk* at para. 125; and *Meady* at para. 34).
>
> [110] External indicators of reasonable conduct, including professional standards and internal policy, may inform the content of the standard and whether it was breached (*Hill* at para. 70; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 29; *Burbank* at paras. 91-92; *Krawchuk* at para. 125). However, policies and statutory standards, while instructive, are not definitive of the content of the standard of care (*Hill* at para. 70). In *Roy*, this Court noted:
>
> > [36] ... The policy of a police force is an important factor in determining the standard of care a peace officer must observe, but it is not determinative, nor is it to be treated as if it were a statute imposing civil obligations. ...
>
> [111] Similarly, while compliance with policy may be an important factor to consider in determining whether the standard of care has been met, failure to follow policy does not automatically compel the conclusion that the standard of care was breached. As this Court noted in *D.H. (Guardian ad litem of) v. British Columbia*, 2008 BCCA 222:

> [83] The respondents and the trial judge put considerable weight upon the policies of the B.C. Corrections Branch as demonstrating a failure to meet the requisite standard of care. The primary obligation of the probation officers is set out in the *Correction Act*. The policy directives function as a guide and are of assistance in determining the standard of a reasonable probation officer. Failure to comply with the policy raises questions as to the quality of judgment brought to bear on the issue by the probation officer but does not, by itself, compel a conclusion that the probation officers failed to meet the standard of care. Here, the policy required information to be given to the at risk person "limited to that information required to enhance safety". The policy goes on to say that in most cases the information would identify the offender by name, general residential area, criminal history, modus operandi and other information needed to identify why there is a risk, but it is couched in terms that leave the degree of detail in any particular case to the probation officer.
>
> [Original emphasis]

Marked and substantial departure

[77] Criminal negligence is nonetheless negligence—a breach of the appropriate standard of care. Constitutional norms dictate criminal negligence be differentiated from civil negligence by requiring morally blameworthy behaviour—that is, behaviour that was a marked and substantial departure from the standard of care a reasonable person would have observed in all of the circumstances.

[78] The second thing that distinguishes penal from civil negligence is for the latter, liability is determined on a purely objective basis. The former operates under a modified objective test.

[79] The modified objective test requires the court to be alive to the possibility that the accused's honestly held and reasonable perception of the circumstances are such that a reasonable person might not have appreciated the risk or could and would have done something to avoid the danger (see: *Beatty*, *supra*, at paras. 37-38; *R. v. Tutton*, *supra*, at para. 45).

[80] That is, the state of mind of the accused is not, as in civil cases, irrelevant. It can lead to acquittal if it creates a doubt that a reasonably prudent person would have appreciated the risks with the act or failure to act (see, for example: *R. v. Beatty*, *supra* at para. 43; *R. v. Doering*, *supra* at para. 93; *R. v. Ibrahim*, 2019 ONCA 631 at paras. 33-34).

Causation

[81] The jury must also understand that the acts or omissions of the accused amounted to a significant contributing cause of the victim's death (*R. v. Nette*, 2001 SCC 78; *R. v. Maybin*, 2012 SCC 24).

Summary

[82] To summarize the appropriate analytical framework, the Crown must establish beyond a reasonable doubt:

1. The acts or omissions by the appellants showed a wanton or reckless disregard for the life or safety of Corey Rogers;
2. The acts or omissions by the appellants caused Corey Rogers' death; and,
3. The acts or omissions that caused Corey Rogers' death were a marked and substantial departure from the standard of care of a reasonably prudent Booking Officer in the appellants' circumstances, including what they knew or ought to have known.

[83] I have not overlooked that for the purpose of affixing criminal liability, the acts or omissions of each appellant must be assessed separately. In other words, if one of the appellants did or omitted to do something that it was their duty to do, which demonstrated a wanton or reckless disregard for Mr. Rogers' death and which caused his death with the requisite fault element of a marked and substantial departure from the conduct of a reasonable Booking Officer in all of the circumstances, did the other appellant do or omit to do anything that made them a party to that offence?

[84] Party liability was never raised at trial, nor on appeal. The issue certainly triggers intricate questions of the *actus reus* and *mens rea* for accessorial liability (see: *R. v. R.(M.)*, 2011 ONCA 190). Since the appellants and the Crown chose to ignore the issue, I will also.

[85] It is to the facts I now turn.

THE FACTS

[86] By way of overview, it was the Crown's theory that because of Mr. Rogers' intoxication, the appellants failed in their duty when they: admitted him into the

Police Prisoner Care Facility (PCF) without a medical examination; left a spit hood on him; and, failed to conduct mandated checks on his well-being.

[87] The appellants' position at trial was that: they relied on their own previous experience with Mr. Rogers and on reliable information received from the arresting officers that Mr. Rogers was playing possum and simply refusing to cooperate; they had no awareness that the spit hood posed a danger or risk to Mr. Rogers; and, the cell checks they did were how they and every other Booking Officer did them, a fact well-known to police management.

[88] The facts, or more accurately, the relevant evidence at trial, were mostly uncontested. June 15 started out a happy day for Corey Rogers. His spouse had given birth to their first child at the IWK Hospital in Halifax on June 14. He left the Hospital around 3:00 p.m. on June 15 to do errands.

[89] When Mr. Rogers returned to the IWK later that evening, he was intoxicated. Security staff would not let him in the hospital to visit his spouse. He threatened staff. The Halifax Regional Police were called.

[90] In the meantime, Mr. Rogers' spouse came downstairs and took him outside to have a cigarette. She described him as intoxicated, but said she had seen him a lot worse. When the police showed up, Mr. Rogers downed the remainder of his liquor—a half-pint of Fireball whiskey and threw the bottle away. Mr. Rogers knew he was going to be arrested, so he gave his cash to his spouse. In return, she gave the police a cigarette and lighter for Mr. Rogers to have the next day.

[91] Cst. Ryan Morris was the first officer to arrive. As he started to approach Mr. Rogers, he saw him consume the half-pint of Fireball whiskey, in what he described as one gulp, and throw the bottle into the bushes. The usual signs of impairment were obvious: slurred speech, swaying and difficulty in walking. Csts. Donna Paris and Justin Murphy arrived in a separate police car.

[92] The decision was soon made to arrest Mr. Rogers for public intoxication and take him to the PCF for the night. The officers permitted Mr. Rogers to smoke another cigarette before the arrest and transport to cells.

[93] When Cst. Murphy arrested Mr. Rogers, he became upset. Mr. Rogers exhibited passive resistance—that is, although it was clear he understood what he was being asked to do, he would not cooperate. On the way to the PCF in the back of the police car, Mr. Rogers became aggressive. He cursed and swore at Cst.

Murphy and repeatedly threatened him. Mr. Rogers banged his head against the silent-partner (a Plexiglas barrier) and spat at Cst. Murphy.

[94] On arrival at the PCF, they had to wait for approximately five minutes while the Booking Officers dealt with a youth. Cst. Murphy tried to have a conversation with Mr. Rogers—he had to stop spitting or a spit hood would be applied.

[95] When they opened the police car door, Mr. Rogers continued to spit and threaten the officers. Cst. Murphy went inside and retrieved a spit hood from the supplies in the PCF. None of the officers had one in their cars. Cst. Morris had never put one on a prisoner.

[96] Cst. Paris put the spit hood on Mr. Rogers. The officers described slightly different levels of resistance by Mr. Rogers. Cst. Paris asked him if he was going to get out. He replied "No, I don't want to". Cst. Murphy testified that Mr. Rogers hooked his feet underneath the silent-partner and refused to get out. They all agreed they had to pull him out of the car.

[97] Once out, Mr. Rogers dropped to his knees and refused to walk into the PCF. Csts. Morris, Paris and Murphy carried him inside. The appellant Gardner had watched the events and held the door to the PCF open for the Constables. They placed Mr. Rogers on the floor.

The admission to the PCF

[98] Documents and other evidence made it clear that Mr. Rogers had been a frequent detainee at the PCF for public intoxication as well as other offences.

[99] After the arresting officers carried Mr. Rogers into the PCF, virtually all of the events thereafter were captured on CCTV footage. Mr. Rogers was placed on the floor in the booking area. The officers searched him and removed his laces, belt and personal effects. Mr. Rogers mumbled he did not want to be there—to the officers, Rogers had decided not to cooperate.

[100] The appellant Gardner completed the paperwork to admit Mr. Rogers into cells. Her uncontradicted evidence was that they had no training on how to assess who is or is not fit for cells. She had two weeks general training with Special Cst. Stephan Longtin followed by on-the-job experience.

[101] S/Cst. Gardner knew Mr. Rogers. He had been arrested and brought to cells many times for public intoxication. She knew he could be verbally aggressive,

violent or passive-resistant. On June 15, 2016, Mr. Rogers had a spit hood on. He was not being cooperative with the arresting officers. S/Cst. Gardner started filling out the standard medical questionnaire for all prisoners. One of the officers told S/Cst. Gardner, "He's not going to answer you" . She wrote on the form "Too intoxicated to answer". To her, this meant he was drunk and did not want to answer the questions. She saw no injuries.

[102] In the interactions between Mr. Rogers and the arresting officers, S/Cst. Gardner saw nothing she had not experienced before with Mr. Rogers—she saw no indication of distress or any reason to call Emergency Health Services. Based on what the officers told her, her experience, and her own observations, she concluded Mr. Rogers was fit for cells, but, because of his behaviour, he should not go into the drunk tank but the "dry cell" (no toilet, sink or bed).

[103] Internal HRPS policy stipulated that prisoners are the responsibility of the arresting and transporting officers until the Booking Office process is complete—they are to provide as much information as possible to the Booking Officer to assist them to determine if the prisoner should be accepted into booking.

[104] HRPS policy for "Intoxicated Persons" required EHS to be called where the prisoner is "showing or known to have been showing any sign of injury, illness, or unconsciousness".

[105] One of the transporting officers, Cst. Donna Paris, had experience as a Booking Officer. The Crown asked her why she had not called EHS. Her response:

> *A.* I didn't call for EHS because I felt that Mr. Rogers' behaviour at the hospital was resisted. And just minutes before that, he was yelling, cursing, swearing, saying, I'm going to kill you, I'm going to fucking kill you. So I didn't believe that he needed EHS at that time.

Cell checks

[106] Sgt. Stephen Gillett was one of two Sergeants in "Internal Oversight". He was in charge of auditing the Booking Office to ensure the officers were adhering to the management team's policies and procedures.

[107] Sgt. Gillett described the responsibilities of the Booking Officers. The officers are required to follow certain protocols if a prisoner is deemed to be "high

risk". In 2016, if a prisoner were "high risk" then 4R checks are called for. He described the checks as for: "rousability"; responds to commands; responds to questions; and, remembers what was said. The checks were to be done every 15 minutes for the first two hours.

[108] A large three-by-four-foot sign posted in the Booking Office displayed the policy. The policy was stressed through email, conversation and instruction.

[109] Sgt. Gillett examined the tape from the night of June 15 and early morning hours of June 16. It was his view that none of the cell checks done by either appellant met the criteria of a 4R cell check. They were more in the nature of a "stop and look" check.

[110] There was no specific policy about use of the "dry cell" but Sgt. Gillett offered it was for highly intoxicated, violent or possibly suicidal prisoners.

[111] Sgt. Gillett had reviewed and observed how the appellants had been doing their job in booking for two years. He found no fault in how they did their respective duties. He acknowledged meetings with the Booking Officers, including the senior Booking Officer, S/Cst. Longtin, and their complaint that it was impossible to do 4R checks. Sgt. Gillett promised he would take up their concerns; in the meantime, "continue doing it the way you are doing it".

[112] Sgt. Gillett testified he went up the chain of command more than once. The answer: you have the policy, carry on.

[113] Every Booking Officer who testified described doing prisoner checks every 15 minutes—but they were not 4R checks. Cst. Tanya Rainault was called by the appellant Fraser. She described her time as a female Booking Officer. A timer was set for 15 minutes. When it went off, that would be the prompt to do the cell checks. These were done by observing if the prisoner was breathing. She had never gone into a cell to rouse a prisoner. If a prisoner is asleep, you do not want to disturb them.

[114] The senior Booking Officer was S/Cst. Stephan Longtin. He had served 18 years as a Booking Officer. He testified that the only time a real 4R check would be done would be at the start and end of the shift, as that would be when two Booking Officers were available to go into the cells. During a shift, they would generally stop in front of a cell and take a peek inside to see if the prisoner is awake. No Booking Officer does a full 4R check every time. That is because it is

totally unsafe for one Booking Officer to go into a cell alone to wake up a sleeping prisoner. If you can see their chests rising, that is sufficient.

[115] Sgt. Gillett also offered that he would never recommend a Booking Officer go into a cell by themselves.

[116] The appellant Fraser testified. He had been a Booking Officer since 2004. S/Cst. Fraser explained that the new policy about 4R checks caused a lot of discussion among the Booking Officers and with management. He met with Sgt. Gillett a number of times. The last was approximately two months before June 2016 when he advised that none of the Booking Officers were following the 4R check requirements. It was left that S/Cst. Fraser would continue to do what he could and only do 4R checks on prisoners who were high risk.

[117] Fraser's uncontradicted evidence was that it was in fact against HRPS policy for an officer to even go into an occupied cell by themselves. Instead, he would check to hear or see if the prisoner were breathing.

[118] In S/Cst. Fraser's opinion, Mr. Rogers was not a high risk prisoner. He relied on the input from Cst. Murphy that Rogers was playing possum. He knew Cst. Murphy and felt he could trust his opinion.

[119] All the activities in booking are under video surveillance. Not once during his twelve years as a Booking Officer had he ever been told he was not doing things properly.

[120] S/Cst. Fraser had dealt with Mr. Rogers before. Like others, he described Mr. Rogers as a nice guy when sober, but when intoxicated, he could be very difficult.

[121] The appellant Gardner testified that the purpose of the 15-minute check was to make sure prisoners are not trying to harm themselves, or others if they are in the drunk tank, and they are not in any form of distress. The checks involve going to the cell, checking that they are breathing and not in distress. However, it is drilled into them—never to go into a cell alone given the dangers of doing so.

[122] S/Cst. Gardner described some of the dangers. She had gone into a cell with another Officer where, on being woken, the prisoner took a swing at them. On other occasions, she had been kicked, punched and spit on by prisoners.

[123] S/Cst. Gardner is familiar with 4R checks. They were done on shift change. She would do modified 4R checks by herself, but never by going into a cell. She echoed the evidence of the other Booking Officers and Sgt. Gillett about the impossibility of following the 4R check policy with current staffing levels.

The spit hood

[124] The evidence could not have been clearer. As of June 2016, none of the officers were trained in their use of or danger associated with leaving a spit hood on a prisoner.

[125] Cst. Donna Paris put the spit hood on Mr. Rogers when he refused to stop spitting at the officers. Cst. Murphy retrieved one from the booking office. When Cst. Paris used it, there was no packaging with the hood.

[126] Sgt. Gillett introduced an unused spit hood. Included with the hood packaging were instructions "like you'd see on a bottle of aspirin". One of the instructions included with the packaging was: "Do not leave on unattended".

[127] Not only was there no training on the use of a spit hood, there was also no policy on their use, except when a prisoner is strapped into a restraint chair.

[128] When Mr. Rogers refused to walk, Csts. Murphy and Morris dragged him on his bottom, along the floor into the dry cell. Cst. Paris followed. The officers removed the handcuffs and left him in what others agreed was the "recovery position".

[129] They did not take the spit hood off. Each Officer explained that they did not remove it because they did not want to get spit on. It was Cst. Paris's experience to leave them on. She had done so on three other occasions.

[130] It was the experience of Csts. Morris and Murphy that if a spit hood was left on, the prisoner simply removed it themselves. Cst. Morris's last interaction with the deceased was on leaving the cell, Mr. Rogers told him to "fuck off". If he thought Mr. Rogers was in any danger from the spit hood, he would have removed it.

[131] Cst. Murphy would normally have had a spit hood with him, given his experience working the bar district. Even he was not familiar with the instructions that come with the packaging, but by the time of trial, he had learned about the

warning not to use the spit hood if the prisoner is vomiting, bleeding or would be left unattended.

[132] Cst. Murphy left the spit hood on Mr. Rogers as he did not want to get spit on. As he left the cell, Mr. Rogers was still cursing and swearing. Cst. Murphy perceived no concerns. He told the Booking Officers that Mr. Rogers was playing possum.

[133] The appellant Fraser, like all the other officers, had never received any training about a spit hood. He had used them and had seen people in booking many times with one on. Once in cells and with the handcuffs off, the prisoner takes it off and then usually tries to spit on the officers.

[134] The original version of the spit hood was all mesh, but a Booking Officer complained because he had still been spit on. A new version came that had "gauzy paper" over the mouth. Prior to June 15-16, 2016, S/Cst. Fraser had never gone into a cell to remove a spit hood. He did so on June 16 when, at 1:38 a.m., he noticed that Mr. Rogers did not appear to be moving and did not respond when he called out his name. That is when he discovered Mr. Rogers was deceased.

[135] The appellant Gardner knew Mr. Rogers had on a spit hood. Normally the regular police officers put them on, but she had done so maybe two or three times. As to the dangers associated with leaving one on, she testified:

> Q. To your knowledge, was there any risk on leaving a spit hood on a prisoner in cells?
>
> A. No. We were never told of any dangers of leaving it on.

[136] Gardner had never entered a cell to remove a spit hood. She had no knowledge they were supposed to do so.

[137] S/Cst. Longtin confirmed the appellant Fraser's evidence about the history of the spit hood. The original mesh version was not very effective. The newer one was mesh on the upper part and fabric below the nose. Usually the police officers put them on. He has handed out many to them, maybe as high as forty times, on their request. Longtin described the serious health risks associated with being spat upon.

[138] Prior to June 15-16, S/Cst. Longtin had received no training about the use of spit hoods. He had experience with arresting officers putting a prisoner in a cell

with a spit hood still on. He had never entered a cell to remove one. The essence of his evidence was he tells the officers not to remove it—just leave the cell due to the risk. Generally, the prisoner will just take it off.

[139] As for the warning on the spit hood label, he had never read it before and was unaware of it.

THE TRIAL ISSUES AND THE JUDGE'S INSTRUCTIONS

[140] The original information from November 2017 charged the appellants that they, "by criminal negligence, to wit: by accepting Corey Rogers into custody without medical assessment, failing to adequately check on him, and leaving a spit hood on him, did cause death to Corey Rogers, contrary to section 220 of the *Criminal Code of Canada*".

[141] No elections were entered. No preliminary inquiry scheduled or held. Instead, on April 11, 2018, the Director of Public Prosecutions preferred an indictment against the appellants. It simply alleged that they did by criminal negligence cause the death of Corey Rogers.

[142] Despite the lack of particulars in the indictment, the Crown advanced the same theory set out in the original information: the appellants caused Mr. Rogers' death by their failure to call EHS for a medical assessment before his admission to the facility; did not carry out 4R checks; and, left the spit hood on Mr. Rogers.

[143] The Crown argued to the jury the appellants were responsible for Corey Rogers' care. His safety and care should have been paramount. The Crown suggested that what they had to do was spelled out in the policies found in the SOPP Manual (Standard Operating and Procedures Manual). The manual was tendered as an exhibit (#4).

[144] The Crown submitted to the jury that the policies set out in Ex #4 were not optional. The 4R checks apply to every prisoner: can they be awakened, can they answer questions; can they respond to commands; and, the fourth R, an admonition for the officers to remember to take into account the possible presence of illness, injury or mental condition—if in doubt, call an ambulance.

[145] The Crown theory was Corey Rogers had vomited at approximately 11:40 p.m. on June 15 and the spit hood prevented the vomit from escaping. Mr. Rogers was too intoxicated to even try to remove the spit hood, and he suffocated. That

was the gist of Dr. Marnie Wood's uncontested evidence, including her observation that Mr. Rogers did not appear to have moved after 11:41 p.m.

[146] In sum, the Crown argued the appellants were required to make sure prisoners were safe and did not die in their care—they were reckless and fell "way below" the standard owed by a Booking Officer.

[147] Unfortunately, the trial judge at no time instructed the jury on the issue of the standard of care a reasonable Booking Officer owed, nor how to determine if the identified omissions by the respective appellants not only amounted to a failure to meet that standard of care but amounted to a marked and substantial departure from it.

[148] The trial judge gave the following description of the fault element:

> Now the fourth essential element, the Crown must prove that the acts or omissions of each accused was both a marked and substantial departure from the conduct expected of a reasonable person in such circumstances. Criminal negligence requires more than just carelessness or a small momentary lapse in care. The conduct of either Mr. Fraser or Ms. Gardner must be a marked departure from the conduct of a reasonable person and must also be a substantial departure.
>
> In deciding whether the conduct of either defendant was a marked and substantial departure, you should consider all the circumstances surrounding that conduct. …

[149] The judge then reviewed evidence about the deceased's level of intoxication, cell checks and the use of the spit hood. At the end of the review, he turned to what he described as the fifth essential element:

> I will repeat element number five, that the accused's acts or omissions showed a wanton and reckless disregard for the lives and safety of other persons. **"Wanton disregard" is a legal term that denotes an individual's extreme lack of care for the wellbeing and/or rights of another individual. "Reckless disregard" is a legal term which means to do something with a conscious awareness of danger while ignoring any potential consequences of so doing**. In assessing whether the Crown has proven this fifth element of the offence beyond a reasonable doubt, you should consider the same evidence that I referred to you respecting element number four. I need not repeat it again for you.
>
> [Emphasis added]

[150] There are several problems with this instruction. Wanton disregard has nothing to do with the "rights of another individual". Although "reckless conduct" usually does connote a subjective awareness of the danger, the Supreme Court of

Canada has clearly indicated criminal negligence causing death or bodily harm does not require subjective awareness. It is sufficient, but not necessary.

[151] All that is required is the accused either knew or ought to have known of the danger and their lack of appreciation of it and consequent conduct amounted to a marked and substantial departure from the standard of care of a reasonable Booking Officer.

[152] Nothing turns on this misdirection since no one suggested there was any disregard for the rights of Mr. Rogers, and the direction about subjective awareness overstated the Crown's burden to the benefit of the appellants.

[153] The trial judge then gave a modified "*W.D.*" direction. In *R. v. W.D.*, [1991] 1 S.C.R. 742, the Supreme Court of Canada suggested a model jury charge, in order to ensure a jury understands that the issue of guilt or innocence is not simply a choice between the Crown's evidence and that of the defence. The suggested charge is as follows (p. 758):

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[154] The parties agreed that because criminal negligence involves a modified objective test, the usual *W.D.* direction (or its more recent updates) needed modification. That is because even if the jury were to accept the accused's evidence, it is still possible to convict given the possibility the jury could conclude that the conduct amounted to a marked departure from the standard of care a reasonable Booking Officer would have observed in the circumstances. They relied on *R. v. Ibrahim*, *supra*.

[155] However, a trial judge must be careful to also instruct a jury on the accused's perceptions of the situation they faced as they may be capable of raising or contributing to reasonable doubt whether their conduct amounted to wanton or reckless disregard or a marked and substantial departure from the requisite standard of care.

[156] The problem is this. At no time did the trial judge instruct the jury to: consider the appellants' respective perceptions; were they reasonably held; and, whether a reasonable Booking Officer would have appreciated the risks associated with the acts or omissions said to have caused Mr. Rogers' death. Nor did the trial judge ever refer to the evidence that could inform the jury about the standard of care of a reasonable Booking Officer and the appropriate role for the policies relied upon by the Crown.

[157] Before I continue with the trial events, there is another aspect of the trial judge's initial charge that deserves comment. The trial judge accurately told the jury "causation" was an essential element. This required the Crown to prove the appellants' actions or omissions caused the death of Corey Rogers. The problem is this: there was absolutely no instruction about how any of the three identified acts or omissions "caused" death. Instead, he suggested causation was essentially undisputed:

> On the third element, causation, **I suspect you will have little difficulty including [concluding] that the Crown have proven causation beyond a reasonable doubt**. Dr. Wood was very clear in her testimony that Mr. Rogers died of asphyxia due to suffocation. She stated that he vomited while wearing a spit hood and that the vomit pooled in the mask of the hood, blocking access to air. Dr. Wood further testified there were no other possible causes of death. **Also, neither Mr. Fraser nor Ms. Gardner substantially challenged Dr. Wood's evidence on cause and manner of death.**
>
> [Emphasis added]

[158] With respect, cause and manner of death are markedly different concepts than the requirement the Crown prove that the acts or omissions of an accused caused death. Causation requires a trier of fact to be satisfied beyond a reasonable doubt the acts or omissions were a substantial contributing cause of death. The Crown argued that admission to the PCF, the deficient 4R cell checks, and the non-removal of the spit hood all amounted to criminal negligence.

[159] The appellants have not relied on the flawed causation charge, but should the Crown decide to proceed with a new trial, care must be taken to understand the difference between cause and manner of death and whether specified acts or omissions of the appellants caused death.

[160] After the charge, Crown counsel objected because the judge had told the jury they had to be satisfied the appellants' conduct demonstrated a "wanton *and* reckless disregard", instead of "wanton *or* reckless disregard".

[161] The appellant Gardner complained: the judge had made no reference to the standard of care; nor whether either appellant may have been mistaken; whether they acted as reasonable HRP Booking Officers; and, the jury was told nothing about the role of the policies.

[162] The trial judge's response to the appellants' objections was a terse "I'm not going there". No reasons were given. The only correction or addition to the jury charge was the clarification it was wanton OR reckless disregard.

[163] The jury started deliberating at 11:30 a.m. on Friday, November 8, 2019. The judge called it a day at 5:00 p.m. On Saturday, November 9, 2019, the day started with a jury question. They asked for a repetition of the instructions on essential elements 4 (marked and substantial departure) and 5 (wanton or reckless disregard). The judge did so, with the suggestion if element 4 is not proven, then they should acquit. If they were satisfied, the jury would then go on to consider element 5, the question whether the acts or omissions amounted to a wanton or reckless disregard.

[164] Later that afternoon, the jury delivered a note to the judge: "Justice Coady, the jury is not unanimous on point four of the essential ingredients". The judge's immediate reaction was that the jury were not asking for clarification—they were split. The appellants agreed with this view.

[165] Crown counsel differed. He argued the instruction on the fourth element, "marked and substantial departure", had not been clear. What was needed was a re-charge that made the subjective/objective test clear. Counsel suggested the model charge from *Watt's Manual of Criminal Jury Instructions*. If the judge failed to properly explain how to determine marked and substantial departure, it would constitute legal error.

[166] The appellants disagreed. They suggested the judge might as well declare a mistrial. The Crown implored the trial judge to re-charge the jury.

[167] While this debate occurred, the jury delivered another note. This time, they asked for a copy of the *Criminal Code* sections so they could read them themselves.

[168] Eventually, the trial judge agreed to re-charge the jury based on the suggested template from *Watt's*. The Crown agreed the re-charge would be at variance from the way the judge had previously described the elements.

[169] In the re-charge, there were three essential elements: the appellants committed acts or omissions that it was their duty to provide; the acts or omissions by the appellants showed wanton or reckless disregard of the lives or safety of others; the conduct of the appellants caused Mr. Rogers' death. Each of these described elements were made into questions. I will consider these questions shortly. First, some general comments and the principles that govern a re-charge.

[170] The principles attract no controversy. When a jury asks questions, it is a clear indication they have problems (*R. v. W.(D.)*, *supra*). Answers given to a jury can exert influence far exceeding the main charge (*R. v. Naglik*, *supra* at p. 139). The re-charge must be clear, correct, and comprehensive (*R. v. S.(W.D.*), [1994] 3 S.C.R. 521 at p. 528).

[171] With respect, the re-charge did not correct the deficiencies with the initial charge. The trial judge did nothing to enlighten the jury about what evidence was relevant for their determination about the standard of care and whether the appellants' omissions were a marked and substantial departure from that standard. Further, despite the Crown's strong suggestion of a need for the trial judge to charge the jury about the modified objective test, that did not happen.

[172] The law is clear that an appellate court must use a functional and contextual approach when engaged in a review of a jury charge (*R. v. Calnen*, 2019 SCC 6 at paras. 6-9). To intervene, we need to be satisfied the jury was not properly equipped to carry out its adjudicative duty. There is a positive obligation on a trial judge to not just review the evidence, but also relate it to the critical issues in the trial (see: *R. v. Azoulay*, [1952] 2 S.C.R. 495; *R. v. Daley*, 2007 SCC 53; *R. v. P.J.B.*, 2012 ONCA 730; *R. v. Levy*, 2016 NSCA 45; *R. v. Barreira*, 2020 ONCA 218).

[173] The appellants argue that the trial judge had a positive obligation when he re-charged the jury to relate the evidence to the issues the jury had to decide. They cite *R. v. S.(W.D.)*, *supra*, for that general proposition. In oral argument, the Crown agreed. Despite that agreement, I do not read *R. v. S.(W.D.)* as standing for the proposition a trial judge commits reversible error if on a re-charge they do not again review the relevant evidence and relate it to the issues the jury must decide.

Such an approach is recommended, but there may be situations where it is not necessary.

[174] *R. v. S.(W.D.)* stands for the proposition that a re-charge must be clear, correct, and comprehensive. Here, the re-charge introduced a differently phrased approach to the allegation against the appellants. In this case, for the re-charge to be clear, correct, and comprehensive, it was necessary to review the evidence and relate it to the issues the jury had to decide.

[175] Quite apart from that failure, the re-charge was flawed.

[176] Less than fifteen minutes after the re-charge, the jury requested the re-charge and any future answers to be in writing. The judge agreed. Deliberations were halted until the next morning for the re-charge to be typed. There are some minor differences in wording. I will quote from the written document, as that was the version left with the jury.

[177] The first question for the jury was:

> 1. Did Cheryl Gardner/Dan Fraser commit acts or allow omissions in the care of Mr. Rogers that it was their duty to do?
>
> This essential element has two parts:
>
> (i) First, **the Crown counsel must prove that Ms. Gardner and/or Mr. Fraser had a legal duty to provide care for Mr. Rogers when he was in custody.**
>
> (ii) Crown counsel must prove that they failed to provide **that level of care.**
>
> If you are not satisfied beyond a reasonable doubt that Ms. Gardner and/or Mr. Fraser had a legal duty to provide **that level of care** to Mr. Rogers, and that they failed to do it, you must find them not guilty. And your deliberations would be over.
>
> If you are satisfied, beyond a reasonable doubt, that they had a duty to provide care for Mr. Rogers and that they failed to do it, you must go on to the next question.
>
> [Emphasis added]

[178] The second question was as follows:

> 2. Did they show a wanton and reckless disregard for the lives or safety of others?

> […] To prove that what they did or failed to do showed a wanton or reckless disregard for the lives or safety of others, Crown counsel must prove beyond a reasonable doubt that what they did or failed to do was a marked and substantial departure from what a reasonably prudent person would do in the same circumstances.
>
> To prove that what they did or failed to do was a marked and substantial departure from what a reasonably prudent person would do in the same circumstances, Crown counsel must prove beyond a reasonable doubt either:
>
> 1. that they were aware of or recognized an obvious and serious risk to the lives or safety of others, but went ahead anyways, despite knowledge of that risk; and
> 2. that they gave no thought to the risk to the lives or safety of others.

[179] Although the judge in his directions and in the written version used the conjunctive "and", he stressed to the jury it was an either-or proposition. Nothing turns on this slip.

[180] Lastly, if the jury were satisfied what the appellants did or failed to do showed a wanton or reckless disregard, they would consider the question:

> Q. Did their acts or omissions cause Mr. Rogers' death? And I don't believe I have to instruct you further on that essential element.

[181] With respect, the re-charge did not properly educate the jury on the real issues they had to decide. First, it was not for the jury to consider whether the appellants had a legal duty to provide care for Mr. Rogers. The existence of a legal duty is a question of law. It was for the judge to decide. Second, the parties never disagreed the appellants had a legal duty to take appropriate care of the health and safety of Corey Rogers. On appeal the appellants cite the *Court Houses and Lockup Houses Act*, R.S.N.S. 1989, c.109 (and the *Lock-up Facilities Regulations*) that clearly imposes a legal duty for the safe custody of prisoners.

[182] The disagreement at trial was in relation to the content of that duty of care. Twice the trial judge in his re-charge instructed the jury they had to be satisfied the Crown had proved the appellants failed to provide "that level of care". This begs the question—what was the standard or "level" of care?

[183] I would have thought the answer was straightforward—resolved in a myriad of civil and criminal cases: the standard of care is that of a reasonably prudent Booking Officer in the circumstances of the appellants. That is, what would a

reasonably prudent Booking Officer have done in all of the circumstances, including any information they had on which it was reasonable to rely (see for example *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra*—reasonable police officer in like circumstances*; Roy v. British Columbia (Attorney General)*, *supra*—reasonable care, not an insurer; *R. v. J.F.*, *supra*—a reasonably prudent parent; *R. v. Javanmardi*, *supra*—a reasonably prudent naturopath; *R. v. Doering*, *supra*—a reasonably prudent police officer).

[184] If the appellants breached that standard of care, they, and their employer, may well be civilly liable for the harm caused. But to be found criminally liable their conduct must have amounted to a wanton or reckless disregard for the life or safety of Corey Rogers, and a marked and substantial departure from the standard of care.

[185] Whether one or both of the appellants failed to follow the suggested protocols found in the HRPS policies, there remains the question of how their conduct in admitting Mr. Rogers, conducting cell checks, and leaving the spit hood on amounted to a heedless or reckless disregard for the life or safety of Corey Rogers, let alone amounted to a marked and substantial departure from the standard of care. I do not determine this issue as the appellants chose not to pursue their ground of appeal that the verdicts were unreasonable or not supported by the evidence.

[186] The Crown, in effect, argued to the jury the appellants were responsible to guarantee Mr. Rogers' health and safety. Rogers died. The appellants therefore failed in their duty to him—and their failure amounted to criminal negligence.

[187] The Crown also suggested to the jury the HRPS policies defined the appellants' obligations and any departure from those dictates amounted to a reckless breach of the requisite standard of care. The law is clear: the appellants were not the insurers of Mr. Rogers' safety; the HRPS policies may well be instructive in resolving the applicable standard of care, but they are not determinative (see: *Roy v. British Columbia (Attorney General)*, *supra* at para. 36; *Hill v. Hamilton-Wentworth Regional Police Services Board*, *supra* at para. 70; *R. v. Doering*, *supra* at para. 105).

[188] The judge gave no instruction to the jury on the requisite standard of care. With respect, this was fatal non-direction amounting to misdirection. Furthermore, it was also fatal non-direction to have not clearly instructed the jury to consider all of the circumstances, including those reasonably perceived by the appellants, on

the issue whether their conduct amounted to a marked and substantial departure from that of a reasonably prudent Booking Officer.

[189] While not intended to be exhaustive, those circumstances included:

- Was it reasonable for the appellants to rely on the information they received from the arresting officers that Mr. Rogers was playing possum and simply choosing to be uncooperative; or should they have placed more significance on the information that Mr. Rogers had rapidly consumed a half-pint of whiskey?

- Was it reasonable for the appellants to rely on their previous experiences with Mr. Rogers in their decision to admit him to the PCF?

- Was it reasonable for them to have continued to do cell-checks in the same manner as all other Booking Officers, without compliance with the 4R policy in relation to Mr. Rogers?

- Was it reasonable for the appellants to have left the spit hood on Mr. Rogers when all of the booking and regular police officers were not only untrained in their use, they had no awareness of any danger caused by leaving one on an unattended prisoner; but should they have been nonetheless aware?

[190] If, after consideration of these circumstances, the jury were to conclude the appellants' conduct did not comply with that of a reasonably prudent Booking Officer, then, and only then, would the jury turn to the question whether such conduct amounted to a marked and substantial departure from that conduct. It could then turn to the vexing issue of what aspects, if any, of their conduct caused Mr. Rogers' death.

[191] I do not overlook the issue that the re-charge collapsed the *actus reus* and *mens rea* into one query: did the complained of conduct show a wanton or reckless disregard for the life or safety of the victim, to be answered by the sole determination whether the accused's conduct amounted to a marked and substantial departure from what a reasonably prudent person would do in the same circumstances.

[192] With respect, this can lead to confusion and a flawed analysis. A jury or a trial judge should first consider whether the conduct showed a wanton or reckless disregard for the life or safety of the victim. This is determined on a strictly

objective basis and engages the question whether the conduct was objectively dangerous such as to create an obvious and serious risk to the life or safety of the victim. I say this because these are the concerns and parameters the law requires for the *actus reus* for the lesser and included offence of dangerous driving or for the lesser offence of failure to provide necessities of life that endangers life or is likely to cause permanent endangerment of health. More importantly, it also accords with the requirement that the conduct must reflect a wanton or reckless disregard for the lives or safety of others.

[193] There may well be a concordance between conduct that is a marked and substantial departure from the appropriate standard of care and showing wanton or reckless disregard, but it is advisable to keep the analysis separate.

[194] A requirement to consider the *actus reus* first is, as discussed earlier, fully borne out by the Supreme Court of Canada's framework for penal negligence found in *R. v. Beatty*, *supra*, *R. v. Roy*, *supra,* and *R. v. J.F.*, *supra,* and applied in *R. v. Tayfel*, *supra,* and *R. v. Doering*, *supra*.

[195] If the jury determines the *actus reus* is made out, it then turns to the *mens rea* or fault element for the offence. This is where they can measure if the accused's conduct amounted to a marked and substantial departure from the standard of care. This engages the modified objective test for the *mens rea*, which includes consideration of any reasonable and honest but mistaken beliefs in facts, or other reasonable perceptions, to determine whether their conduct amounted to a marked and substantial departure from the standard of care.

SUMMARY AND CONCLUSION

[196] The appellants owed a duty to use reasonable care to safeguard the health and safety of Mr. Rogers. The Crown alleged the appellants were not only guilty of violating their duty, but that their violation amounted to criminal negligence causing Mr. Rogers' death.

[197] The Crown contended the appellants were guilty of criminal negligence because their conduct demonstrated wanton or reckless disregard for Mr. Rogers' health or safety by their: improper admittance of Mr. Rogers into the PCF; failure to conduct 4R cell checks; and, failure to remove the spit hood.

[198] To convict, the jury must not only be satisfied the appellants' conduct demonstrated wanton or reckless disregard, but that their conduct was causative of

death, and the appellants had the necessary *mens rea* or fault element—that is, the appellants' conduct amounted to a marked and substantial departure from the standard of care of a reasonably prudent Booking Officer in all of the circumstances.

[199] Unfortunately, the initial jury charge did not adequately instruct the jury on these critical issues nor relate the evidence to them. The trial judge should have explained how to determine the standard of care owed by a reasonable Booking Officer, including the evidence that could inform the jury about the standard of care and the appropriate role for the policies relied upon by the Crown at trial.

[200] The trial judge should have explained how to determine if the identified omissions by the appellants amounted to a marked and substantial departure from the standard of care, having regard to the appellants' respective perceptions, whether they were honestly and reasonably held, and whether a reasonable Booking Officer would have appreciated the risks associated with the acts or omissions said to have caused Mr. Rogers' death. The trial judge did not.

[201] The appellants urged the trial judge to address these issues with the jury after the initial charge. The trial judge declined to do so. The questions posed by the jury indicated that they had problems. In particular, they could not decide whether the appellants' conduct amounted to a marked and substantial departure from the requisite standard of care.

[202] The Crown urged the trial judge to re-charge the jury using a different template and to explain to the jury how to apply the modified objective test for the fault element for criminal negligence. The Crown recognized that the new template redefined the issues the jury had to decide.

[203] The re-charge was not clear, comprehensive, or correct. It failed to review the evidence and relate it to the redefined issues. Importantly, it did not provide an instruction on the modified objective test to decide if the conduct of the appellants were a marked and substantial departure from the standard of care of a reasonably prudent Booking Officer in all of the circumstances.

[204] The test introduces the important role of the honestly held and reasonable perception of the circumstances, including any information on which it may have been reasonable for them to rely on.

[205] The trial judge was obliged to charge the jury that the Crown must prove beyond a reasonable doubt that: (1) the acts or omissions by the appellants showed a wanton or reckless disregard which created an obvious and serious risk for the life or safety of Mr. Rogers; (2) the acts or omissions by the appellants caused Mr. Rogers' death; and (3) the acts or omissions that caused Mr. Rogers' death were a marked and substantial departure from the standard of care of a reasonably prudent Booking Officer in the appellants' circumstances, including what they knew or ought to have known.

[206] As announced at the close of the hearing, the appeals from conviction are allowed and a new trial ordered, as always to be undertaken at the discretion of the Crown.

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Derrick, J.A.