SUPREME COURT OF YUKON

Citation: *R. v. Kloepfer*, 2017 YKSC 44

Date: 20170828
S.C. No. 15-01505
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

PAUL MARIA MAXIMILLIAN KLOEPFER

Publication of any information that could identify a victim under the age of 18 years is prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Before Mr. Justice L.F. Gower

Appearances:
Jennifer Grandy — Counsel for the Crown
André W.L. Roothman — Counsel for the Defence

REASONS FOR SENTENCE

INTRODUCTION

[1] GOWER J. (Oral) This is the sentencing of Paul Maria Maximillian Kloepfer on the following charges: (1) dangerous driving causing bodily harm to T.S., contrary to s. 249(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, (the "*Code*"); (2) dangerous driving involving Herbert Arnold, contrary to s. 249(3) of the *Code*; (3) leaving the scene of an accident involving T.S., contrary to s. 252(1.1) of the *Code*; and (4) leaving the scene of an accident involving Herbert Arnold, also contrary to s. 252(1.1). All the events occurred on August 20, 2014 on Mosquito Road, a rural road that is partly on

public land and partly on private land, approximately a 30-minute drive south of Whitehorse.

[2] I found the offender guilty of these charges following the trial which took place over five days from May 9-13, 2016. I delivered my reasons for judgment, cited as 2016 YKSC 55, on October 14, 2016. The sentencing was adjourned until August 24, 2017, because of an intervening failure to appear by the offender and his unavailability for sentencing during the winter of 2016-2017.

[3] The Crown seeks a jail sentence of five months, plus a two-year driving prohibition and a 10-year firearms prohibition under s. 109 of the *Code*. Defence counsel seeks a suspended sentence or a fine, plus an unspecified duration of probation. Thus, the main issue is whether the accused should be punished by a jail sentence or one which does not require his incarceration. A conditional sentence is not available because of the dangerous driving causing bodily harm conviction and the operation of s. 742.1(e)(i) of the *Code*.

CIRCUMSTANCES of the OFFENCES

[4] I made the following findings of fact at the trial. On August 20, 2014, at approximately 4 PM, Mr. Herbert Arnold, R.S. and her two sons were walking westerly down Mosquito Road in the vicinity of the “S-curve”. The offender drove his four-wheel-drive diesel pickup truck into the S-curve. He would not have seen the four individuals walking on the road until he turned the corner into the S-curve. His reaction was to accelerate his truck towards the group. This reaction was consistent with previous encounters between members of the S. family and the offender coming and going on Mosquito Road, as testified to by T.S. This was unsafe conduct, especially given the

relatively fresh and loose gravel in the S-curve, which the offender knew about. In any event, the offender initially drove very close to R.S., who was reaching down to pick up her small dog. She was on the north side of the road at that time. As a result, the offender reacted by weaving to the left or southerly side of the road which meant that he passed very close by S.S. and ultimately collided with T.S., who was standing on the road immediately adjacent to the red stake, facing the offender's oncoming truck. The result was that the driver's side mirror struck T.S. in the left shoulder. The offender then reacted to this collision by veering to the right or northerly side of the road where Mr. Arnold was walking towards the edge of the road with his back to the accused's oncoming truck. The passenger side of the truck sideswiped Mr. Arnold in his central back area causing him to pivot from left to the right with his arms outstretched, at which point he lost his grip on his walking stick, which flew into the air, rebounded off the side of the truck, and struck him on his right elbow. After colliding with Mr. Arnold, the offender reacted a third time by veering back towards the centre of the road. He continued to accelerate and left the area of the S-curve without stopping to render assistance or check for injuries. Rather, he continued down the road to his home where he made yet another complaint to the police about mischief caused by the S. family, this time in conjunction with Mr. Arnold.

[5] The offender was originally charged with two counts of using his motor vehicle as a weapon, contrary to s. 267(a) of the *Code*. I found him not guilty of those offences, because I did not find that either of his collisions with T.S. or Mr. Arnold was intentional. Rather, I found that he reacted to the presence of the four individuals by accelerating his truck in a manner which caused him to lose control and nearly collide with R.S. He

reacted further by correcting the trajectory of the truck excessively to the left or southerly side of the road, where he collided with T.S. He then reacted again by veering to the right or northerly side of the road, where he collided with Mr. Arnold.

[6] Nevertheless, I was satisfied that the Crown had proven beyond a reasonable doubt that the offender was driving too fast through the S-curve, given the presence of the pedestrian victims and the loose gravel. Although he did not anticipate the former, he was aware of the latter, and clearly had time to slow down and even stop his vehicle once he came into the S-curve. I found that the circumstances necessitated a slower speed overall and perhaps even a stop before proceeding. However, the offender was heard to accelerate his diesel truck both before and after the two collisions. I also found that he swerved from side to side on the road.

[7] I found the offender guilty of dangerous driving *simpliciter* with respect to Mr. Arnold, because I was not satisfied beyond a reasonable doubt that the Crown had proven bodily harm in his case. I did find that he caused bodily harm to T.S.

[8] I was also satisfied beyond a reasonable doubt that the offender had had an "accident" involving his truck with Mr. Arnold and T.S., and that he failed to stop his vehicle in each case. There was no evidence to the contrary that his intent was other than to escape liability. Accordingly I found him guilty of both counts of leaving the scene of an accident.

CIRCUMSTANCES of the OFFENDER

[9] A Pre-Sentence Report ("PSR") was prepared for the sentencing by Probation Officer Brunet ("P.O. Brunet").

[10] The PSR states that the offender does not have a criminal record in Canada. However, the offender admitted receiving a $5000 fine in 2007 for an incident occurring in Alaska. The following is the offender's account of the incident:

> He was guiding for two female tourists. He had picked up a city permit for the local campground. Upon arrival Mr. Kloepfer and the two females noticed signs of bears in the area. The two females advised Mr. Kloepfer they would not be camping in that area out of safety reasons. They moved to the national park campground, without the appropriate permit. A park ranger came by and noticed they did not have a permit and they notified Mr. Kloepfer that he would be getting a ticket. Another park ranger appeared and started searching in Mr. Kloepfer's truck. Mr. Kloepfer got nervous as he had $700 cash inside the truck. He approached the park ranger and there was miscommunication that resulted in Mr. Kloepfer getting pepper sprayed. He ended up being transported to a jail in Juneau, Alaska where he spent the following 22 days incarcerated.

[11] The offender was born on January 4, 1957, and is therefore presently 60 years of age. He was born in Germany and is the middle child of three children. He was formerly very close to his mother, now 83 years old, but over the last few years they have distanced themselves from one another. The offender stated that his father was very authoritative in the household. He recalls his father being physically and emotionally abusive on a weekly basis, and on one occasion he saw one of the sisters get physically beaten.

[12] The offender says that initially he had very good relationships with both of his sisters, but that since he moved to the Yukon in 1995, he has had very limited contact with them.

[13] The offender has had three marriages.

[14] The first lasted from 1980 to 1986 and produced a son, Matthew. Matthew visited the offender in the Yukon in 1996 and 2000, however over the next few years they grew distant. He was not invited to his son's wedding and they have not spoken since 2015.

[15] The second marriage was from 1988 to 1999. The offender felt that his second wife did not live up to her obligation to help finance the couple and they had many arguments about money.

[16] The offender married his current partner, Sonya Seeber, in 2003, and they appear to be happily married to this day. They usually spend each winter on their trap line in the Pelly Mountains, southeast of Whitehorse. However, during the winter of 2009-2010, they went through a rocky patch where the offender seemed depressed and ended up going to the trap line himself that winter. The couple attended counselling on two occasions to deal with the problem.

[17] The offender recalls being sexually and physically abused during his early school years. He struggled with his grades for a time but never had to repeat a year. He described himself as a loner and that he kept to himself.

[18] In 1981, he qualified as a mason. In 1990, he received a diploma as a state qualified engineer in structural engineering. In 1993, he was admitted as a member of the National Association of Independent Experts, with qualification in the field of wood construction work. In 1994, he completed his practical training as an auto mechanic.

[19] One of two identified childhood friends was interviewed by P.O. Brunet for the PSR. He described the offender as a "quiet" and "reliable", person and that he has never observed or heard the offender to be violent. Three other persons who have

either been friends or former neighbours were interviewed and provided favourable comments about the offender's character.

[20] In addition, the offender provided two letters of reference. The first is from the Vice President of the Yukon Trappers' Association, of which the offender has been a director for the past seven years. The author described the offender as a "helpful…community-oriented person", who has done a great deal to improve the operation of the Association. The second letter is from the General Manager of his employer, Yukon Water Services, where he has worked for the last five years. The Manager described him as an "extremely dedicated and reliable employee" with zero incidents, which I take to be no driving or disciplinary infractions. She also said that he handles himself professionally, has a positive demeanour and is an asset to the company.

[21] On the other hand, P.O. Brunet also stated in the PSR:

> A few individuals that did not want to be named expressed that they had concerns about Mr. Kloepfer and that they did not share a positive relationship with him. At some point in time, these individuals lived in the same proximity as Mr. Kloepfer. The comments received were that he has "left people with sleepless nights (…), he is a loose cannon (...) he doesn't look at consequences (…) I try to avoid him (…)".

[22] While a teenager, the offender started working as a logger every summer until he was 18 years old.

[23] He then did four years of basic training in the military in Germany from 1975 to 1979. In 1976, the offender suffered a particularly traumatic assignment, being sent to the site of a devastating earthquake in Italy, where he was tasked with pulling out

mutilated body parts by hand, most of which had started decomposing. The images of that trauma continue to haunt him to this day.

[24] Immediately after leaving the military, the offender commenced his apprenticeship as a mason. However, three years after completing his apprenticeship, he was advised to change careers because of serious back pain. He then tried logging for a time, but the back pain only got worse. He then worked for two years as a commercial driver, but the back pain continued to be an impediment.

[25] At 30 years old, he began working as a supervisor in the construction industry.

[26] As stated, the offender moved to the Yukon in 1995, and in 1997, he purchased the trap line, which he attends every winter. Since then, he has had numerous part-time jobs over the summer seasons as a labourer, a tour guide, hunting guide, equipment operator and a professional driver. As noted, for the past five years, he has worked as a driver for Yukon Water Services during the summer months.

[27] The offender reported that he has never been diagnosed and/or treated for mental health issues and has never experienced hallucinations or paranoia. This last point is belied by the offender's reaction when he saw the "boulders" on the road just before the incident in the S-curve. He testified rather incomprehensibly that he chose not to get out of his vehicle to move the rocks because of his concern that members of the S family might be in the vicinity. This in turn was based upon a previous encounter that he had with US about a year earlier. However, there was absolutely no reason for the offender to suspect the presence of members of the S family in that vicinity at that time. Further, he declined to move the rocks even though he knew that his wife would

be following him within the next hour or two in her own vehicle and that the rocks could pose a hazard for her as well.

[28] From 2011 to 2017, the offender indicated that he and his wife owned a home on Mosquito Road, where the offences occurred. However, he also said that they had since moved from that area to distance themselves from the neighbourhood dispute.

[29] The offender reported that he has no debts and several assets, including his trap line, a cabin, an RV trailer, a 2008 Ford F450 truck, and his personal effects.

[30] There is no indication that he has any substance abuse problems.

[31] The offender continues to deny that he committed the offences for which he was found guilty. He added that the victims have "succeeded quite well at destroying his life" and that "some days they must wish that they never lied".

[32] He reported that he has had some positive and some negative experiences with the police.

[33] P.O. Brunet conducted a criminogenic risk assessment of the offender and indicated that "a low criminal history risk rating is justified". While he appears to have some stable relationships, "the relationships he shares with his family members are not on positive terms, including his only son". Further, P.O. Brunet also indicated that the offender's childhood trauma and experience in the military "appear to have caused some ongoing behavioural/emotional problems and indicate some need for assistance". Finally on this point, it is noted that while the offender appears to be well appreciated by friends and colleagues "there is a pattern of conflict with individuals when they express an alternative point of view".

[34] In P.O. Brunet's summarizing comments, he reports that the offender:

> … appears to lack some insight on the impact that his behaviour may have on others around him. It continues to be the case in the current situation where he denies any responsibility regarding the offences before the Court.
>
> Mr. Kloepfer does not welcome individuals to get between his personal goals and himself. He appears to get along quite well with individuals that share a similar view of life. However, when that similarity is not shared, there appears to be a pattern of conflict in his personal relationships. Over the years there have been patterns of discontent in Mr. Kloepfer's life that is reflected in job movements, residency issues, divorce, family dynamics and personal relationships. Over the course of his adult life, Mr. Kloepfer has made decisions that are based on his own personal interests, sometimes to the detriment of others around him.
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> …
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> Mr. Kloepfer would benefit from some counselling to address historical trauma, if he chose to do so. Risk/needs assessments suggest that Mr. Kloepfer has some significant issues with conflict resolution and cognitive distortions that should be addressed.

VICTIM IMPACT STATEMENTS

[35] Victim Impact Statements were filed by three of the victim pedestrians and by U.S., the father of T.S. and S.S. and the husband of R.S. Crown and defence counsel agreed that certain portions of some of the Victim Impact Statements were inappropriate and should be redacted. I accepted all of their recommendations in that regard. Defence counsel made some further objections about other portions of certain statements. He highlighted those statements in yellow. I agreed with some of the objections, which I

highlighted in orange, and disregarded those statements. However, I disagreed with the remaining objections and have given due consideration to those statements.

[36] Mr. Arnold filed a Victim Impact Statement on October 12, 2016. He complained about the offender acting irrationally on Mosquito Road and said that the past few years have been a "nightmare" for him. Although he stated that he has "recuperated good enough" from the physical injury, he is still struggling with the "mental wounds", trying to understand how the offender is functioning.

[37] Mr. Arnold filed a second Victim Impact Statement on August 11, 2017. For the most part, it repeated things he had said in his first Statement. However, he did complain about suffering from anxiety and being placed on antidepressant medication. On the positive side, he stated that since the offender and his wife moved away from the Mosquito Road area this past spring, a "very slow process of recuperating started".

[38] Evie Zehnder, Mr. Arnold's spouse, filed a Victim Impact Statement on August 18, 2017. Like Mr. Arnold, she questioned why the offence had occurred in the first place. Ms. Zehnder also corroborated Mr. Arnold's depression as a result of the incident.

[39] R.S. filed a Victim Impact Statement on October 12, 2016. She stated that the incident still haunts her and her family. She said that when the offender intentionally accelerated towards them it was like something out of a "scary movie". She said that she no longer feels safe on her own land. She stated that her son, T.S., is no longer able to compete at the top level of his sports because of the injuries that he sustained from the incident. R.S. continued that she is no longer comfortable leaving her property unattended, as they have livestock and board other people's horses there. She said that

she and her family have lived in a state of anxiety over the incident and have suffered emotional distress.

[40] R.S. filed a second Victim Impact Statement on August 18, 2017. It was a duplicate of her first Statement, with one additional paragraph added at the end. However, both counsel were agreed that that paragraph should be redacted, so I make no further comments about this Statement.

[41] T.S. filed a Victim Impact Statement on August 18, 2017, and read the redacted version into the record at the sentencing hearing. He stated that in the past few years he has not been able to compete at any international competitions due to the injuries that he suffered since the offender struck him with his truck. However, he has turned to coaching younger athletes and being their mentor to help them achieve their goals and pursue their dreams. He said that it is scary to think that people like the offender are just walking/driving around and it makes him think twice about walking around town or even in his own backyard.

[42] Defence counsel challenged the credibility of T.S.'s statement that he has been unable to compete in any international competitions due to the injuries. This was because there was evidence at the trial that T.S. had relative success in his sporting activities after the incident. I referred to this at para. 58 of my reasons for judgment. I reject this argument because the competitions referred to in evidence at trial were all Yukon competitions and none were international in scope.

[43] U.S. filed a Victim Impact Statement on August 23, 2017. He said he was the first person to arrive at the scene of the crime and that he will never forget the images of the victims sitting on the ground in pain, with fear and shock showing in their eyes. He

stated that he lives in constant fear of another attack and has not been able to sleep, worrying about keeping his family safe. He suggested that he had even gone to the extent of building a different road to minimize the potential for conflict.

LAW

[44] *R v. Lommerse*, 2013 YKTC 49, var'd 2013 YKCA 13, was a case of impaired driving causing bodily harm. Nevertheless, it is a comparable offence to the one of dangerous driving causing bodily harm, and I note that both have a maximum sentence of 10 years in jail.

[45] In that case, the offender had been drinking with friends and was stunt driving on a parking lot with a passenger in his ATV. The vehicle flipped over and the passenger was pinned under it, resulting in broken ribs and a punctured intestine. The victim required surgery and was hospitalized for six days, but subsequently fully recovered. The offender was youthful (age 21), pleaded guilty, had no prior record and was very remorseful. Like the case at bar, a conditional sentence was no longer available because of the operation of s. 742.1(e)(i) of the *Code*.

[46] The sentencing judge, relying upon a case from the Manitoba Court of Appeal, *R. v. Henderson*, 2012 MBCA 9, noted that a jail sentence will normally be imposed for impaired driving causing bodily harm, absent exceptional circumstances and reduced moral blameworthiness (paras. 52 and 55). The sentencing judge found that there were such circumstances in that case and he imposed a fine of $1500, a $225 fine surcharge, and a 15-month driving prohibition.

[47] The Crown successfully appealed *Lommerse*, cited above, and the Court of Appeal substituted a sentence of four months in jail, notwithstanding the apparent

absence of aggravating circumstances and the numerous mitigating factors. The Court of Appeal also implicitly accepted the sentencing judge's statement that, in general, a conviction for impaired driving causing bodily harm will result in a jail sentence of four to 10 months (para. 15).

[48] In *R. v. Bhalru*, 2003 BCCA 645, the British Columbia Court of Appeal dealt with a case of criminal negligence causing death. There, the offender had raced at high speeds through busy residential streets and a pedestrian was killed by another racer. The offender was youthful (21 years old), had no previous record and showed remorse. He received a conditional sentence of two years less a day, with strict terms of confinement, plus a three-year probation order and a five-year driving prohibition. The sentence was upheld on appeal.

[49] Finch C.J B.C., speaking for a unanimous court, emphasized the paramountcy of general deterrence and denunciation in sentencing for impaired or dangerous driving offences, at para. 47:

> ..Courts have repeatedly recognized that general deterrence and denunciation will be "paramount objectives" in sentencing for impaired or dangerous driving offences... Indeed, in *Proulx*… the Supreme Court singled out dangerous driving and impaired driving as types of offences where the inference that harsher sentences effect greater general deterrence may hold true….

[50] Finch C.J.B.C. also commented earlier on the issue of moral culpability for such offences, at para. 28:

> The level of moral culpability is determined in part by considering the intentional risks taken by the offenders, the degree of harm that they have caused, and the extent to which their conduct deviates from the acceptable standard of behaviour…

[51] A number of sentencing precedents were referred to me by counsel. A list of these precedents is attached as Appendix A to these reasons. Unfortunately, many of them are of little use because of the significant variations in the fact patterns and the combination of various offences. Having said that, I will attempt to summarize some of the cases provided with a view to establishing an appropriate range of sentence.

[52] As I suggested earlier, the cases involving dangerous driving causing bodily harm and impaired driving causing bodily harm are generally comparable. In *Lommerse*, cited above, the Yukon Court of Appeal imposed a sentence of four months in jail, notwithstanding significant mitigating factors:

- a guilty plea;
- a youthful (21-year-old) offender;
- no criminal record of any kind;
- significant remorse;
- a supportive victim who had fully recovered from his injuries;
- a low risk to reoffend; and
- driving on an empty parking lot, as opposed to a public road.

[53] In *R. v. Tom Tom*, 2014 YKTC 22, the offender was convicted of dangerous driving causing bodily harm and leaving the scene of an accident. He had intentionally struck the victim with his ATV, knocking him to the ground. The victim was subsequently attacked by a friend of the offender and sustained severe injuries, including brain trauma, fractured ribs and a broken jaw. However, it was impossible to determine the extent of the injuries caused by the offender's ATV. The Crown sought a sentence of six

months' imprisonment, plus a lengthy period of probation. There were significant mitigating factors:

- a guilty plea;
- a youthful offender (21 years old);
- a supportive family;
- out of character behaviour;
- *Gladue* factors;
- a limited criminal history and no prior jail time;
- an eventual confession to the police; and
- remorse.

The sentencing judge, after citing *Bhalru*, noted above, imposed a sentence of six months imprisonment for the dangerous driving causing bodily harm, and would have imposed an additional four months imprisonment for the offence of leaving the scene, but for the totality principle. Rather, he chose to allow the four months to be served concurrently. In addition, he imposed a probation order of 18 months, plus a DNA order under s. 487.04 of the *Code*.

[54] In *R. v. Gill*, 2010 BCCA 388, the British Columbia Court of Appeal was dealing with an offence of dangerous driving causing bodily harm and leaving the scene of an accident knowing that bodily harm had been caused[1]. The offender had reached out with a cigarette lighter to his passenger to light his cigarette, while taking his eyes away from the road. His truck crossed four lanes on the road from the southbound curb lane to the northbound curb lane and struck another vehicle virtually head on. The injuries

[1] Section 252(1.2) of the *Code*, for which the maximum sentence is 10 years, as opposed to the case at bar, where the offence is under s. 252(1.1), where the maximum sentence is five years in jail.

sustained by the female occupant of the other vehicle included soft tissue injuries, extensive and severe facial lacerations, fractures to a number of her facial bones, an injury to the musculature of one eye, fractures to her pelvis and the loss of several teeth. She also suffered a traumatic brain injury and adverse effects to her sense of taste and smell. Following the collision, the offender and his passenger got out of their vehicle and saw that the female occupant of the other vehicle was injured badly. However, neither did anything to assist the victim. Rather, they called another family member to come and pick them up from the scene. By that time the ambulance and the police had arrived, but neither the offender nor his passenger made themselves known. The sentencing judge imposed 12 months in jail for the dangerous driving causing bodily harm, plus a consecutive 18 months in jail for leaving the scene of the accident, plus a two-year driving prohibition. He was also ordered to provide a DNA sample.

[55] The Court of Appeal recognized the following mitigating factors:

- the offender was 51 years of age and was of previous good character;
- no prior criminal record;
- good driving record, first as a professional truck driver, and later as a municipal bus driver; and
- remorse.

[56] The Court also cited para. 28 of *Bhalru*, noted above, and upheld the sentence. Interestingly, the Court commented that the offender did not choose to risk killing or maiming others, but nevertheless failed in his moral and legal duty to consider the risk he placed upon others using the road, when he chose to look away from his path of travel and focus on the lighting of the cigarette. In dealing with this issue, the Court also

cited its earlier decision in *R. v.* Pawa, (1998), 106 B.C.A.C. 296 ,on the aspect of deliberateness, which I will quote because of its pertinence to the case at bar:

> 25 While Mr. Gill's conduct, as found by the sentencing judge, did not involve a choice to risk killing or maiming a pedestrian, it was no less both a moral and legal failure on his part to consider the risk he placed upon other users of the road, when he chose to look away from his path of travel and focus on the lighting of a cigarette…This issue of deliberateness was aptly considered by Mr. Justice Esson in *R. v. Pawa*, 106 B.C.A.C. 296 at para. 16:
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> > Counsel for Mr. Pawa pointed to the fact that no liquor was involved and that there was no speed. It is true that the aggravating factor of drinking and driving is absent here but to say there was no excessive speed is to avoid the real issue. The speed was normal for vehicular traffic in that area but that is not the point. The point is that the respondent was approaching a crosswalk in which he had good reason to know a pedestrian was crossing although he did not actually see her. He then made a deliberate choice to take the risk of killing or maiming the pedestrian, should that person continue into his path, and he did that in preference to doing what was his moral and legal duty which was to slow down so that he could stop before the crosswalk. This was not, as the reasons of the judge seem to imply, a situation of agony of collision. It was a question of a man deliberately courting a terrible risk to others so that he would not be detained for a few seconds on his way home. True, he did not have much time to decide. But, driving in modern traffic conditions, one rarely has much time to decide. A second or two is all that is given to us. The point is that there was no reason for him to have any question in his mind as to what was the right course. (my emphasis)

[57] In *R. v. Lane*, 2013 YKTC 2, the offender pled guilty to five *Code* offences and two offences under the Yukon *Motor Vehicles Act*. One of the *Code* offences was a charge of dangerous driving (but without causing bodily harm). The offender was seen operating a motorcycle with no taillight. When the police pursued him, he fled at high

speed throughout the streets of the town of Watson Lake, blasting through stop signs and driving on and off the roadway. The following mitigating factors were present:

- guilty pleas to seven offences;
- a youthful offender (20 years of age); and
- no prior criminal record.

The sentencing judge imposed a jail term of three months consecutive, plus a driving prohibition of one year and 12-months' probation.

[58] In *R. v. McDiarmid*, 2014 YKSC 9, the offender was found guilty, after a jury trial, of dangerous driving (but without causing bodily harm). The offender had driven his pickup truck at a high-speed towards a marked police vehicle with its emergency lights activated, nearly colliding with the vehicle. The case was before me and I imposed a sentence of four months in jail plus a driving prohibition of 12 months. I noted the following mitigating factors:

- a relatively youthful offender (32 years old at the time of the offence);
- no criminal record; and
- 62 letters of reference.

[59] In *R*. *v. Schinkel*, 2015 YKCA 2, the Court of Appeal for Yukon was dealing with an offender who had pled guilty to charges of dangerous driving causing bodily harm, impaired driving causing bodily harm, and refusal to provide a breath sample. The facts were described by the sentencing judge as "rather egregious". The offender had been driving down the Alaska Highway and in Whitehorse at high speeds of 130-140 kilometres per hour, all over the road, in the wrong lane, going through stop signs and hitting medians. At one point she hit another car and the person in that car was injured

fairly badly, suffering a severe head injury and a major concussion. The Crown sought a global sentence of six months in jail, after taking into account the significant *Gladue* factors. The sentencing judge had determined that the offender had been rehabilitated by successfully undertaking substance abuse treatment and imposed a 60-day intermittent jail sentence, concurrent, for the offences, plus a two-year period of probation and a one-year driving prohibition. The Court of Appeal upheld the sentence.

[60] In *R. v. Conville*, 2017 BCSC 971, the offender pled guilty to operating a seadoo in a dangerous manner which resulted in significant bodily harm to two victims. The victims had been passengers on an inner tube which was being towed by the seadoo. The offender was doing circles in the water and creating a whiplash effect with the inner tube. There was a suggestion that he thought it might be fun to splash people on the dock. On one loop he caused the inner tube to whip into the dock at considerable speed and the two passengers sustained significant injuries. One suffered a broken hip and a concussion and had to be hospitalized. The other suffered a broken left arm, chronic pain, post-concussion effects, post-traumatic stress disorder and an anxiety disorder. The sentencing judge felt that the circumstances of the offence were lower on the scale of moral blameworthiness than many other offences. She summarized the actions of the offender as “a relatively young man showing off, forgetting the laws of physics and overestimating his own abilities” (para. 21). There were also significant mitigating factors:

- guilty plea;
- relatively youthful offender (age 30 at the time of the accident);
- no history of criminal conduct;

- the offence was out of character for the offender who was described as "otherwise a good man"; and
- significant remorse.

The sentencing judge imposed a suspended sentence plus a one-year probation order and a two-year prohibition from operating a vessel. He was also ordered to pay a fine of $3000, plus a victim surcharge and restitution to one of the victims totalling $5549.27.

[61] In *R.* v. *Riddell*, 2011 SKQB 378, a fine of $2500, plus probation for three years and a three-year driving prohibition were imposed upon a 19-year-old offender who entered a guilty plea to impaired driving causing bodily harm. The offender had struck an open car door and caused it to slam on the victim who was placing a child into a car seat. The victim's vehicle was parked facing the wrong direction and was sufficiently far away from the curb that it required the victim to stand in the driving lane. The offender failed to stop and was arrested later at his home. He also admitted to having smoked two bowls of marijuana. The victim spent three weeks in a wheelchair after the accident and had undergone four surgeries, as well as a painful skin graft.

[62] The offender was youthful (19 years of age), entered a guilty plea, and was extremely remorseful. He had no criminal record and it appeared to be an isolated incident. The offender was described as otherwise a young man of good character and social responsibility. Most significantly, there was expert psychiatric evidence that the offender was at risk of committing suicide if he was incarcerated.

[63] The Court noted that a conditional sentence was no longer available because of amendments to s. 742.1 of the *Code*. The Court imposed a fine of $2500, plus a

probation order for three years. The offender was also prohibited from driving for a period of three years and required to pay a victim fine surcharge.

[64] The cases involving leaving the scene of an accident are summarized as follows.

[65] In *R. v. Lisi*, 2001 BCCA 559, the British Columbia Court of Appeal was sentencing an offender for leaving the scene of an accident where a seriously injured pedestrian had been killed. There is little in the case report about the facts or the circumstances of the offender. The sentence of three months' imprisonment and a 12-month driving prohibition was upheld and the Court emphasized the importance of deterrence as a paramount sentencing principle.

[66] In *R. v. Naidu*, 2017 BCSC 671, the Supreme Court of British Columbia was dealing with a failure to remain at the scene of an accident where the 53-year-old offender had truck struck a pedestrian, causing a fractured skull, internal bleeding and abrasions. The victim had been permanently disabled as result of the accident. However, there was no suggestion that the offender was responsible for the accident, as the victim had been dressed in black clothing and it was dark at the scene of the accident. The Court noted the following mitigating factors:

- guilty plea;
- offender not at fault for the accident;
- no prior criminal record;
- offender previously gainfully employed; and
- remorse.

The Court imposed a sentence of 70 days in jail, to be served intermittently on weekends, plus 12 months' probation and a nine month driving prohibition.

[67] In *R*. *v. Peragine,* 2012 BCPC 355, the British Columbia Provincial Court was dealing with a charge leaving the scene of an accident knowing that bodily harm or death was caused, contrary to s. 252 (1.3)(b) of the *Code*, for which the maximum penalty is life imprisonment. The offender was driving down a main arterial road, heard a loud bang, but continued driving. His passenger looked out the rear window and saw someone lying on the road. The offender also looked back and saw a person lying on the road with a second individual going forward to assist. The offender then pulled into a parking lot and observed damage to the front end of his vehicle, as well as a bag lodged in the grill. He removed the bag and placed it in the trunk and told his passenger not to tell anyone about the accident. When questioned by the police a few weeks after the accident, he denied any involvement and lied about the cause of the damage to his vehicle.

[68] Almost two years after the accident, the offender was contacted by an undercover officer and admitted his involvement in the accident. There was no evidence that he had been at fault for the accident. However, the victim had died from her injuries.

[69] The Court noted that the paramount principles in sentencing for such offences are denunciation and deterrence (para. 29). The Court also noted that the range of sentence is incarceration between three and 18 months (para. 42). The court imposed a jail sentence of five months, plus a two-year driving prohibition and a DNA order. The Court noted that the following were mitigating circumstances:

- the offender was not at fault for the accident;
- guilty plea;

- no criminal record (although there was a lengthy driving record);
- the actions were out of character; and
- the offender expressed remorse.

[70] In *R. v. Eichler*, 2012 ONCJ 480, the offender was being sentenced for leaving the scene of an accident knowing that the victim had suffered bodily harm, contrary to s. 252(1.2) of the *Code*. He struck a pedestrian with his vehicle, as pedestrian was crossing the street, and fled the scene. The victim was significantly disabled by the accident and suffered injuries more serious than in the case at bar. The Court imposed a six-month jail sentence, plus probation for 12 months and a driving prohibition of two years. This was notwithstanding mitigating factors, which included:

- a guilty plea;
- no criminal record;
- a youthful offender (20 years old);
- a positive PSR; and
- extreme remorse.

The court also made the following comment regarding the obligation to stop a motor vehicle if it is involved in a collision:

> 45 Driving is a privilege and all of the obligations and responsibilities associated with that privilege must be respected. There is a statutory obligation to stop a motor vehicle if it is involved in a collision. Even more so, there is a moral obligation where an accident occurs and serious injuries are obvious on the individuals involved in such an accident to stop and assist each other with specific regard to those in clear need such as Mr. Medeiros in this case. Mr. Eichler not only ignored his legal obligation, he also failed to "comport with the standards of humanity and decency" by leaving the scene. A period of imprisonment in a traditional setting is called for here.

ANALYSIS

[71] I conclude that the offender must serve a jail sentence in order to satisfy the paramount principles of denunciation and deterrence in this case. I am also satisfied that the sentence the Crown is seeking is entirely appropriate. Accordingly, I sentence the accused to five months in jail, plus a two-year driving prohibition. I do so for the following reasons.

[72] Firstly, jail is normally imposed as the sentence for impaired driving or dangerous driving causing bodily harm, absent exceptional circumstances. There are no such circumstances in the case at bar. While the injuries to Mr. Arnold and T.S. are less serious than many of the other cases referred to, that is the result of sheer luck, rather than any actions by the offender.

[73] Having said that, the injury to T.S.'s left shoulder was significant enough to constitute bodily harm, notwithstanding the absence of broken bones or medical treatment. T.S. testified that the pain lasted for about the following year and a half and impacted his regular activities to the extent that he could not lift things like he normally could and did not have a full range of mobility. Even though he did not return for further medical treatment, as of the time of the trial, he has stated in his Victim Impact Statement, that he has been prevented from competing in international sporting events, which is a great shame, given his history of successful competitions, particularly in snowboarding and motocross dirt bike riding.

[74] Secondly, there are few mitigating circumstances in this case. As stated, I recognize that the injuries incurred were less serious than those in many other cases, but I do not think that the offender can be credited for that. I also recognize that the

offender has suffered trauma as a child and as a young adult in the Army, which can potentially help to explain the offender's present psychological state. However, it is up to the offender to seek out counselling to resolve that trauma if he is continuing to suffer adverse effects from it. There is no evidence that he has taken any such steps to date. I also recognize: that P.O. Brunet assessed the offender as having a low risk to reoffend; that the PSR and character references generally paint a positive picture of the offender's character; and that there is an absence of any previous driving record. However, these mitigating factors do not make this a case where there are exceptional circumstances; nor do they reduce the level of the offender's moral culpability.

[75] Thirdly, there is little or nothing to explain the irrational behaviour of the offender in reacting the way he did when he noticed the four pedestrian victims across the road before him in the S-turn. The fact that he accelerated his diesel truck when he noticed the pedestrians is not inconsistent with his previous behaviour when encountering members of the S. family on Mosquito Road. As I noted in my reasons for judgment, at para. 59, T.S. testified at trial as follows:

> Every time we drive past him on the road, because we share an access road with each other, and any time we pass him, every time he speeds up, gives us this weird glare and just drives off. And we have multiple accounts he had spat on our car or our truck, spat on our pickup truck…

Further, this irrational reaction to the sighting of the pedestrians and the two dogs placed them all at considerable risk of death or serious bodily harm. While I found in my reasons that he did not intentionally collide with either T.S. or Mr. Arnold, that does little to reduce his moral culpability for intentionally accelerating his pickup truck towards the group. Unlike Mr. Gill, whose case was cited above, and who did not choose to risk

killing or maiming a pedestrian, the offender in the case at bar did make such a deliberate choice, when it was his moral and legal duty to slow down or even stop before passing by the group. By accelerating, he courted a terrible risk to them all. In this regard, I conclude that his level of moral culpability is very high, considering the intentional risk he took, the degree of harm that he caused, and the extent to which his conduct deviated from an acceptable standard of behaviour.

[76] Fourthly, to add insult to injury, after he had to have known of the collision with T.S., who was struck with the driver's side rear-view mirror of the diesel truck, and the collision with Mr. Arnold, as the offender clearly heard a loud banging sound when Mr. Arnold's walking stick with the metal end struck the side of the offender's truck, he failed to stop to determine whether anyone had been injured. Rather, he accelerated away from the scene of the accidents. And when he did arrive home and call the police, it was only to provide the false report of the pedestrians having committed mischief by placing boulders on the road. He made no mention of the potential that any of the pedestrians might have been injured during the incident.

[77] Thus, in my view, the two offences of dangerous driving alone justify a five-month jail sentence, leaving aside the additional offences of leaving the scene of the accidents. Ordinarily, those offences would attract further consecutive jail time. However, as the Crown has not sought such additional time, I will structure the sentence as follows:

- for the offence of dangerous driving causing bodily harm against T.S. - five months in jail, plus a two-year driving prohibition;
- for the offence of dangerous driving involving Mr. Arnold - four months in jail, plus a two-year driving prohibition, concurrent;

- for the offence of leaving the scene of the accident involving T.S. - three months in jail, concurrent; and
- for the offence of leaving the scene of the accident involving Mr. Arnold - three months in jail, concurrent.

[78] For the reasons indicated by the court in *R v. Tom Tom*, cited above, at para. 31 of that decision, I conclude that it is also appropriate for the offender to provide a DNA sample for purposes of analysis and recording pursuant to s. 487.04 of the *Code*.

[79] The Crown also submitted that a ten-year firearms prohibition was mandatory in this case pursuant to s. 109(1)(a) of the *Code*, because the offence of dangerous driving causing bodily harm is an offence "in the commission of which violence against the person was used threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more". For the reasons given by Cozens C.J., in *Lommerse*, cited above, at paras. 92 through 95 of that decision, which were implicitly accepted by the Court of Appeal of Yukon, I disagree. As Cozens C.J. put it, there is absolutely no rational connection between the offences committed by the offender and the imposition of a firearms prohibition, and I decline to make the order sought.

[80] The offender shall also pay the appropriate victim surcharges required by s. 737 of the *Code*. He has thirty (30) days to pay.

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GOWER J.

APPENDIX A

R. v. Schinkel, 2015 YKCA 2

R. v. Conville, 2017 BCSC 971

R. v. Ridell, 2011 SKQB 378

R. v. Tom Tom, 2014 YKTC 22

R. v. Gill, 2010 BCCA 388

R. v. Naidu, 2017 BCSC 671

R. v. Peragine, 2012 BCPC 355

R. v. Lisi, 2001 BCCA 559

R. v. Eichler, 2012 ONCJ 480

R. v. Lane, 2013 YKTC 2

R. v. McDiarmid, 2014 YKSC 9