Citation: *R. v. McCluskey*, 2019 YKTC 20

Date: 20190417
Docket: 17-00348
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**
Before His Honour Judge Cozens

REGINA

v.

MARK MCCLUSKEY

Appearances:
Leo Lane — Counsel for the Crown
Joni Ellerton — Counsel for the Defence

## REASONS FOR SENTENCE

[1] Mark McCluskey was convicted after trial of having committed two offences contrary to s. 255(2) and two offences contrary to s. 255(2.1) of the *Criminal Code*. The charges arose out of an accident that occurred on January 20, 2017.

[2] Pursuant to the rule against multiple convictions arising out of the same act set out in ***R.*** v. ***Kienapple***, [1975] 1 S.C.R. 729 the s. 225(2) charges were conditionally stayed.

[3] In my decision ***R.*** v. ***McCluskey***, 2019 YKTC 10 at para. 6, I stated as follows:

> It is undisputed that Mr. McCluskey was driving a motor vehicle from the Alaska Highway in a westbound direction, (also referred to as northbound in the evidence), on the South Access/Hamilton extension (the

> “Extension”) when his vehicle went out of control and crossed the median (comprised of a shallow ditch), striking head-on the eastbound (also referred to as southbound) vehicle being driven by Ms. Blindheim. Ms. Johnnie was a passenger in Mr. McCluskey’s vehicle. The bodily harm suffered by Ms. Blindheim and Ms. Johnnie was a direct result of this collision.

[4] In convicting Mr. McCluskey of the s. 255(2.1) offences in regard to the bodily harm suffered by Ms. Blindheim and Ms. Johnnie, I stated at paras. 44 and 45 as follows:

> On the evidence, I am satisfied that Mr. McCluskey‘s failure to maintain control of the vehicle he was driving is for reasons attributable to his actions or inactions, notwithstanding that I cannot point to any particular action or inaction that, in and of itself, can be shown to have been the reason for him to lose control.
>
> Mr. McCluskey had a responsibility to maintain control of the vehicle and he failed to do so, thus causing the accident. I find that there was no other factor outside of his control that raises a reasonable doubt in this regard.

[5] With respect to the s. 255(2) convictions, I further stated at para. 57:

> I find that there is nothing in the circumstances that existed as adduced in the evidence before me that would raise a reasonable doubt in my mind as to Mr. McCluskey’s impairment being a contributing factor to the cause of the accident beyond the *de minimus* range.

**Bodily Harm**

*Kimberly Johnnie*

[6] The injuries suffered by Ms. Johnnie, who did not testify at trial, were set out in an Agreed Statement of Facts as follows:

> 4. Kimberly Johnnie was admitted to Whitehorse General Hospital on January 20, 2017 and discharged on January 23.

5. Ms. Johnnie suffered the following injuries as a result of the collision:

   a. Dislocated right hip

   b. Probable tiny (3 x 1 mm) avulsion fracture along the right lateral acetabulum…[photograph attached indicating the hip socket where the femoral head (ball) is inserted]

   c. Knee pain likely related to ligament strain

   d. Small laceration to upper lip that did not require sutures

   e. Large deep laceration to left buttock; 7-10 cm long, visceral fat showing, sutures used.

*Naomi Blindheim*

[7] I stated, at para. 10, as follows with respect to Ms. Blindheim's injuries, which injuries I note were not contested:

> Ms. Blindheim was flown to Vancouver where she spent several days in hospital. She suffered fractured ribs, nose and cheekbone, facial lacerations and scarring, a lost front tooth, a concussion, and a torn rotator cuff. She continues to require therapy for her shoulder. She has ongoing breathing issues from the broken nose. She required a second reconstructive surgery in April 2018.

**Victim Impact**

[8] Ms. Johnnie did not provide a Victim Impact Statement. This said, there would have undoubtedly been some immediate pain and discomfort that would have taken some time to subside.

[9] Victim Impact Statements ("VIS") were provided by Ms. Blindheim, her husband, Brian, and her daughter Katelynn. Each chose to read their VIS in court.

*Naomi Blindheim*

[10] Ms. Blindheim provided some background to the months before the accident. She had left her job and started upgrading in September, 2016. Shortly afterwards, however, her husband became ill and required medical treatment. His illness continues to prevent him from working. Ms. Blindheim obtained part-time on-call employment in December while continuing her upgrading.

[11] The accident occurred at a time when Ms. Blindheim was already dealing with a difficult life situation and, in a moment of time, created considerable turmoil in her and her family's life.

[12] There was the uncertainty in the immediate aftermath of the accident with respect to her and her family knowing what was going to happen. This was very stressful for Ms. Blindheim, in addition to the immediate impacts of the injuries.

[13] Ms. Blindheim's two children struggled in their immediate interactions with her, which further negatively impacted her. Ms. Blindheim's perception of herself was negatively impacted and, due to her scars, continues to affect her. She required the assistance of others for weeks after the accident, which she found humiliating and helpless to the point of crying. She suffered from concussion-related issues for some time.

[14] She continues to have flashbacks to the accident and fear when driving.

*Brian Blindheim*

[15] Mr. Blindheim says that his family's life has been "turned upside-down" since the accident. He continues to have flashbacks to the severity of the injuries to his wife that he saw at the accident scene.

[16] He describes the struggles their two children had dealing with the injuries, which further impacted their school attendance, although he notes that once recovering from the initial shock, they have both been very helpful in their mother's recovery.

[17] The accident resulted in immediate negative financial consequences and, notwithstanding some insurance coverage assistance, there has been considerable time and stress involved in working through that process.

[18] I note that Mr. Blindheim requested an order providing compensation for the lawyer's fees incurred in settling insurance company claims. Crown counsel did not pursue any such restitution order and, in any event, such recovery would likely be more appropriate in the context of civil litigation.

*Katelynn Blindheim*

[19] Katelynn, who was 14 years old when she prepared the VIS, (13 at the time of the accident and 15 at the date of the commencement of the sentencing hearing), says that seeing her mother in the hospital the day after the accident has scarred her for life. It was difficult for her to be in the hospital and she was trying hard not to break down into tears.

[20] Katelynn continues to worry about her mother driving; she sees her mother break into tears while having a flashback when driving and has to remind her that she is not at the accident. Katelynn's ongoing worries for her mother continue to impact her focus and learning at school. She asks why this had to happen.

[21] It is clear that this accident has had a significant physical and emotional impact upon the Blindheim family, impacts that continue to this day. The recovery process for this family has been and continues to be an arduous one.

**Positions of Counsel**

[22] Crown counsel is seeking a custodial disposition of 10 months.

[23] Counsel for Mr. Blindheim submits that a custodial disposition of three to five months is appropriate, to be followed by a 12-month period of probation.

[24] Counsel are in agreement that a three-year driving prohibition order is appropriate.

**Circumstances of Mr. McCluskey**

[25] Mr. McCluskey was convicted of driving with more than 80 mgs of blood in 1992, for which he received a $600 fine. That is the only prior impaired driving conviction on his criminal record. He was convicted of driving while disqualified in 1993 and received a $2,000 fine. He has three theft under $5,000 convictions in 1996 and 1997, as well as a fail to comply with a probation order. His next and final criminal conviction was in 2008 for trafficking and possession for the purpose of trafficking. He was sentenced to

21 months' custody for this offence after having received credit for nine months of pre-trial custody. This was followed by a 12-month period of probation.

[26] Mr. McCluskey is 48 years of age. A Psychological Assessment dated November 5, 2017 (the "Report") was provided. The Report had been requested through Employment and Training Services, Adult Unit for the purpose of facilitating Mr. McCluskey's return to employment. The Report provided considerable information as to Mr. McCluskey's background circumstances, as well as the results of the psychological assessment that was conducted.

[27] Mr. McCluskey was born in Belfast, Ireland. He, with his family, moved to Alberta when he was five. He describes the period of between five to eight years of age as "nothing but chaos" where he witnessed alcohol abuse and physical abuse between his parents.

[28] Mr. McCluskey's parents separated when he was eight years old. During the period of time following the separation, he lived with his mother in an unstable environment where he was exposed to alcohol abuse and witnessed physical abuse towards his mother by various boyfriends. Mr. McCluskey struggled with feelings of rejection and felt alienated within the family. He and his siblings were the victims of significant third-party abuse, as well as other traumatic experiences.

[29] At the age of 12, Mr. McCluskey moved back to Ireland with his mother. His mother became sober and he was able to establish positive and supportive relationships with his extended family. This two and one-half-year period of Mr. McCluskey's life was generally a positive experience. However, when he and his family

returned to live in British Columbia in order to be nearer to his father, Mr. McCluskey struggled in high school and with frequent substance abuse.

[30] Mr. McCluskey's adult years have been marked by significant substance abuse and the associated social and vocational impairments, punctuated, however, by periods of abstinence. He was clean and sober for two years after he turned 27. During this period he attended at Alcoholics Anonymous and re-built his life. He continued, however, to struggle with mood disturbances, self-perception and other associated difficulties, and began to abuse alcohol and drugs when he turned 29 for a one-year period, costing him the relationship he was in.

[31] Mr. McCluskey again was able to manage a period of sustained sobriety between the ages of 30 to 36, before he became involved in trafficking crack cocaine, which he subsequently began to abuse at the age of 39.

[32] Mr. McCluskey moved to the Yukon in 2010 and managed to maintain sobriety for approximately six months, relapsed for six months, and then remained clean and sober for approximately five more years. Mr. McCluskey relapsed into alcohol abuse in 2016, until the car accident in January 2017. Mr. McCluskey has maintained abstinence from alcohol and illegal drugs since the date of the accident.

[33] Mr. McCluskey's education has been marked by consistent learning difficulties, although he managed to obtain his high school degree. Verbal and written learning are more difficult for him than hands-on and procedural learning.

[34] He has worked fairly consistently since he was a teenager, although he has struggled to retain jobs, both as a result of substance abuse issues, but also because of emotional issues such as depression. Mr. McCluskey has struggled for a considerable period of time with mental health issues. He was diagnosed with depression in 2003 and continued to take medication as of the date of the Report. He has participated in counselling of various sorts and for varying periods of time throughout much of his adult life, including, in particular, Alcoholics Anonymous.

[35] As of the date of the Report, Mr. McCluskey described himself as being at a particularly low point with respect to his quality of life and the severity of his symptoms, acknowledging that he needs help. He described struggling with mood disturbance issues, related a historical although not current suicidal ideation, a life of substance abuse up until January 2017, hyperarousal patterns of restlessness, anger and irritability when exhausted, relational avoidance, and increasing chronic fatigue.

[36] The conclusions following the administering of the Psychometric testing clearly identify an individual struggling in many areas such as depression, anxiety, and trauma-related symptoms and behaviours. The Personality Assessment Inventory revealed that Mr. McCluskey struggles significantly with self-perception, to the extent that his self-perception may in fact be somewhat distorted at times. He struggles with substance abuse related issues, anger management and some areas of general intellectual functioning. While he has struggled academically, the Report concludes that Mr. McCluskey possesses some key skills for successful academic functioning and the pursuit of post-secondary education, should he choose to do so.

[37] He also struggles with attention deficits and memory.

[38] Mr. McCluskey appeared to meet the criteria for the following DSM-5 diagnosis:

> Persistent Depressive Disorder late onset with intermittent depressive episodes, with current episode. Severe (300.4) with anxious distress, moderate.
>
> Alcohol Use Disorder, in early remission (303.90).
>
> Stimulant Use Disorder, Severe in sustained remission (304.20)

[39] In addition to the Report, other materials were filed in support of Mr. McCluskey.

[40] Clinical Counsellors Craig Dempsey and Kate Hart-Kalasz provided current information that Mr. McCluskey has attended Mental Wellness and Substance Use Services on a weekly basis in excess of one year in order to address his substance abuse issues and depression. He is noted to continue to be highly motivated to change, committed to doing so and demonstrating success in effecting change.

[41] Letters from friends are positive with respect to many of the attributes Mr. McCluskey exhibits in their interactions with him. They validate Mr. McCluskey's sobriety and his desire to effect change since the date of the accident.

[42] For those who may wonder why this decision spends more time detailing the personal circumstances of Mr. McCluskey than those of the victims, it is because it is Mr. McCluskey who is being held accountable for his actions and being sentenced for his act of criminal culpability. In determining a just and appropriate sentence therefore, I am required to focus on his personal circumstances.

[43] This said, it is of course also an important requirement in determining a just and appropriate sentence that I consider the impact of Mr. McCluskey's criminal offence upon the victims, as well as the impact of impaired driving offences upon society as a whole, both of which are of considerable significance.

[44] The devastating impacts of impaired driving upon so many innocent victims has been noted repeatedly in courts across Canada, and still individuals drive while impaired, risking not only their lives but the lives of others.

**Statutory Sentencing Scheme**

[45] As stated in ss. 718 of the *Code*:

> *Purpose*
>
> 718. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[46] And in s. 718.2(a))(iii.1):

> *Other sentencing principles*
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> …
>
> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> …
>
> shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances
>
> …
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (c) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders. …

[47] Certainly, the decision to drive while impaired, on its own, is an act of criminal culpability and moral blameworthiness. A prior history of impaired driving convictions, and a failure to take steps to avoid making the choice to drive while impaired can increase the moral culpability of the impaired driver. The sentence imposed, however

for the same initial decision to commit a criminal offence by driving while impaired can vary greatly, from a fine to years in prison.

[48] While there are aggravating and mitigating circumstances that will cause variances in the sentence, for example the blood alcohol readings, the driving pattern, or any past history of impaired driving convictions, generally the biggest factor that separates sentences from only fines to lengthy custodial dispositions is whether or not someone was injured or killed as a result of the impaired driving.

[49] A first time offender with a blood alcohol reading say of 120 mg% who, for example, swerves into an oncoming lane as a result of his or her impairment, but causes no accident, could face a fine and one year driving prohibition, whereas, if the same act of swerving when driving while impaired happens to cause an accident that results in death or serious bodily harm to another person, the sentence could be measured in years or months.

[50] As stated by Johnston J. in ***R.*** v. ***Leung***, 2016 BCSC 214, after a consideration of case law regarding the impact of the consequences of the impaired driving:

> 58 Doing the best I can with all of these not necessarily congruent statements from the Court of Appeal, I think it is safe to say that, reading all of these decisions together, the moral culpability here comes primarily from the act of driving drunk, of putting oneself at risk of doing so by failing to take treatments or precautions. I think it is also fair to say that the moral culpability can be influenced, perhaps even heightened, by horrific consequences that flow from that basic act of driving while drunk or failing to take precautions.

[51] The consequences of the act in the harm caused to the victims remains a significant factor in determining a just and appropriate sentence.

**Case Law**

[52] I have considered the following cases that were submitted by counsel:

> ***R.*** v. ***Coldwell***, 2008 YKTC 59, ***R.*** v. ***Dickson***, 2013 YKTC 27, ***R.*** v. ***Kuhl***, 2018 YKTC 27, ***R.*** v. ***Lommerse***, 2013 YKCA 13, ***R.*** v. ***Marshall***, 2010 YKTC 81, ***R.*** v. ***Schinkel***, 2015, YKCA 2, ***R.*** v. ***Gaulin***, 2017 QCCA 705, ***R.*** v. ***Gill***, 2013 BCPC 245, ***R.*** v. ***Anderson***, 2004 BCCA 547.

[53] It is well-established in the Yukon, as stated in para. 22 of ***Lommerse***, that the general sentence for ss. 255(2) and (2.1) offences is a custodial disposition in the four to ten-month range. Both counsel agree on this being the general sentencing range.

[54] A sentencing range is, of course, not a hard and fast rule. In ***R.*** v. ***Charlie***, 2015 YKCA 3, Kirkpatrick J.A. stated in paras. 38 and 39:

> 38 In *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 92, the Supreme Court of Canada explained the underlying justification for the reliance on sentencing ranges, which is to "minimiz[e] the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed..." (Emphasis added). The Supreme Court discussed the relationship between the wide discretion granted to sentencing judges and the range of sentences for particular offences in *R. v. Nasogaluak*, 2010 SCC 6 at para. 44:
>
>> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred. [Emphasis added.]

> 39 A sentencing judge does not commit an error in principle simply by crafting a sentence that falls outside of the typical range for a particular offence. The appropriate sentence is determined by the circumstances of the offender and the offence, whether aggravating or mitigating. It is for this reason that, as the Supreme Court explains in *C.A.M.* at para. 92, "a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from sentences customarily imposed for similar offenders committing similar crimes..." (Emphasis added).

[55] As such, there will be cases where sentences are imposed for ss. 255(2), (2.1) offences that fall outside of the general range on either end, including non-custodial probationary dispositions, such as was imposed in ***R.*** v. ***Marshall***, 2018 YKTC 39.

[56] While there may be similarity between cases, both in the circumstances of the offence and those of the offender, every case has its own unique characteristics and sentencing remains an individualized process.

**Application to Mr. McCluskey**

[57] The aggravating factors in this case are as follows:

- The elevated blood alcohol readings of at least 186 mg%;
- The extent of the bodily harm suffered by the victims;
- The fact that there were two passengers in Mr. McCluskey's vehicle;
- The time of day that the impaired driving occurred, when there was a reasonable expectation that there would be traffic; and
- The related, albeit dated, prior impaired driving conviction, and other convictions.

[58] The mitigating factors are:

- The steps Mr. McCluskey has taken since the accident to attain and maintain his sobriety; and
- His genuine remorse. In saying this, I recognize that Mr. McCluskey is not entitled to the mitigation that is associated with pleading guilty to these offences. I note that Mr. McCluskey did not dispute that he was driving while over 80 mg% and was therefore guilty of a s. 253 offence simpliciter. By taking the matter to trial, he required the Crown to prove that he caused the accident and further that his impairment was a contributing factor. However, I accept that he is nonetheless sorry for his actions. I consider his remorse to be genuine and further demonstrated by the rehabilitative steps he has taken since the accident.

[59] There was nothing in Mr. McCluskey's driving pattern that I consider to constitute an aggravating circumstance. There is no indication of excessive speed or swerving in and out of his lane prior to the loss of control that occurred and resulted in the accident.

[60] In ***Coldwell***, I imposed a sentence of seven months' custody on a 21-year-old offender who had entered a guilty plea to a s. 255(2) offence. He had a prior impaired driving conviction imposed less than four months before the impaired driving incident. He rolled a vehicle with two passengers, both of whom suffered bodily harm, one incurring two fractured ribs, bruising and abrasions, the other bruising, abrasions, contusions, swelling and a hematoma. Both passengers were in considerable distress as a result of their injuries. Mr. Coldwell had a blood alcohol level of 100/110 mg%, but he had also been smoking marijuana. He was on a probation order at the time that required him to abstain from the consumption of alcohol. He was also subject to a driving prohibition.

[61] In ***Dickson***, the 31-year-old Indigenous offender, after entering a guilty plea, received a custodial disposition of five months concurrent for three s. 255(2.1) offences. She fell asleep while driving a vehicle with three passengers, and left the road, striking a lamppost and ending up in the ditch. Her blood alcohol level at the time was estimated to be between 117 and 144 mg%. All three passengers suffered bodily harm; the first incurring four fractured ribs which caused respiratory distress, the second serious fractures to both arms, requiring plates and pins to be inserted during surgery, and the third primarily soft tissue injuries. Ms. Dickson had no prior criminal convictions.

[62] In ***Kuhl***, after a review of relevant jurisprudence, I imposed a 90-day sentence to be served intermittently on the 35-year-old offender for a conviction after trial of a s. 255(2.1) offence. Mr. Kuhl had turned his vehicle into the exit lane of a parking area, striking a pedestrian. She suffered a serious left knee injury, but due to pre-existing medical conditions, the injury had a far more significant debilitating impact than would otherwise have been expected. Mr. Kuhl's blood alcohol level was 214 mg%. He had no prior criminal convictions.

[63] In ***Lommerse***, the Court of Appeal substituted a sentence of four months' custody for the probation order I had originally imposed. Mr. Lommerse was 21 years old at the time of the offence and had no prior criminal convictions. He had been driving an All-Terrain vehicle with a passenger in an isolated parking lot, doing doughnuts and burnouts, when he flipped the vehicle, causing the friend to be pinned under it and suffering a broken rib which had punctured his lower intestine, potentially a life-threatening injury. Mr. Lommerse had a blood alcohol level of at least 150 mg%. The

Court, in paras. 19 and 20 held that in sentencing Mr. Lommerse I had underestimated the risks inherent in his driving an:

> …inherently unstable vehicle with limited protection for its occupants…

and stated:

> Further, the nature of the driving – which was intended to provide thrills for the vehicle occupants – made impaired driving particularly risky…

[64] In ***Marshall***, 2018 YKTC 39, I distinguished ***Lommerse*** as follows:

> 42 ***Lommerse*** cannot stand for the proposition that an offender's moral culpability in deciding to drive while impaired is sufficient, in and of itself, to require that a custodial disposition be imposed in all cases where bodily harm results, and that a non-custodial disposition cannot or should not be imposed. Such a proposition would result in the creation of a sentencing starting point in which a custodial disposition is required, and effectively nullify the availability of non-custodial dispositions that remain a legislative option in the *Code*.
>
> 43 In ***Lommerse*** the Court found that it was the particularly risky thrill-seeking nature of the driving while impaired that made a non-custodial disposition inappropriate.

[65] In ***Marshall***, 2010 YKTC 81, the 31-year-old offender entered a guilty plea to a s. 255(2) offence. She was driving on the wrong side of the road on the North Klondike highway, narrowly missing one vehicle and striking a second vehicle with two individuals head-on. Ms. Marshall also had a passenger in her vehicle. Ms. Marshall had a blood alcohol level of 160 mg% at the time. The driver of the second vehicle suffered near-catastrophic injuries that required prolonged medical treatment and invasive surgery. The recovery process was ongoing and expected to be a prolonged one. Both the victim and his wife were suffering from post-traumatic stress symptoms. The financial consequences were enormous.

[66] Ruddy C.J. stated as follows:

> 29 It is clear to me that Ms. Marshall appreciates the seriousness of her conduct and is genuinely remorseful such that a custodial term is not necessary to deter her from like conduct in the future. She is at very low risk to reoffend. I also recognize that any length of time in custody will have a significant impact on her, particularly given her father's current medical status. However, sentences in cases of impaired driving causing bodily harm are very much driven by the consequences flowing from the act of driving while impaired. Ms. Marshall's moral culpability in getting behind the wheel while under the influence of alcohol in this case is no different than it would be in the case of impaired simpliciter for which one could receive a fine. As noted by the Ontario Court of Appeal in *R. v. McVeigh*, [1985] O.J. No. 207:
>
>> No one takes to the road after drinking with the thought that someone may be killed as a result of his drinking.
>
> 30 What differs between the two scenarios are the consequences. The impaired simpliciter driver presents a serious risk to the safety of the public. For the impaired driver causing bodily harm or death, that risk has been tragically realized. The sentence must reflect the gravity of the consequences to the Spencers. Furthermore, the case law is clear that in order to achieve the principles of general deterrence and denunciation in such cases, the sentence must be of sufficient length to make it unattractive for others to get behind the wheel when intoxicated. While I do not believe that it can be said that the deterrent impact of a sentence exponentially increases in relation to the length of a sentence, I am of the view that to have a general deterrent effect the sentence must be of sufficient length to be viewed as something more than a slap on the wrist.

[67] Ms. Marshall, who had no prior criminal convictions, was sentenced to five months' custody.

[68] In ***Schinkel***, the Court of Appeal upheld concurrent sentences of 60 days' custody, to be served intermittently, imposed after guilty pleas to ss. 255(2), 249(3) and 254(5) offences. The circumstances of the offences were consider to be egregious, marked by high speeds and bad driving over an extended period of time, and the very serious physical, emotional and financial consequences upon the 16-year-old victim

who had been in another vehicle that was struck by Ms. Schinkel's vehicle. ***Gladue*** factors (***R.*** v. ***Gladue***, [1999] 1 S.C.R. 688) were significant in the sentencing judge's decision. There was no mention of any prior criminal convictions.

[69] ***Gaulin***, which was a trial and not a sentencing decision, was filed by counsel for Mr. McCluskey for the principle in para. 46 that:

> …any problems that might arise as a result of the relatively low "significant contributing cause" standard can be offset in sentencing. They [authors Manning and Sakoff] add that this is the stage of proceedings where any weakness in the chain of causation should be considered:
>
> > Weaknesses in the chain of causation are regarded as a matter to be assessed as a factor in the sentencing process…It should be recognized that most problems created by a low causal standard can be rectified, for the most part, in the sentencing process, where the accused's level of moral culpability can be more sensitively addressed.

[70] In ***Gill***, the 30-year-old offender was sentenced to a 90-day intermittent sentence on a s. 255(2) offence. He was driving away at a high speed, and in the wrong lane, from one minor incident of contact with a vehicle, when he struck a second vehicle with two individuals. Mr. Gill began to walk away from the accident but he was apprehended by witnesses. He provided breath samples of 180 and 190 mg%.

[71] The victim suffered a broken pelvis that required surgical intervention and a lengthy period of recovery, as well as a broken rib, whiplash, lacerations to her liver and spleen and sore knees. There was a significant emotional impact on her, and on her daughter who was in the vehicle with her at the time of the accident. There were significant financial consequences. Mr. Gill had no criminal or motor vehicle convictions, other than a non-relevant motor vehicle offence. He did not stop drinking

after the offence for a period of time until he finally took steps to do so, maintaining sobriety for nine months prior to being sentenced.

[72] In ***Anderson***, the Appellate Court was dealing with the driving prohibition aspect only of a 41-year-old offender was sentenced, after a guilty plea to a s. 255(2) offence, to 90 days' custody, to be served intermittently. The vehicle he was driving veered into oncoming traffic and collided with another vehicle, causing it to roll over into a ditch. He had been noted to have earlier been driving so erratically another vehicle had to take evasive action to avoid an accident. One of the passengers in the other vehicle suffered a broken femur and other lesser injuries. Several of the other passengers suffered soft tissue injuries. The driver of the vehicle suffered significant emotional trauma, impacting her ability, because of fear, to drive at night.

[73] The offender had three prior drinking and driving convictions, the last being 13 years earlier, although one week prior to the accident he had been given a 24 hour suspension. He had maintained sobriety from the date of the accident, and had engaged in counselling, making significant progress.

**Analysis**

[74] There is no sentencing grid into which the circumstances of the offence and the offender can be neatly plotted in order to reach a sentence that is on all points consistent with other sentences. It is the role of the sentencing judge to assess all the relevant factors, including the circumstances of the offence, the harm caused to the victims of the offence, the circumstances of the offender, both before and since the commission of the offence, and the applicable purpose and principles of sentencing.

[75] In looking at the above cases, and the cases considered within these cases, there are similarities and dissimilarities that distinguish each from the other and from the circumstances of Mr. McCluskey's offence. The victims in these cases have suffered both greater and lesser injuries than those suffered by Ms. Blindheim, as further extended to the suffering Ms. Blindheim's family has had to endure as a result, and by Ms. Johnnie.

[76] General deterrence is a primary concern when sentencing impaired drivers and more so when sentencing impaired drivers who have caused death or bodily harm to another person. As stated by Fuerst J. in ***R.*** v. ***Muzzo***, 2016 ONSC 2068, at para. 58:

> In cases of drinking and driving, particularly where death is involved, denunciation and general deterrence are the paramount sentencing objectives. Denunciation refers to the communication of society's condemnation of the conduct. General deterrence refers to the sending of a message to discourage others who might be inclined to engage in similar conduct in the future. General deterrence is particularly important in cases of impaired driving. Drinking and driving offences are often committed by otherwise law-abiding people. Such persons are the ones who are most likely to be deterred by the threat of substantial penalties.

[77] Mr. McCluskey made a decision to drive, while impaired at a level above what is considered to be an aggravated blood alcohol level, during the morning hours of Friday, January 20, 2017, when he could reasonably expect there to be traffic on the roadway. He took the risk that his driving would put others on the roadway at risk. He also put his passengers at risk. His elevated level of impairment increased the nature of the risk involved.

[78] He did so, having already been convicted of an impaired driving offence, albeit many years back, yet nonetheless therefore being aware of the penal consequences of impaired driving. The previous conviction should have had a specific deterrent effect on him, although I recognize that its dated nature places it as a less aggravating factor than if it had occurred more recently.

[79] There was significant physical harm caused to Ms. Johnnie and significant physical, emotional and financial harm caused to Ms. Blindheim and, as can be expected, also some financial distress and emotional harm to Ms. Blindheim's husband and children. This is to be distinguished from cases where the bodily harm is on the low end of the spectrum, but also from those where there are catastrophic injuries.

[80] There was nothing in Mr. McCluskey's pattern of driving prior to the accident that indicated he had put other users of the roadway at risk, any more than the risk naturally inherent in driving a vehicle while impaired. The causation element, while sufficient to allow for a conviction, is not as aggravated as in many other cases.

[81] Mr. McCluskey is remorseful and has apologized for his actions. He has maintained sobriety since that date, a period in excess of two years, and, on his own initiative, has sought out and actively engaged in assessments and counselling in order to address not only his substance abuse issues, but also the additional underlying issues that have contributed to his substance abuse.

[82] While specific deterrence remains an important objective of sentencing for Mr. McCluskey, I am satisfied that he has already been somewhat specifically deterred, as is seen in the steps he has taken since the accident.

[83] Mr. McCluskey has also indicated that he is supportive of a probationary period that would attach to a custodial disposition, in order to assist him in his rehabilitative efforts. I consider the additional monitoring and assistance available through a probation order to not only assist Mr. McCluskey in his rehabilitative efforts, but to provide further protection to the public through an enhanced probability of his rehabilitation, thus protecting against the commission of further offences.

[84] In all the circumstances, I am satisfied that a custodial disposition of five and one-half months' custody concurrent on each offence, to be noted as 165 days, is appropriate, to be followed by a 12-month period of probation on the following terms:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Notify the Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation;
4. Report to a Probation Officer immediately and thereafter, when and in the manner directed by the Probation Officer;
5. Have no contact directly or indirectly or communication in any way with Naomi Blindheim, Brian Blindheim, Katelynn Blindheim or Matthew Blindheim except with the prior written consent of your Probation Officer and with the consent of each of the above-named individuals;

6. Do not go to any known place of residence, employment or education of Naomi Blindheim, Brian Blindheim, Katelynn Blindheim or Matthew Blindheim except with the prior written permission of your Probation Officer and with the consent of each of the above-named individuals;

7. Not possess or consume alcohol and /or controlled drugs or substances that have not been prescribed to you by a medical doctor;

8. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;

9. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer for alcohol abuse, psychological issues and any other issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;

10. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;

11. Not drive a motor vehicle at any time.

[85] Mr. McCluskey will be subject to a driving prohibition for a period of three years, concurrent, for each offence.

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COZENS T.C.J.