

R v Dunford, 2015 SKQB 386 (CanLII)

Date: 2015-12-04

Docket: QBCRIM 654 of 2013

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QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2015**

SKQB 386

Date: **2015 12 04**
Docket: QBCRIM 654 of 2013
Judicial Centre: Weyburn

BETWEEN:

HER MAJESTY THE QUEEN

- and -

KEITH DUNFORD

Counsel:

Mitchell T. Miller and Curtis G. Wiebe
Aaron A. Fox, Q.C. and Paul K. Wood

for the Crown
for the accused

INTRODUCTION

[1] Mr. Dunford was found guilty of dangerous operation of a motor vehicle causing the death of Ashley Richards, contrary to [ss. 249\(4\)](#) of the [Criminal Code, RSC 1985, c C-46](#). The facts surrounding this offence are fully stated in [2015 SKQB 322 \(CanLII\)](#). While a portion of those facts and comments contained in that decision will be repeated in this sentencing decision, they will not be reproduced in their entirety.

[2] Tragically, on August 24, 2012, Ashley Richards lost her life while working on a highway construction crew, having been struck by a motor vehicle driven by Mr. Dunford. Mr. Dunford drove on highway #39 in Saskatchewan through a construction area. In that construction area, there were 13.1 kilometers of roadside signage that Mr. Dunford neither observed nor obeyed. In that 13.1 kilometer distance, he passed a message board containing information that there was construction ahead, that motorists were to be prepared to stop and that motorists were going to be obliged to reduce speed ahead. Mr. Dunford also passed:

- one sign advising that there was construction ahead;
- two signs indicating that the highway was uneven;
- one sign indicating that people were working on the highway;
- one sign indicating a reduction of the speed limit to 60 kilometers per hour when passing workers;
- one sign indicating a flagger was ahead; and
- two signs prohibiting motorists from passing other vehicles.

[3] Mr. Dunford's vehicle collided with Ms. Richards while she stood at her flagging station, which was located on the highway on a straight and flat area.

[4] While Mr. Dunford travelled between 90 kilometers per hour and

100 kilometers per hour in the construction area, a speed that did not exceed the speed limit, he did not heed the signage that would have had him prepared to stop his vehicle when required. Further, despite the two signs prohibiting Mr. Dunford from passing other vehicles, Mr. Dunford passed two semi-trucks, doing so at the 90 kilometer per hour to 100 kilometer per hour speed, despite the fact that the semi-trucks were slowing down.

[5] Mr. Dunford's passing action was normal and he pulled back in front of the semi-truck at a safe distance from the semi-truck. It was when he pulled back into the lane in which the semi-trucks were travelling that he saw Ms. Richards who was six metres ahead of his vehicle. Although Mr. Dunford attempted to avoid Ms. Richards, he was unable to do so and his vehicle collided with her, causing her death. Just prior to the collision, the wind, through an open window, caught the documents on Mr. Dunford's front seat and displaced them. He returned the documents to their folder and found that he was fast approaching Ms. Richards.

[6] Mr. Dunford was aware that he was travelling in a construction area both because he had driven through it hours earlier that same day and because he could see the road surface had been modified as a result of the construction. Mr. Dunford, however, was not fully aware of his surroundings as he had not observed any of the signs located along the 13.1 kilometers of highway. His focus was, admittedly, elsewhere.

[7] Subsequent to the collision with Ms. Richards, Mr. Dunford stopped his vehicle and got out to assist. He also called 911. When police arrived on scene, Mr. Dunford was co-operative with them. On August 24, 2012, Mr. Dunford had not consumed alcohol.

[8] It now falls to the court to impose a fit sentence for the offence committed by Mr. Dunford.

[9] A sentence imposed on any person must be arrived at with the principles of sentencing in mind, responding appropriately to the circumstances of the offence and the particulars of the offender. Ultimately, the sentence must be fair and just. While the notion of punishment may be a factor, the concept of vengeance cannot be.

[10] A sentence, however fit, cannot fill the void in the lives of those who lost their loved one. That loss is tragic and unimaginable.

POSITION OF THE PARTIES

[11] Mr. Dunford submits that a period of incarceration would not be appropriate. He states that it is not necessary to separate him from society given that he has no previous criminal record and there is little risk that he will commit another offence. He states there is no need for rehabilitation. He accepted responsibility for the incident immediately after it occurred. Mr. Dunford is genuinely and deeply remorseful for what occurred. In Mr. Dunford's view, the primary issue is how denunciation and general deterrence impact the fashioning of an appropriate sentence. Mr. Dunford submits that this can be accomplished with the imposition of a period of probation with strict conditions associated with that probation order and a two year driving prohibition.

[12] The Crown submits that Mr. Dunford's degree of responsibility is high. Mr. Dunford was required to pay attention to the signage along the highway and he chose not to do so. The Crown submits that general deterrence is of great import and that the sentence must be responsive to this sentencing purpose. The Crown submits that a three year period of incarceration together with a five year driving prohibition upon Mr. Dunford's release from custody is an appropriate sentence.

THE OFFENDER

[13] Mr. Dunford is 47 years old. He was born in South Hampton, England. He has two step-brothers who reside in England and a sister who resides in British Columbia.

[14] Mr. Dunford suffers from a minor dyslexic condition and had difficulties in school. He left school at 16 years of age and has been employed full-time since then.

[15] While still residing in England, he was employed as a truck driver. His sister and brother-in-law moved to Canada where his brother-in-law obtained work as a truck driver. In 2009, Mr. Dunford came to Canada to similarly pursue work. He did secure employment as a truck driver and has earned safe driving awards with the company employing him. Mr. Dunford now has his landed immigrant status.

[16] Mr. Dunford does not have a criminal record. He does, however, have a history of infractions pursuant to *The Traffic Safety Act, SS 2004, c T-18.1*. On January 28, 2012, Mr. Dunford failed to stop his vehicle or proceed before safe to do so. On January 12, 2012 and April 7, 2011, Mr. Dunford exceeded the speed limit while operating a motor vehicle.

[17] Letters of support from eight persons – friends, co-workers and an employer – were provided to the court. Mr. Dunford was described as a responsible, sincere, dependable, honest, kind, hard-working, compassionate and considerate man. He was also described as a good father and friend. Mr. Dunford's deep remorse was noted.

[18] Mr. Dunford addressed the court, conveying that deep remorse for his actions and conveying sympathy to Ms. Richards' family.

VICTIM IMPACT

[19] **Subsection 722(1)** of the *Criminal Code* is relevant. It reads:

722(1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.

[20] While victims of an offence are not permitted to have a role in suggesting the type or length of sentence to be imposed, victim impact statements are useful and important in describing to a court the loss experienced by all victims.

[21] The Crown presented four victim impact statements from Ms. Richards' father, mother, sister and partner. The impact of this incident on these victims had been profound. They have experienced shock and grief and unimaginable pain. They deeply miss Ms. Richards and continue to be emotionally troubled as a result of the loss.

SENTENCING PROVISIONS OF THE CRIMINAL CODE

[22] My decision must be guided by the provisions of **ss. 718 to 718.2** of the *Criminal Code*.

The Fundamental Purpose of Sentencing – Section 718

[23] The fundamental purpose of sentencing is contained in **s. 718** of the *Criminal Code*. In 2012 when the offence was committed, **s. 718** of the *Criminal Code* read:

718. The fundamental purpose of sentencing is 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;
- (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 and to the community.

[24] Amendments to this provision occurred in 2015. Counsel did not address the court as to which version of [s. 718](#) is applicable in this circumstance. In both the version cited above or the 2015 amended version, the court is to consider harm done to victims as well as harm done to the community. Whether the above cited version or the 2015 amended version is considered, my analysis would remain the same. As such, I need not determine the propriety of using the 2015 amended version.

[25] The emphasis to be placed on each of these objectives varies according to the unique nature of the offence and the offender.

[26] Given Mr. Dunford's personal circumstances and significant remorse, I am satisfied that Mr. Dunford is a very low risk to reoffend. He has no criminal record, although he has demonstrated a lack of compliance with traffic safety legislation, with three convictions registered pursuant to that legislation. There is some, but not a great need for, specific deterrence in this instance. Further, there is no particular area in which Mr. Dunford requires rehabilitation.

[27] However, in order to determine a just sentence, the focus cannot be entirely on Mr. Dunford. There are other interests requiring consideration, as noted in [s. 718](#) of the *Criminal Code*.

[28] While no sentence can address the loss suffered by the victims, the sentence must acknowledge the harm this offence has caused to the victims and to the community.

[29] In cases such as this, denunciation and deterrence play a significant role in maintaining public confidence in the administration of justice (see *R v Blackwell* (1999), [1999 CanLII 12292 \(SK CA\)](#), 180 Sask R 102 (Sask CA) [*Blackwell*]). The nature of this offence is such that the sentence imposed must deter others from committing similar offences. Others must be deterred from driving dangerously, particularly in a highway construction area, thereby putting those working to repair the highway at risk.

[30] Finally, Mr. Dunford's unlawful conduct must be denounced. Regarding the notion of denunciation, the Supreme Court of Canada noted in *R v M. (C.A.)*, [1996 CanLII 230 \(SCC\)](#), [1996] 1 SCR 500 at para 81:

81 ...The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. ...

The Fundamental Principle of Sentencing – Section 718.1

[31] Regarding the fundamental principle of sentencing, [s. 718.1](#) of the *Criminal Code* reads:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[32] In *R v Nasogaluk*, [2010 SCC 6 \(CanLII\)](#), [2010] 1 SCR 206, the Supreme Court stated at paras. 41 and 42 as follows:

41 It is clear from these provisions that the principle of proportionality is central to the sentencing process (*R. v. Solowan*, [2008 SCC 62 \(CanLII\)](#), [2008] 3 S.C.R. 309, at para. 12). This emphasis was not borne of the 1996 amendments to the *Code* but, rather, reflects its long history as a guiding principle in sentencing (e.g. *R. v. Wilmott* (1966), [1966 CanLII 222 \(ON CA\)](#), 58 D.L.R. (2d) 33 (Ont. C.A.)). It has a constitutional dimension, in that s. 12 of the *Charter* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. But what does proportionality mean in the context of sentencing?

42 For one, it requires that a sentence not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of

the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused (*R. v. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, at para. 81; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at pp. 533-34, per Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J.V. Roberts and D.P. Cole, *Introduction to Sentencing and Parole*, in Roberts and Cole, eds., *Making Sense of Sentencing* (1999), 3, at p. 10). Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

[33] Proportionality is central to the sentencing process. It serves the principle of restraint by requiring that a sentence not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. It also seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm caused.

[34] With regard to the gravity of the offence, there are varying degrees of severity in the manner in which dangerous operation of a motor vehicle may be committed. For instance, cases involving deliberately dangerous acts will be seen as more serious than those that are closer to accidents. Additionally, offences involving acts of longer duration are generally more serious than those of a shorter duration.

[35] In this instance, Mr. Dunford's unlawful conduct was not momentary or of a short duration. Rather, Mr. Dunford did not observe any of the signage erected by the road along a 13.1 kilometer distance. Noting any one of, or a few of, those signs would have alerted him to the fact that his driving pattern would have to be modified in order to avoid creating a danger by that driving. He should have been prepared to modify his driving and react to any changes in the construction zone he was travelling in. Because Mr. Dunford did not observe those signs, he passed two semi-trucks when he was prohibited from passing, even though he did so in a normal manner. Further, he was not

prepared to slow in response to the direction contained in the road signs, even though he did not exceed the speed limit in the construction area. Mr. Dunford engaged in a prolonged period of distraction and inattentiveness during which he was not aware of his surroundings. As a result of that conduct, Ms. Richards was killed. I hasten to add that while the resulting death is one factor to consider in determining the gravity of the offence, it is not the sole or primary factor to be considered. In light of all relevant factors, I conclude that the gravity of this offence is high.

[36] As stated, the moral blameworthiness of an offender is also a critical factor to consider in determining a just sentence. The more flagrant and deliberate the behaviour, the harsher the penalty.

[37] In this instance, I consider Mr. Dunford's moral blameworthiness or degree of responsibility to be high. Mr. Dunford was aware that he was travelling through a construction zone. He had driven through it earlier that day and because of that, he was aware that he would be encountering construction workers in that area. He drove without awareness for his surroundings for a significant period of time. I recognize that the displacement of his documents by the wind distracted him, though that was for a short period of time when he should have, by that time, remained in the proper lane of travel and been prepared to slow for construction workers. With Mr. Dunford's lack of attention, he disregarded the safety of those working on the highway and those travelling on the highway.

Other Sentencing Principles – Section 718.2

[38] [Section 718.2](#) requires a sentencing judge to have regard for secondary sentencing principles. [Section 718.2](#) of the *Criminal Code* reads, in part:

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...;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) 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, with particular attention to the circumstances of Aboriginal offenders.

(a) Relevant Aggravating and Mitigating Factors

[39] I consider that Mr. Dunford's commission of previous infractions pursuant to provincial traffic legislation to be an aggravating factor. I also consider the devastating impact on Ms. Richards' family and partner to be an aggravating factor.

[40] There are mitigating factors to be considered as well. Those are:

- Mr. Dunford did not have a criminal record and there is little chance of Mr. Dunford reoffending;

- Mr. Dunford's sincere and profound remorse;

- Mr. Dunford stopped his vehicle to assist Ms. Richards and he called 911;

- Mr. Dunford co-operated with the police;

- Mr. Dunford had not consumed alcohol;

- Mr. Dunford did not exceed the speed limit;

(b) Parity: Similar Sentences in Similar Cases with Similar Offenders

[41] Mr. Dunford's sentence must be within the range of sentences imposed upon similar offenders for similar circumstances.

[42] It is clear from the jurisprudence that the courts have recognized that the range of sentencing for dangerous operation of a motor vehicle causing death is necessarily broad to account for, among other factors, the diverse circumstances of the offence and the offender.

[43] Mr. Dunford relies on the following cases to support his submission as to the propriety of the imposition of a probation order:

[44] In *R v Riddell*, [2011 SKQB 378 \(CanLII\)](#), 384 Sask R 152, Mr.

Riddell was charged with and convicted of operating a motor vehicle while impaired and thereby causing bodily harm. The victim's friend parked her vehicle in such a manner that when the victim placed a child into the vehicle, the victim was standing in the driving lane of the road. The vehicle was parked the wrong way on the street. The accused's vehicle hit the open car door which closed onto the victim's leg. The accused was scared and drove away. Mr. Riddell had been drinking alcohol. Mr. Riddell was a young man who was mentally fragile and physically challenged. Prior to the incident, he had been treated by a psychiatrist. Subsequent to the incident, he exhibited severe depressive symptoms and suicidality, requiring one on one support and intensive supervision. His psychiatrist warned that if Mr. Riddell was incarcerated, his suicide risk would increase. Mr. Riddell had no previous criminal record and this incident was an isolated one. The court imposed a sentence of three years of probation with a number of attached conditions. A fine was also imposed.

[45] In *R v Duchominsky*, [2003 MBCA 19 \(CanLII\)](#), 171 CCC (3d) 526, Mr. Duchominsky was convicted of two counts of dangerous driving causing death and three counts of dangerous driving causing bodily harm after a trial. Mr. Duchominsky had been driving a large truck which was towing a trailer. Mr. Duchominsky was driving normally and responsibly. He had not been drinking and was not exceeding the speed limit. Mr. Duchominsky did not observe flashing warning lights at an intersection which indicated that either the intersection lights ahead were red or would shortly be turning red. The red light at the intersection had been on for up to half a minute before the appellant entered the intersection. It would have taken Mr. Duchominsky almost 11 seconds to drive the distance from the flashing warning lights to the intersection. Mr. Duchominsky drove his truck through the red light and into the intersection, killing two people and injuring three others. The trial judge imposed a sentence of imprisonment of two years less a day. The Court of Appeal recognized that Mr. Duchominsky had been in prison for four months and varied the sentence and imposed a conditional sentence of two years less a day. The Court of Appeal noted that while the results of the driving were catastrophic, that was but one factor to consider in determining a fit sentence. They also noted that there was no excessive speed or alcohol involved. Mr. Duchominsky was genuinely remorseful and had one prior related criminal conviction.

[46] In *R v Manty*, [2006 MBCA 25 \(CanLII\)](#), [2006] 6 WWR 387, Mr. Manty was convicted of three counts of dangerous driving causing death and one count of dangerous driving causing bodily harm. Mr. Manty received a suspended sentence, probation for two years and 100 hours of community

service work. Mr. Manty appealed his convictions to the Manitoba Court of Appeal, but abandoned his sentence appeal.

[47] Mr. Manty was 22 years of age and had no criminal record. He was driving on a rural highway on his way from church to bible camp. He was not speeding nor had he been consuming alcohol. While driving, he missed the warning signs and drove into an intersection through a stop sign which was illuminated by a flashing red light. He struck another vehicle that had entered the intersection. All three passengers in the other vehicle died while the driver was seriously injured. Mr. Manty's passenger also suffered injuries. The trial judge concluded that Mr. Manty's period of inattentiveness while driving was substantial. The convictions were upheld by the Court of Appeal.

[48] In *R v Shoyoye*, [2015 MBQB 72 \(CanLII\)](#), 317 Man R (2d) 57, Mr. Shoyoye drove his vehicle through an Ultracuts hair salon injuring one person and causing the death of another. This occurred when he unintentionally applied the gas pedal, meaning to apply the brake. Mr. Shoyoye entered guilty pleas to one count of dangerous driving causing death and one count of dangerous driving causing bodily harm. The Crown sought a sentence of incarceration while Mr. Shoyoye argued for a two year suspended sentence. The court imposed a sentence of 90 days incarceration to be served intermittently and a driving prohibition of 8 years for the dangerous driving causing death. A concurrent sentence of that same duration was imposed for the dangerous driving causing bodily harm.

[49] In *R v Guimond*, [2010 MBQB 1 \(CanLII\)](#), 249 Man R (2d) 75, Mr. Guimond was speeding at night and passed a slower vehicle despite a double solid line prohibiting passing. Two people walking on the side of the highway were killed. A two year conditional sentence was imposed.

[50] In *R v Muthoka*, [2011 MBCA 40 \(CanLII\)](#), 268 Man R (2d) 26, Ms. Muthoka accidentally stepped on the gas rather than the brake and killed two pedestrians. The court characterized her actions as a momentary lapse of judgment. She entered guilty pleas to two counts of dangerous operation of a motor vehicle causing death. A two year suspended sentence with probation was imposed.

[51] In *R v Czornobaj*, [2014 QCCS 6709 \(CanLII\)](#), Ms. Czornobaj stopped her vehicle on a highway in order to gather seven ducklings and bring them to her home. She did not activate any emergency lights on her vehicle. The driver and passenger on a motorcycle collided with Ms. Czornobaj's vehicle, killing both the driver and passenger. She was found guilty of two counts of criminal negligence causing death. Two counts of dangerous driving

causing death were conditionally stayed by the court. The court noted, among other things, that Ms. Czornobaj was a young woman when the offences were committed, she had no criminal record and she was not drinking. The court further noted that Ms. Czornobaj engaged in risk-taking behaviour that she should have foreseen would put the lives of others in danger. She showed a lack of empathy for the victims and their family. The court imposed a sentence of 90 days imprisonment on each count to be served concurrently with each other. That sentence of imprisonment was to be served intermittently. A period of probation, the length of which was three years, was also imposed. A ten year driving prohibition was also imposed.

[52] In *R v Stevens*, [2014 ONCA 591 \(CanLII\)](#), Mr. Stevens was convicted of three counts of dangerous driving causing death. He attempted to pass three vehicles on a two lane highway. The road was wet. The traffic was heavy. Mr. Stevens was driving up a hill so his view of oncoming traffic was obscured. While attempting his pass one vehicle, another vehicle in the oncoming lane of traffic collided with Mr. Steven's vehicle. Both occupants of the vehicle in the oncoming lane were killed as was the passenger in Mr. Steven's vehicle. The trial judge imposed a sentence of one year imprisonment. Mr. Stevens appealed the convictions, not the sentence. The convictions were upheld by the Ontario Court of Appeal.

[53] In *R v Butterfield*, [2012 SKPC 11 \(CanLII\)](#), 389 Sask R 31 [*Butterfield*], Mr. Butterfield pled guilty to dangerous operation of an aircraft causing death. Mr. Butterfield was 23 years of age and a commercial pilot. The deceased was also a pilot and a photographer. The deceased had asked Mr. Butterfield to fly a “low and over”, meaning Mr. Butterfield was to fly his plane, a Cessna 207, low to the ground and past where the deceased stood with a camera. On the day of the incident, the winds were strong and gusty. In the midst of that maneuver, the plane encountered a gust of wind, was blown off course and the plane's wing struck and killed the deceased. Mr. Butterfield did not have a criminal record. The pre-sentence report was overwhelmingly positive. There was a negligible risk that Mr. Butterfield would reoffend. The court noted that although the tragic consequences were not intended, they were foreseeable. Both the gravity of the offence and the degree of Mr. Butterfield's responsibility were very significant. The court further noted that the deceased, as the person who suggested the activity, was also responsible for the outcome. A sentence of nine months imprisonment and a two year driving prohibition was imposed.

[54] In *R v Carleton*, [2012 MBPC 54 \(CanLII\)](#), 282 Man R (2d) 247, Mr. Carleton entered a guilty plea to a charge of dangerous driving causing

death. Mr. Carleton, an 18 year old man, had been driving and failed to see overhead pedestrian flashing lights indicating a pedestrian corridor. Mr. Carleton drove through that corridor, colliding with and killing a pedestrian. The court characterized Mr. Carleton's driving actions as a serious driving error, made in mere seconds, caused by a lack of attention. Mr. Carleton had not been speeding and he had not consumed alcohol. He remained at the scene and co-operated with police. However, he had engaged in frequent and aggressive lane changes. Mr. Carleton's pre-sentence report was positive. He had no criminal record, but did have one instance of speeding in his driving history. The sentence imposed by the court was a period of imprisonment, the length of which was 30 days, followed by 2 years of probation and an 18 month driving prohibition.

[55] The Crown relies on the following cases to support its position that a three year period imprisonment is just:

[56] In *R v Bear* (1994), [1994 CanLII 4609 \(SK CA\)](#), 120 Sask R 294 (Sask CA) [*Bear*], Mr. Bear was convicted of refusing to comply with a breath sample and operating a motor vehicle while disqualified from doing so. In determining what a fit sentence was for Mr. Bear, a repeat impaired driving offender, the court compared sentencing considerations respecting dangerous driving offences. In the course of that analysis, the court observed at page 10:

... In 1984, the beginning of the range for dangerous driving was eight months for someone with no record of driving offences. For dangerous driving causing bodily harm the beginning of the range was one year for someone with no record, while for dangerous driving causing death it was two years less a day for someone with no record of driving offences. Thus, in the absence of any aggravating factors, the length of sentence increased proportionally with the severity of the offence.

[57] In *R v Hagen*, 1987 SKCA (Sent Dig) 3, the Saskatchewan Court of Appeal upheld a sentence of imprisonment of two years less a day for Mr. Hagen who, when attempting to get around a line of traffic that had stopped for a red light, struck and killed a boy on a bicycle. Mr. Hagen was 23 years of age, had no previous criminal record and was extremely remorseful. He was convicted of dangerous driving causing death.

[58] In *R v Reynold*, 1988 SKCA (Sent Dig) 143, a sentence of 15 months imprisonment was imposed on a 20 year old man who fell asleep while driving. He was convicted of dangerous driving causing death. Mr. Reynold's vehicle went off the highway and rolled, killing his passenger. Although he had

no previous criminal record, he did have a record for speeding and disobeying a stop sign.

[59] In *R v Awasis* (1989), [1989 CanLII 4761 \(SK CA\)](#), 78 Sask R 156 (Sask CA) [*Awasis*], Mr. Awasis entered guilty pleas to two counts of dangerous driving causing death. He was sentenced to two years less a day imprisonment. The night before the incident, Mr. Awasis was “partying with no sleep to speak of”. As a result of tiredness, Mr. Awasis drove in the wrong lane on the highway. A driver in that same lane, driving correctly, took evasive action and rolled his vehicle. Two persons in the vehicle that had rolled were killed. Mr. Awasis had a previous criminal record, which included driving offences. He was 56 years of age. The Court of Appeal varied the sentence to three years.

[60] In *R v Osiowy*, 1993 SKCA (Sent Dig) 63 [*Osiowy*], the Court of Appeal upheld a sentence of four and a half years for the offence of dangerous operation of a motor vehicle causing death. Mr. Osiowy was 29 years of age. He attempted to pass vehicles on the shoulder of a highway at a peak traffic time when traffic was already moving at the speed limit. Mr. Osiowy's vehicle collided with and killed a person riding a bicycle. Mr. Osiowy left the scene, abandoned his vehicle and endeavoured to avoid detection by removing the license plates from the vehicle. He had consumed some alcohol, but was not impaired. Further, Mr. Osiowy was a suspended driver at the time of the offence.

[61] In *R v Arcand*, 1995 SKCA (Sent Dig) 101, Mr. Arcand was convicted of dangerous operation of a motor vehicle causing death and was sentenced to two years less a day imprisonment. The sentence was upheld on appeal by the Court of Appeal, though it was noted that the sentence was at the low end of the range. Mr. Arcand had been consuming alcohol. He entered and drove in a ditch where he encountered a gully which caused an abrupt stop to the vehicle's travel. Two of the vehicle's occupants were injured and a third occupant died.

[62] In *R v Delaittre* (1998), [1998 CanLII 12361 \(SK CA\)](#), 168 Sask R 195 (Sask CA), Mr. Delaittre pled guilty to dangerous driving causing death. He was sentenced by the trial judge to 90 days imprisonment, to be served intermittently and 18 months probation. Mr. Delaittre had been driving on a busy street, racing another vehicle. As Mr. Delaittre approached an intersection where other vehicles had stopped for a pedestrian, he could not stop in time. He drove into the curb lane, striking and killing a pedestrian. In addition to this incident, which the Court of Appeal described as risk-taking behaviour, Mr.

Delaittre had been convicted of speeding. The Court of Appeal varied the sentence with one described as falling at the bottom of the range, having taken into account the guilty plea and the 24 days Mr. Delaittre had already served in custody. The sentence imposed by the Court of Appeal was 15 months imprisonment.

[63] In *Blackwell*, Mr. Blackwell was convicted of one count of dangerous driving causing death and two counts of dangerous driving causing bodily harm after trial. He was sentenced to a 15 month conditional sentence order. The Crown appealed that sentence. Mr. Blackwell had driven his vehicle at approximately 100 kilometers per hour in a residential area. His vehicle collided with another vehicle that was travelling through an intersection. The driver of that vehicle and her front seat passenger were seriously injured. The young child in the back seat was killed. Mr. Blackwell was 18 years of age and had been convicted of speeding on four previous occasions and also convicted of disobeying a stop sign. While sorry for his actions, Mr. Blackwell believed that the other driver was partly at fault. On appeal, Mr. Blackwell's sentence was varied to 19 months imprisonment.

[64] In *Blackwell*, the Court of Appeal expressed that a sentence in the range of 18 months to two years would be appropriate, but taking into account the youth of the accused, the court determined that 19 months imprisonment was a fit sentence.

[65] In *R v MacDonald*, [2008 SKCA 127 \(CanLII\)](#), 314 Sask R 85, Mr. MacDonald entered guilty pleas to dangerous driving causing death, operating a motor vehicle while disqualified and breaching a recognizance. He was sentenced to 17 months in jail for the dangerous driving offence and one month in jail concurrent with respect to each of the other two offences. Mr. MacDonald was given a credit of twelve and one-half months for the time spent in jail prior to the resolution of these charges. Mr. MacDonald was also placed on six months probation. The Crown appealed the sentence. The vehicle Mr. MacDonald had been driving left the highway and rolled several times. The front seat passenger was ejected from the vehicle and died. Another passenger was injured. Mr. MacDonald's blood alcohol concentration exceeded the legal limit. He was driving very quickly and doing so in the middle of the road. Mr. MacDonald had a criminal record with convictions relating to driving offences. He had other criminal driving offences outstanding when these offences were committed. Mr. MacDonald was sincerely remorseful for his actions, had strong community support and had a desire to seek treatment for his alcohol abuse. The Court of Appeal stated that in the normal course, they would have increased Mr. MacDonald's jail sentence, however, since the original sentence

imposed had already been served, they opted not to do so. Instead, Mr. MacDonald's probationary period was increased from six months to three years.

[66] In *R v Smith*, [2009 SKCA 38 \(CanLII\)](#), 324 Sask R 142, Mr. Smith pled guilty to dangerous driving causing death. He was sentenced to 27 months in jail and appealed that sentence, citing a failure by the sentencing judge to give effect to the principle of parity and over emphasized on the principle of deterrence. Mr. Smith had been drinking alcohol and decided to drive his vehicle, which he did at a high rate of speed. His vehicle slid into a tree and his passenger died. Mr. Smith was 19 years of age. He did not have a criminal record but did have 10 convictions on his provincial driving record. Victim impact statements were provided to the court in which family members of the deceased expressed their intense loss. Mr. Smith took responsibility for his behaviour and was sincerely remorseful. Comparing this matter to the facts in *Blackwell*, the sentencing judge, without explanation, imposed a harsher sentence than Mr. Blackwell had received (19 months imprisonment). The Court of Appeal reduced the sentence to two years, which allowed Mr. Smith to remain in the penitentiary system as he had requested.

[67] In *R v Chamakese*, [2014 SKQB 44 \(CanLII\)](#), 437 Sask R 215, Ms. Chamakese was found guilty of dangerous driving causing death and leaving the scene of an accident after trial. The facts of this incident were not stated in the sentencing decision. However, some facts are known. She was 19 years of age. The pre-sentence report indicated that Ms. Chamakese was a low risk to reoffend. She had not driven since the incident occurred. The Crown sought a sentence of 30 months in jail while Ms. Chamakese sought a 24 month period in jail, which would allow her the benefit of programming in the penitentiary. The trial judge noted that the sentences proposed by both the Crown and counsel for Ms. Chamakese were in the appropriate range. The court imposed a sentence of 26 months in jail for the dangerous driving offence and 9 months for the offence of leaving the scene of an accident, to be served concurrently.

[68] In considering the cases supplied by Mr. Dunford, I find their precedential value to be limited. In many of the decisions, the accused person was a youthful offender and/or had engaged in a single act with tragic consequences. In contrast, Mr. Dunford is not a youthful offender and his poor driving conduct occurred over a sustained period of time. In the case of *Butterfield*, the provincial court judge properly noted the deceased's role in the tragic events.

[69] In some of the decisions, a conditional sentence order was available pursuant to [s. 742.1](#) of the *Criminal Code*. However, the *Criminal*

Code was amended, and as of December 1, 2007, “serious personal injury offences” as defined in s. 753 are ineligible for conditional sentences. The offence of dangerous operation of a motor vehicle causing death is a personal injury offence and as such, a conditional sentence is not available (see *R v Littlecrow*, 2011 SKQB 393 (CanLII), 384 Sask R 289). Both Crown counsel and counsel for Mr. Dunford take the same view of the lack of availability of a conditional sentence in these circumstances.

[70] Thus, the decisions provided by Mr. Dunford are distinguishable on their facts and of limited value.

[71] The Crown has provided cases which have a range of sentences of 15 month to 4 ½ years. In the case of *Osiowy*, a 4 ½ year sentence was imposed. However, those facts differ markedly from Mr. Dunford's matter. In that case, Mr. Osiowy left the scene after colliding with the person on the bicycle, abandoned his vehicle and removed his license plates in an effort to avoid detection. Further, he was suspended from driving when the incident occurred and had been consuming alcohol.

[72] The other decision at the high end of the range, with a three year sentence of imprisonment imposed, was *Awasis*. Again, the facts in that case differ from Mr. Dunford's situation. Mr. Awasis had been partying the night before the incident and had not slept. He was tired. He had a criminal record with convictions for driving related offences.

[73] The decisions of *Osiowy* and *Awasis* differ to such a degree from Mr. Dunford's situation that they are of limited precedential value.

[74] That leaves a range of 15 months to 26 months with respect to the balance of the cases filed by the Crown. I find the comments in the decisions of *Bear* and *Blackwell*, two decisions from the Saskatchewan Court of Appeal, to be instructive. In *Bear*, the court noted that the starting point for the offence of dangerous driving causing death is two years less a day for someone with no record for driving offences.

[75] The decision in *Blackwell* is of particular value. Mr. Blackwell drove through a residential neighbourhood at the speed of 100 kilometers per hour. This constitutes more than just momentary poor conduct. Mr. Blackwell did not have a criminal record, though he did have provincial legislation convictions. Alcohol was not involved. The Court of Appeal stated that the sentence range for the offence of dangerous driving causing death in circumstances such as these was 18 months in jail to 24 months in jail. It was because Mr. Blackwell was a youthful offender that a just and fit sentence was

determined to be 19 months.

[76] It is important to note at this point that sentencing ranges are guidelines. They are not conclusive of the appropriate sentence in a given case.

[77] While certainly not identical to Mr. Dunford's matter, this case is certainly instructive. There are differences, however, between Mr. Blackwell's situation and Mr. Dunford's, and those differences are not in Mr. Dunford's favour. Mr. Dunford's unlawful driving conduct occurred over a lengthier distance and for a more sustained period of time. Mr. Dunford is not a youthful offender. He, in fact, was an experienced driver, given that he was employed as a semi-truck driver.

(c) Restraint

[78] [Subsections 718.2\(d\)](#) and (e) require that an offender not be deprived of liberty if less restrictive sanctions are appropriate. A sentencing judge must consider all available sanctions other than imprisonment that are reasonable in the circumstances.

[79] Most cases involving dangerous operation of a motor vehicle causing death that I have reviewed involved sentences of actual imprisonment, or terms of imprisonment served in the community as a conditional sentence order. As previously noted, a conditional sentence order is not an available sentence for this offence.

[80] Although a conditional sentence is not available in this instance, the Supreme Court of Canada's remarks in *R v Proulx*, [2000 SCC 5 \(CanLII\)](#), [2000] 1 SCR 61 [*Proulx*] still guide this analysis. In *Proulx*, the Supreme Court noted that a conditional sentence is a punitive sanction, capable of achieving the objectives of denunciation and deterrence. For this reason, the court noted, a conditional sentence is not akin to a suspended sentence, which is primarily a rehabilitative sentence, not meant to have as its primary focus a denunciatory or general deterrent effect (see *Proulx* para 22).

[81] In *R v Taylor* (1997), [1997 CanLII 9813 \(SK CA\)](#), 163 Sask R 29, the Saskatchewan Court of Appeal made the following comments with respect to a suspended sentence and probation order, commencing at para 30:

30 Apart from the wording of the provision, the innate character of a probation order is such that it seeks to influence the future behaviour of the offender. More specifically, it seeks to secure "the good conduct" of the offender and to deter him from committing other offences. It does not

particularly seek to reflect the seriousness of the offence or the offender's degree of culpability. Nor does it particularly seek to fill the need for denunciation of the offence or the general deterrence of others to commit the same or other offences. Depending upon the specific conditions of the order there may well be a punitive aspect to a probation order but punishment is not the dominant or an inherent purpose. It is perhaps not even a secondary purpose but is more in the nature of a consequence of an offender's compliance with one or more of the specific conditions with which he or she may find it hard to comply. But even in that sense, the punitive aspect acts primarily as a specific deterrent and has the corollary rehabilitative effect.

31 The nature of a probation order contrasts with that of a custodial order which has as its core considerations, the offender's degree of culpability, the seriousness of the offence and the need for general deterrence. One should not overlook that although a custodial sentence is primarily intended to serve as an expression of society's denunciation of the offence as well as a retributive or punitive measure it is nonetheless secondarily intended to serve as a learning experience for the offender with the resulting expectation of securing "the good conduct" of the offender and preventing "the repetition by him of the same offence, or the commission of other offenses" - to use the probation order language of clause (h) quoted above.

32 In other words both the probation order and the custodial sentence often have overlapping purposes and share desired consequences in that the former always and the latter often intends to influence the future behaviour of the offender and the latter always and the former sometimes intends to punish the offender. The difference between the two lies in the objective the sentencer wishes to prevail. That in turn will determine which sentencing principles the sentencer will emphasize.

[82] Important objectives in this instance are denunciation and deterrence, particularly general deterrence. Further, the seriousness of the offence and Mr. Dunford's high degree of culpability must inform the determination of a just sentence. In this regard, a probation order, as sought by Mr. Dunford, will not satisfy the principles of denunciation and deterrence. In particular, a suspended sentence and probation order would not be sufficient to deter others from committing such an offence. Nor would it satisfy the need to reflect the gravity of this offence and Mr. Dunford's high degree of moral culpability. Finally, a period of probation imposed in this situation would offend the principle of parity. Having considered Mr. Dunford's submission in support of a suspended sentence and probation order, I conclude that such a

sentence would not be appropriate.

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CONCLUSION

[83] The sentence imposed on Mr. Dunford must be a period of imprisonment that is of sufficient length to meet the objectives of denunciation and deterrence, particularly general deterrence. It must also address the harm done to the victims and to the community. It must reflect the significant gravity of the offence committed and Mr. Dunford's high degree of responsibility. The sentence must also give appropriate credit for the mitigating factors associated with this offence as well as taking into account the aggravating factors. The principle of parity must be kept in mind as well as Mr. Dunford's personal circumstances.

[84] Bearing all this in mind, and in light of the previous analysis, I sentence Mr. Dunford to a period of incarceration of two years less one day.

[85] In addition to the period of incarceration imposed, pursuant to [ss. 259\(2\)](#) of the *Criminal Code*, I make an order prohibiting Keith Dunford from operating a motor vehicle on any street, road or highway or other public place for a period of three years following his release from imprisonment.

[86] Additionally, pursuant to [s. 737](#) of the *Criminal Code* I order a victim surcharge of \$200.00 to be paid within 60 days, failing which I impose a sentence in default of payment of five days to be served concurrently.

J.

L.L. KROGAN

