

**IN THE MATTER OF THE POLICE SERVICES ACT,
R.S.O. 1990 AND THE SAULT STE MARIE POLICE
SERVICE.**

AND

INSPECTOR ART PLUS #205

SERGEANT JOSEPH TRUDEAU #216

CONSTABLE DARREN SIRIE #276

CONSTABLE WILLIAM FREEMAN #255

DECISION

APPEARANCES:

Mr. Ian Johnstone	Counsel for the Sault Ste Marie Police Service
Mr. Julian Roy.	Counsel for the complainant.
Mr. Wayne Chorney	Counsel for Constable Freeman and Sergeant Trudeau
Mr. Jeff Broadbent	Counsel for Constable Darren Sirie

BEFORE:

**Deputy Chief Terence Kelly
York Regional Police (Retired)
Hearing officer.**

**DECISION DATE:
December 21st, 2011.**

DECISION

Inspector Art Pluss #205

Sergeant Joseph Trudeau #216

Constable Darren Sirie #276

Constable William Freeman #255

DECEMBER 21, 2011

DEPUTY CHIEF TERENCE KELLY (RET.) Before dealing with my decision in this matter, I wish to thank Mr. Wayne Chorney and Mr. Jeff Broadbent, Defence counsel; Mr. Ian Johnstone, the Service prosecutor, and Mr. Julian Roy, counsel for the Complainant, for their able arguments and exhibits tendered, all of which have assisted me in reaching my decision.

Inspector Art Pluss and Sergeant Trudeau have pleaded not guilty to two counts each of Neglect of Duty and Discreditable Conduct.

Constables Sirie and Freeman have pleaded not guilty to one count each of Neglect of Duty, laid under the Police Services Act.

INSPECTOR ART PLUSS

Charge Number 1 – Neglect of Duty alleges that on or between February 28 and March 1, 2010, without lawful excuse did, as the on-site incident Commander, fail in his duties to properly oversee and ensure a thorough investigation was completed regarding a complex fatal motor vehicle collision.

Charge Number 2 - Discreditable Conduct alleges that on or between February 28 and March 1, 2010, failed to properly fulfill his role as on-site Commander to oversee a complex pedestrian fatal motor vehicle collision involving a pedestrian.

SERGEANT JOSEPH TRUDEAU

Charge Number 1 – Neglect of Duty alleges that on or between February 28 and March 1, 2010, without lawful excuse, did fail in his duties to properly supervise and ensure a thorough investigation was completed regarding a complex fatal motor vehicle collision.

Charge Number 2 – Discreditable Conduct alleges that on or between February 28 and March 1, 2010, failed to properly supervise a complex pedestrian fatal motor vehicle collision.

CONSTABLES DARREN SIRIE AND WILLIAM FREEMAN

Charge – Neglect of Duty alleges that on February 28, 2010, without lawful excuse, failed in their duties to read an approved alcohol screening device (ASD) test; demand to collect a breath sample from Mr. Joe Biocchi in keeping with the Criminal Code of Canada and the Sault Ste Marie Policy Order 15.01(10) – Approved Screening Device Tests.

At the commencement of the Hearing, the Service prosecutor, Mr. Johnstone, advised the Tribunal that he had discussions this morning with three of the investigators from the Office of the Independent Police Review Director, namely Mr. Robert Zufelt, Mr. Glenn Code and Ms. Kim McDonald. They informed him that, upon reflection of the evidence with respect to the indicia of the circumstances, they did not have to look at the evidence of the statement made about the drinks. If they had looked at the indicia they would not have formed their reasonable suspicion, in their opinion. It was subsequently agreed by all counsel involved that the Hearing would proceed with the focus being on two specific points.

- 1) **R. v. SOULES**, Ontario Court of Appeal June 6, 2011; does this decision impact on the existence of Reasonable Suspicion.

- 2) Does the evidence placed before this Tribunal form Reasonable Suspicion as to the condition of Mr. Biocchi at the accident scene.

The first witness for the prosecution, Detective Sergeant Sparling, introduced Exhibit Number 3 – video of Mr. Biocchi at his workplace at 9:20 p.m. on February 27, 2010, exiting the premises and returning February 28, 2010, at approximately 2:43 a.m, then exiting at 2:52 a.m. to enter his vehicle.

Under cross-examination by Mr. Roy, Detective Sergeant Sparling stated that, having reviewed the video, he did not observe any indicia of impairment regarding Mr. Biocchi.

Under cross-examination by Mr. Broadbent and subsequently by Mr. Chorney, Detective Sergeant Sparling reiterated that, upon viewing the video, he observed no indicia of impairment with regard to Mr. Biocchi.

The next witness for the prosecution, Constable Kevin Dukes, testified that he was called at home and advised that a driver was involved in a serious motor vehicle accident involving a pedestrian and was being brought to the station for an interview. He spoke with

Acting Sergeant Freeman in relation to this. He was advised that there were no criminal charges being laid against the driver, however, upon interviewing the driver, a Mr. Biocchi, he cautioned him under the Highway Traffic Act (HTA). He further stated that the purpose of the interview was to gather information pertaining to the circumstances behind the accident.

Under cross-examination by Mr. Roy, Constable Dukes stated he had no information pertaining to any charges that may be laid against Mr. Biocchi. He was advised that it was not a criminal investigation and felt no obligation to caution him regarding this. Constable Dukes also stated that he spoke with investigating officers during and after the interview with Mr. Biocchi.

Under cross-examination by Mr. Broadbent, Constable Dukes testified that Mr. Biocchi was not being treated as a suspect. However, he kept an open mind as to the answers and conduct of Mr. Biocchi during the interview and would have acted accordingly. When questioned by defence counsel about his policing career, Constable Dukes stated that he was qualified at one time as a breath technician and attended RIDE programs in the past. He stated he is quite familiar with the indicia of impairment. He further stated that the interview of Mr. Biocchi lasted approximately one (1) hour and eighteen (18) minutes. During this time he did not notice any signs of

impairment, nor did he detect any signs of alcohol coming from the breath of Mr. Biocchi.

Under cross-examination by Inspector Pluss, Constable Dukes agreed that one of the purposes of the interview was to get as much information as possible with regard to the accident.

Entered at this time was Exhibit Number 8 – the audio interview of Constable Darren Sirie by members of the O.I.P.R.D. In this interview Constable Sirie stated that on February 28, 2010, at approximately 3:00 a.m. he responded to a motor vehicle accident involving a pedestrian. When questioned about the driver of the motor vehicle, Mr. Biocchi, and his condition, Constable Sirie stated that he was standing very close to Mr. Biocchi and did not notice any alcohol whatsoever on his breath; that Mr. Biocchi appeared quite panicked, very upset and was breathing heavily. Constable Sirie stated that he returned to Mr. Biocchi a second time to make sure he had not missed anything, asking him general questions about the accident and, again, could not smell any alcohol or notice any signs of impairment. He also stated that he spoke with Acting Sergeant Freeman upon his arrival and updated him regarding the accident and that there was no indication of alcohol consumption from Mr. Biocchi.

The next exhibit entered was Exhibit Number 9 – the audio interview of Acting Sergeant Freeman with members of the O.I.P.R.D. Kim McDonald and Robert Zufelt. In this interview A/Sergeant Freeman states that he arrived at the scene of the accident at approximately 3:10 a.m. Upon arrival he spoke with two civilian witnesses, a Geraldine Owens and a William Lee. Shortly afterwards he spoke to Constable Sirie who updated him about the accident and identified the driver as a Mr. Joe Biocchi. He stated he attempted to identify witnesses to the accident and keep them separated from the driver, Mr. Biocchi. He then approached Mr. Biocchi to determine if there was something that Constable Sirie had missed in relation to the condition of the driver.

Mr. Biocchi initially told him that he had not had anything to drink, that he had been visiting a friend at the Michigan casino. Mr. Biocchi then told him that, at this time, he had one beer some several hours ago while speaking with his friends.

A/Sergeant Freeman stated he made a point of speaking to Mr. Biocchi and could not smell any odour of alcohol from him or noticed any physical signs of impairment. At this time he arranged for other personnel to assist at the scene. He then spoke with Staff Sergeant Trudeau upon his arrival and informed him there was no odour of alcohol from the driver or anything like that.

Acting Sergeant Freeman then advised the investigators that he

transported Mr. Biocchi to the station at approximately 5:07 a.m. and turned him over to Constable Dukes. He updated Constable Dukes regarding the accident and Mr. Biocchi. When asked about the driver's emotional state he said that he appeared confused and concerned.

The next exhibit entered was Exhibit Number 10 – the transcript of an interview of Sergeant Trudeau conducted by Kim McDonald and Glen Code of the O.I.P.R.D. Sergeant Trudeau stated that he received a telephone call at home from Acting Staff Sergeant Magnan advising him of a serious personal injury accident involving a pedestrian. As a result of receiving this information he arranged for traffic specialists to attend the scene, then subsequently attended himself. Upon arrival at the scene, he was updated by Acting Sergeant Freeman and Constable Sirie and was made aware that the driver had admitted to drinking at some point earlier in the evening. Both officers advised him that they could not smell anything on the driver's breath and could not come up with any grounds in relation to any alcohol driving offences. Sergeant Trudeau then directed the traffic officers to commence an investigation of the accident and to start mapping it out. A short time later Inspector Pluss, the Patrol Inspector, attended and he walked him through the scene and updated him with the information obtained from the other officers.

Sergeant Trudeau directed Acting Sergeant Freeman to take Mr.

Biocchi to the station where he could be further interviewed on video. After determining that all the necessary personnel and equipment was secured at the scene, Sergeant Trudeau attended at the station and monitored the interview of Mr. Biocchi. During a break in the interview Sergeant Trudeau spoke with the officer conducting the interview, Constable Dukes, and was advised by Dukes that he could detect no odour of alcohol, or any impairment symptoms whatsoever, on Mr. Biocchi.

The next witness for the prosecution was Mr. Glenn Code, an investigator with the Special Investigations Unit (SIU) who was assisting the O.I.P.R.D. Mr. Code advised the Tribunal with regard to his attempts to reconstruct the accident scene. He stated that the best piece of evidence recovered in determining the point of impact was a paint chip believed to have come from the vehicle being driven by Mr. Biocchi, which would also indicate the direction of travel.

Under cross-examination by Mr. Roy, Mr. Code agreed that he was not asked to give his opinion regarding reasonable suspicion about the condition of the driver.

Under cross-examination by Mr. Chorney regarding an officer having reasonable suspicion, he agreed that an investigating officer has to consider everything, alcohol consumption and other indicators of alcohol having been consumed

When questioned about the point of impact, Mr. Code agreed that the paint chip located at the scene provides better evidence with regard to the direction of travel of the vehicle, rather than the point of impact; that no-one can say precisely where the point of impact is. He also agreed that there is no evidence to suggest that the car driven by Mr. Biocchi crossed the fog line.

Under cross-examination by Mr. Broadbent, Mr. Code agreed that the paint chip recovered could have moved from the area where it was found.

The next witness for the prosecution was Mr. Biocchi. When questioned by the Service prosecutor regarding the events on February 28, 2010, he stated that he does not recall anything of the incident; it was the worst night of his life and he has been taking treatment since then.

Under cross-examination by Mr. Roy, Mr. Biocchi stated that he has no memory of the accident, before or after, or what was on his mind at the time. Further, he cannot remember what he said or who he said it to.

Under questioning by Mr. Broadbent, Mr. Biocchi stated that he

believed he would have to answer any questions from the police about any incidents he was involved in,

Under cross-examination by Mr. Chorney with respect to Mr. Biocchi having no memory of the accident, he was questioned if he got into an accident, striking a pedestrian after leaving this Hearing and the police arrive at the scene, how would he deal with it. Mr. Biocchi stated that he would feel obligated or compelled to cooperate, to tell the police officers what had occurred and provide information.

The next witness for the prosecution, Ms. Justine Precepa, testified that on February 28, 2010, she was with her mother driving towards her home when she observed flashing lights ahead of her. They were stopped at this location by a police officer. She recalls that somebody had been injured and observed a girl at the side of the road in hysterics. Ms. Precepa recalls the driver of the vehicle involved in the accident getting into her vehicle (rear seat) between her and her girlfriend, Celene Marquis. She stated that the driver, Mr. Biocchi, was in the rear seat for approximately (2) two hours, that he was relatively quiet and wanted to call his wife.

Under cross-examination by Mr. Roy, Ms. Precepa stated that she recalls Mr. Biocchi saying that he had hit someone, that he appeared in shock, white in the face and shaking. She agreed that this could

also be attributed to being in shock and also from being out in the cold.

Under cross-examination by Mr. Chorney, Ms. Precepa stated that Mr. Biocchi was seated with her in the back seat of her car for a period of time with all the car windows closed. She left this area once or twice to speak to police officers at the scene. When questioned if she could smell any alcohol coming from Mr. Biocchi, Ms. Precepa stated that she did not detect any signs of alcohol coming from him. She recalls telling the police that Mr. Biocchi appeared sober.

When questioned by counsel if, in fact, she had detected alcohol, would she advise the police. Ms. Precepa responded absolutely and she would advise the police if she suspected he had consumed alcohol as she is totally against drunk driving.

The next exhibit entered was Exhibit Number 11 – audio of interview with Inspector Pluss conducted by Kim McDonald and Rob Zufelt of the O.I.P.R.D. Inspector Pluss stated that he received a call at home from Staff Sergeant Magnan at approximately 3:36 a.m. informing him of a serious motor vehicle accident. Inspector Pluss stated that he inquired about the resources at the scene. At approximately 4:29 a.m. he received a second call from Staff Sergeant Magnan advising him that it had gone from serious personal injury to a fatality. Inspector Pluss then advised the Staff Sergeant that he would attend the scene.

At approximately 5:18 a.m. Inspector Pluss arrived on-scene and spoke to the Traffic Sergeant and was briefed by him as to the circumstances of the accident and the personnel at the scene. As a result of receiving this information, Inspector Pluss was satisfied that the accident scene was being adequately managed to the level of dealing with a major incident, in particular a traffic fatality. Inspector Pluss then returned to the police station and spoke to Constable Dukes who was interviewing the driver of the vehicle. Constable Dukes advised him that he had interviewed Mr. Biocchi at length and could not support an impaired driving charge against him.

The next witness for the prosecution, Mr. Rob Zufelt, an investigator with the Office of the Independent Police Review Director, testified that, together with Kim McDonald, he investigated a public complaint under Part 5 of the Police Services Act relating to a public complaint concerning the conduct of police personnel at a fatal motor vehicle accident involving a pedestrian. Entered at this time were a number of Exhibits pertaining to the investigation conducted by the O.I.P.R.D.

Under cross-examination by Mr. Roy, Mr. Zufelt stated that he prepared his investigative report prior to the R. v. Soules case being released by the Ontario Court of Appeal. He stated that the utterances made by Mr. Biocchi at the accident scene were available to him.

Under cross-examination by Mr. Broadbent, Mr. Zufelt stated that the task of the investigators was to access the public complaint and he, along with Kim McDonald, interviewed a number of persons involved in the investigation of the accident along with civilian witnesses. He agreed that Constable Freeman was the second officer on the scene and that he spent a great deal of time locking down the scene and separating witnesses to avoid contamination. He also agreed with counsel that the civilian witnesses interviewed by him made no mention of any indicia of alcohol consumption in Mr. Biocchi's system.

When questioned by counsel regarding the administration of a roadside testing device, Mr. Zufelt agreed that officers have to have reasonable suspicion of alcohol in a person's body and that the officer has the discretion as to whether or not to administer this test.

Under cross-examination by Mr. Chorney, Mr. Zufelt agreed if the Tribunal accepted the R. v. Soules decision, then there would be no reasonable doubt or suspicion for the officers to administer a road-testing device. Mr. Zufelt agreed with counsel that the administration of the test has to be done forthwith and the time involved is generally fifteen (15) minutes after forming reasonable suspicion based upon alcohol consumption.

Under cross-examination by Inspector Pluss, Mr. Zufelt agreed that

officers must reasonably suspect that a person has alcohol or drugs in their system before they can make a demand.

The next witness for the prosecution, Ms. Kim McDonald, an investigator with the Office of the Independent Police Review Director, testified that she is the acting manager of investigations within this office and, prior to this, she was a police officer for twenty-two (22) years with the Toronto Police Service.

Under cross-examination by Mr. Broadbent, Ms. McDonald agreed that Constable Freeman arrived on the accident scene at approximately 3:10 a.m. and that he was the second officer on the scene. She had received information that, upon the officer's arrival, he spent approximately thirty (30) minutes segregating witnesses and locking down the scene to avoid cross-contamination between witnesses. Ms. McDonald also agreed with Defence counsel that the evidence of Justine Precepa, an independent witness, was consistent with that of Constables Freeman and Sirie and that none of the other witnesses in contact with Mr. Biocchi observed any signs of alcohol in Mr. Biocchi's system.

When questioned regarding the elimination of alcohol in a person's body, she agreed that it is eventually eliminated over a period of time and that her understanding of the process is that a person consuming one beer would eliminate it in approximately one (1) hour.

Ms. McDonald agreed with counsel that Constables Freeman and Sirie advised her they actively looked for signs of indicia when speaking with Mr. Biocchi, that he was breathing heavy at the scene and they could not detect or smell alcohol emanating from him, that he showed no physical signs of alcohol consumption.

Ms. McDonald also agreed that officers have discretion as to whether or not they administer a test and they are expected to exercise that discretion in good faith. Ms. McDonald also agreed that if the officers believed Mr. Biocchi had no alcohol in his system that the officers cannot logically, at the same time, suspect he has alcohol in his system.

Under cross-examination by Inspector Pluss, Ms. McDonald was asked a series of questions regarding the completion of a motor vehicle accident report.

Under cross-examination by Mr. Chorney, Ms. McDonald agreed with Defence counsel that an important qualifier in the Criminal Code is that the demand, the roadside demand, be made forthwith and that forthwith means promptly or immediately and that her understanding is that it be made within fifteen (15) minutes when the suspicion arises. If it's not then the lawfulness of the demand gets into peril, it becomes unlawful.

When questioned as to her knowledge of the arrival of Sergeant

Trudeau at the accident scene, she agreed that he arrived at approximately 4:20 a.m. and that the accident had occurred at approximately 3:00 a.m. in the morning. Further, Acting Sergeant Freeman briefed Sergeant Trudeau upon his arrival at the accident scene.

When questioned by Defence counsel that for Sergeant Trudeau to direct Acting Sergeant Freeman or Constable Sirie to make a demand at that time would be well beyond "forthwith." She stated that it's too late at that point, that the clock does not get restarted every time an officer develops a reasonable suspicion. She also agreed that the first officers on the scene were Constables Sirie and Smith and that there was a conversation between Constable Sirie and the driver shortly thereafter and that the argument about whether the demand should or should not be made centred around, in part, his initial discussion with the driver.

Under questioning regarding Acting Sergeant Freeman's first contact with the driver, Ms. McDonald agreed that it was at approximately 3:40 a.m. and had A/Sergeant Freeman made a demand at this time it could be susceptible to a violation of the forthwith element.

Under cross-examination by Inspector Pluss, Ms. McDonald responded to a series of questions pertaining to the duties of a police officer upon receiving information of motor vehicle accident reports as required under Section 199 of the Highway Traffic Act.

Ms. McDonald was then asked about her response to Mr. Chorney as to her understanding of the meaning "forthwith" and would she agree that she concluded that Mr. Chorney's client, Sergeant Trudeau, arrived at the accident scene an hour or so post-accident, was beyond the forthwith limitations. Ms. McDonald responded, "Yes it was." Inspector Pluss then asked Ms. McDonald if he arrived after Sergeant Trudeau, would she extend that same definition of forthwith towards him, to which she replied, "I would."

The next witness for the prosecution, Mr. William Lee, testified that at the time of the accident he was living one street parallel to the accident scene. On that particular evening he heard a girl screaming and immediately went to this location. Upon arrival he observed a dark-coloured Hyundai parked on the north side of Queen Street, a male in the ditch and a girl screaming. He went to the girl, determined that she was not injured, then approached the driver of the vehicle and advised him that he had called 9-1-1. The driver told him that he had also called. Mr. Lee stated that the driver made some comments to him that he didn't see the male and asked about his condition.

Under cross-examination by Mr. Roy, Mr. Lee stated that he interacted with the police officers at the accident scene and agreed to give a statement to the officers. Mr. Lee recalls Mr. Biocchi saying he didn't know what happened and that the male had been in the middle

of the road, however, he is not sure if, in fact, he had mentioned this to the police officers. When asked about his interaction with Mr. Biocchi at the scene, Mr. Lee stated that he told Mr. Biocchi to have a seat and try and calm down as he looked panicked and shocked. He was then further asked about his demeanour, Mr. Lee stated that he was shocked, antsy and pacing back and forth, walking around, not staggering, and that he noticed nothing unusual with his eyes. He advised the Tribunal that he was standing approximately two (2) feet from the driver when speaking to him and did not detect any odour of alcohol.

Under cross-examination by Mr. Chorney, Mr. Lee stated that he observed Mr. Biocchi walking back and forward and noted nothing unusual in his movements.

In his submissions, Mr. Johnstone, the Service prosecutor, spoke to the statutory duties of a police officer with regard to Section 42 of the *Police Services Act*. Mr. Johnstone then spoke to the evidence of Mr. Biocchi, that he had no recollection of feeling compelled to give a statement when interviewed by the officers at the scene and that Mr. Biocchi was cooperative with them.

He then spoke to R. v. Soules Ontario Court of Appeal, stating in that particular matter there was clear evidence that the driver felt compelled under Sections 199-200 of the Highway Traffic Act to give

a statement. He then spoke to a number of cases dealing with the compellability and/or admissibility of statements.

In his submissions, Mr. Julian Roy, Counsel for the Complainant, spoke to the issues before the Tribunal, R.v.SOULES and the potential impact on the issue of reasonable suspicion. The issue is whether or not SOULES drives a finding that says Mr. Biocchi's statements are out and, further, that the Tribunal must make a factual determination as to Mr. Biocchi and his state of mind and why he made the statements that he did.

Mr. Roy then spoke to Mr. Biocchi's state of mind and that there is no evidence before the Tribunal compelling Mr. Biocchi to give a statement.

Mr. Roy then spoke to the notes of Constable Sirie and Acting Sergeant Freeman, stating that there is nothing contained in their notes that speak to compulsion or any concerns from Mr. Biocchi about whether he is required to cooperate. He also stated that the officers were not looking at the reasonable suspicion pertaining to the consumption of alcohol, but to the possible impairment of Mr. Biocchi. Further, there is no notation as to any question being asked pertaining to the time of consumption. Mr. Roy then referenced Section 42 of the PSA stating that it is not a police officer's responsibility to make a determination about the elimination process pertaining to alcohol consumption.

Mr. Roy then spoke to the confusion and shock of the driver that was observed by the officers and that these symptoms of shock and confusion as described are equally consistent with the consumption of alcohol.

In his submissions, Mr. Chorney spoke to a number of cases in his hearing brief, specifically R. v. Grant, Supreme Court of Canada, July 17, 2009, in that it spoke to physical and/or psychological restraint; that psychological detention was established either when the individual had a legal obligation to comply with the restrictive request or demand and why a reasonable person would conclude that he or she had no choice but to comply. Further, in situations where police might be uncertain as to whether their conduct was having a course of effect on the individual, it was open to them to inform the subject in unambiguous terms that he or she was under no obligation to answer questions and was free to go; that this Tribunal can look at this legal concept of psychological detention as it relates in this matter on the issue of whether or not Mr. Biocchi felt compelled, or didn't feel compelled.

Mr. Chorney then related to the evidence placed before the Tribunal regarding the investigating officers, namely Constable Sirie and Acting Sergeant Freeman, and their interaction with Mr. Biocchi. Mr. Chorney stated that both these officers arrived at the scene with emotional baggage in that several years ago Acting Sergeant

Freeman's partner was killed by an impaired driver while they were on duty in a police vehicle, and that Constable Sirie was also a friend and colleague of this officer, so the antennae of both these officers was up in relation to alcohol being involved in this motor vehicle accident. In their contact with Mr. Biocchi, these two officers, together with other officers and independent civilian witnesses, noticed no signs of alcohol emanating from Mr. Biocchi and/or his clothing. Neither did they observe any indicia of alcohol consumption. When you look at the totality of all the evidence and how to weigh it, none of it points to alcohol being in the body of Mr. Biocchi at that time, therefore, it would be impossible for them to form a reasonable suspicion.

In his submissions, Mr. Broadbent also spoke to specific cases regarding alcohol consumption and the operation of a motor vehicle. He then referenced the present matter stating that the officers could not form a reasonable suspicion as it is clear from the evidence that there was no detection of alcohol in the system of Mr. Biocchi and that this is also clear from the totality of the evidence in the interviews of the officers and is supported by the objective evidence.

He then spoke to the compellability of Mr. Biocchi at the accident scene, stating that the law requires Mr. Biocchi to be cooperative. He is compelled to be cooperative and he was compelled to give information and remain at the scene and participate and that the best evidence of this would be the totality of the taped interview with

Police Constable Dukes.

In his submissions, Inspector Pluss spoke to the authority that requires a police officer to complete an accident report, during which they rely on a number of sources to be able to complete the document. With regard to compellability, he also stated that there is an expectation that we all know, along with Mr. Biocchi, to report an accident and furnish information forthwith to the police officer to complete the report. He then spoke to Mr. Biocchi's actions at the scene that once he became involved in the accident he stops a short distance away, makes a U-turn and returns to park his vehicle on the north side of the street, then immediately calls the police to report the accident, and remained at the scene. It is clear from his actions that he understood his duty to report it.

Inspector Pluss also alluded to the evidence of Mr. Code that the seriousness of the offence does not dictate the use of the roadside-screening device; that many officers spoke to Mr. Biocchi, as well as himself, to specifically determine if there were issues of impairment, and found none.

My findings have been based on all submissions, exhibits and cases spoken to by counsel for the complainant, counsel for the officers, Inspector Pluss and the Service prosecutor.

I will speak to the first point at issue.

1. R. v. SOULES, Ontario Court of Appeal June 5, 2011

When looking at all the evidence presented in this Tribunal regarding this unfortunate incident, one has to look initially at the actions of Mr. Biocchi when he became involved in the collision.

Upon the initial impact, he stopped his vehicle a short distance from the location, made a U-turn and returned to the immediate area, realizing he had struck a pedestrian and immediately makes a call to the police emergency line 9-1-1 reporting that he believed he had struck someone on the road. He then remains at the scene until the arrival of the police.

By these actions alone it would indicate to this trier-of-fact that Mr. Biocchi subjectively believed he was required by law to report the accident and remain at the scene.

It is clear from the evidence presented in this Tribunal by the independent civilian witness, Ms. Justine Precepa, who testified that she recalls Mr. Biocchi telling her that he had hit someone; that he appeared in shock, white in the face and shaking. However, she did not disagree with Mr. Roy that Mr. Biocchi's appearance could also be attributed to the cold.

Ms. Precepa's evidence regarding the condition of Mr. Biocchi is verified by the evidence of Mr. Lee who, upon his arrival at the scene, spoke to Mr. Biocchi and stated that he appeared shocked, antsy, pacing back and forth and walking around. However, he noted nothing unusual in his movements.

Police Constable Sirie and Acting Sergeant Freeman, in their interviews with members of the O.I.P.R.D. also spoke of their observations of Mr. Biocchi, stating that he appeared to be in shock over the accident and that he was extremely panicked, but there was no indicia of alcohol consumption.

Given the evidence regarding the emotional condition of Mr. Biocchi, it would be reasonable to conclude that this accident would have a strong psychological effect on the thought process of Mr. Biocchi to question the compellability to respond to the officers' questions under Section 199 of the Highway Traffic Act.

Regarding the HTA and Section 200 of that same legislation, Mr. Chorney, Defence counsel, spoke to this issue in his submissions, stating that it is not often that people involved in an accident are going to expressly say, or expressly give evidence, that they knew they had a duty to report it.

Constable Sirie and Acting Sergeant Freeman clearly stated in their statements that, while enroute to the accident scene and given the

time of day it was, they had a strong suspicion that the driver of the motor vehicle might possibly be impaired and they would be looking for signs of indicia regarding this. Counsel for the complainant, Mr. Roy, alludes to this in his submissions that both Sirie and Freeman were not applying a reasonable suspicion test deciding whether or not to issue the alert demand; they were applying an impairment test.

It is the opinion of this trier-of-fact that R. v. SOULES, Ontario Court of Appeal June 6, 2011, is triggered by these events and the evidence is excluded.

2. DOES THE EVIDENCE PLACED BEFORE THIS TRIBUNAL FORM REASONABLE SUSPICION AS TO THE CONDITION OF MR. BIOCCHI AT THE ACCIDENT SCENE?

REASONABLE SUSPICION

Reasonable Suspicion refers to a hunch, or suspicion, for which there is some rational basis to suspect that someone has been consuming alcohol. The odour of an alcoholic beverage on someone's breath is sufficient evidence to form Reasonable Suspicion,

Reasonable suspicion to suspect need not be based on the accused's operation of a vehicle; it may be based on a police officer's

observance of the accused's condition, or on information supplied by third parties.

In the matter before this Tribunal we have the evidence of the independent civilian witnesses who came across the accident scene and had contact with Mr. Biocchi, some for a matter of minutes and another for a much longer period of time.

Ms. Justine Precepa, who came across the accident scene as she was driving her mother home, testified that she allowed the driver of the vehicle involved to be seated in the rear of her vehicle to get out of the cold. She stated that for a period of time she sat in the rear of the vehicle with Mr. Biocchi and, at times, all the windows were closed. She did not smell any signs of alcohol coming from him and to her he appeared sober. When under cross-examination and asked if she, in fact, did detect alcohol would she advise the police. Ms. Precepa responded absolutely she would advise the police if she suspected he had consumed alcohol as she is totally against drunk driving.

Mr. Lee, who was living one street parallel to the accident scene, stated he attended at the location as the result of hearing a girl screaming. Mr. Lee approached the driver of the vehicle involved in the accident and advised him that he had called 9-1-1. The driver of the vehicle responded that he also had called 9-1-1. Mr. Lee then had some interaction with Mr. Biocchi and stated he told him to have a seat and try and calm down as he looked panicked and shocked. He

was then asked about Mr. Biocchi's demeanour and stated that Mr. Biocchi was standing approximately two (2) feet from him and he noticed nothing unusual with his eyes, nor did he detect any odour of alcohol when speaking with him. Mr. Lee also stated that he observed Mr. Biocchi pacing back and forward, walking around, that his movements were normal.

Mr. Rob Zufelt, one of the investigators from the Office of the Independent Police Review Director, stated in his evidence that he agreed with counsel that the civilian witnesses interviewed by him made no mention of any indicia of alcohol consumption in Mr. Biocchi's system.

Ms. Kim McDonald, the lead investigator with the O.I.P.R.D. stated under cross-examination that the evidence of Ms. Precepa, an independent witness, was consistent with that of Constables Freeman and Sirie and that none of the other witnesses in contact with Mr. Biocchi observed any signs of alcohol in Mr. Biocchi's system. She also agreed that both Freeman and Sirie advised her that, upon arriving at the accident scene, they were actively looking for any signs of indicia when speaking with Mr. Biocchi; that he was breathing heavily at the scene but they could not detect or smell alcohol emanating from him and that he showed no physical signs of alcohol consumption. She also agreed with counsel that if the officers believed Mr. Biocchi had no alcohol in his system, they cannot logically, at the same time, suspect he had alcohol in his system.

When viewing Exhibit Number 3 – the video of Mr. Biocchi entering and leaving his workplace prior to the accident, there is nothing apparent in this particular video that would suggest the consumption of alcohol.

Exhibit Number 5 – the lengthy interview conducted by Constable Dukes at the Sault Ste Marie Police Headquarters, which lasted approximately (1) one hour and 18 (eighteen) minutes, showed a clearly distraught Mr. Biocchi who was very concerned about the condition of the pedestrian that had been struck. Constable Dukes stated that he kept an open mind with regard to the answers and demeanour of Mr. Biocchi; that he is quite familiar with the indicia of impairment as he was once qualified as a breath technician. At no time during this interview did he detect any signs of alcohol consumption by Mr. Biocchi.


In all of the entire taped interviews of the officers before this Tribunal, which were conducted by members of the O.I.P.R.D. the officers stated they were actively looking for signs of impairment upon arriving at the scene right up to the interview process being conducted by Constable Dukes some hours later at Police Headquarters.

Forming reasonable suspicion is a precursor to forming reasonable grounds. A suspicion is not an allegation. There is nothing unethical, or illegal, about forming suspicions during an investigation for

exploratory purposes. A logic-based suspicion, when investigated properly, can either be disproved, or it may lead to forming reasonable suspicion.

In this particular case it is clear from the evidence of the police officers and the civilian witnesses who spoke with and/or interacted with Mr. Biocchi, could see no signs of indicia that would indicate he had alcohol in his system.

When one considers all of the evidence placed before this Tribunal, one can only come to the logical conclusion that there were obviously no grounds to establish mere suspicion, let alone reasonable suspicion.


Terence Kelly
Deputy Chief (Retired)
York Regional Police
Hearing Officer