

Citation: *R. v. Heathcliff*, 2015 YKTC 9

Date: 20150123  
Docket: 13-00511  
13-00511A  
Registry: Whitehorse

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

REGINA

v.

NATHANIAL J. HEATHCLIFF

Appearances:  
Leo Lane  
Melissa D. Atkinson

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR SENTENCING**

[1] LUTHER T.C.J. (Oral): What this case tells us, more than most cases in the criminal justice system, is that sentencing is very much a human process. It is not a matter of taking a look at 10 or 12 cases that have been decided here and in B.C. and plugging some numbers and factors into a computer and coming up with what the proper sentence is.

[2] Rather, each case is individual. And this case is built on a tragedy which need never have occurred. We are dealing with an offence under s. 255(2.1) of the *Criminal Code*. That is, in common parlance, a breathalyzer offence causing an accident resulting in bodily harm to Linda Miller, this having occurred on October 18, 2013.

[3] The Crown attorney read into the Court the facts of this case, including the details of the accident and how it happened on the Alaska Highway. The victim, Linda Miller, was heading southbound. She was near the Kopper King and all of a sudden there were headlights in her lane and a head-on collision caused by Mr. Nathaniel Heathcliff, the offender, who was drinking to excess and, for reasons hard to fathom, had got behind the wheel of his motor vehicle and drove.

[4] Over 40 years ago when I was in law school, I wrote a paper on drinking and driving and the initiatives that were taken in places like England and Arizona and parts of Canada. A lot of it had to do with public education.

[5] Over four decades later, I have seen improvements in public education brought about by such organizations as Mothers Against Drunk Driving and also by school initiatives. People in school, sometimes as early as the fifth and sixth grade, have police officers come in or other people come in and tell them about drinking and driving. Again in high school they probably have another visit from the police or some other outside visitor to talk about the evils associated with drinking and driving.

[6] The writers of these papers back in the '70s, myself included, optimistically figured that with this great emphasis of public education that the incidents of drinking and driving would go down considerably to the point that it would rarely occur. Sadly, we were wrong.

[7] The photographic evidence given by the Crown has shown that this was a very serious accident. Just looking at the photos, I am surprised that the injuries were not more substantial and, indeed, that there was not a death occurring.

[8] The Crown further told me about the nature of the injuries suffered by the victim, Linda Miller, and she, of course, told us about that when she so eloquently spoke to the Court.

[9] In this thoughtful and thorough Victim Impact Statement she outlined the injuries, including a two and a half inch wound to the back left side of her head, badly bruised and swollen left side of her body with lacerations. She was in hospital for two and a half days, mostly in the intensive care unit.

[10] Even 15 months after the offence, she constantly suffers from headaches, back and rib pain and resultant mobility concerns, plus vertigo and some insomnia. Ms. Miller has been diagnosed with post-concussion syndrome. She is on pain medication and regularly attends for treatment.

[11] Her emotional injuries are considerable and remain to this day. She is no longer the happy, healthy and productive person she once was. There is a very real issue as to whether she will be able to become pregnant.

[12] This case is not that much dissimilar to a very recent case from the Yukon Court of Appeal, *R. v. Schinkel*, 2015 YKCA 2. At paragraph 7 of that case, which was only decided by the Yukon Court of Appeal on January 5, 2015, they talked about the victim in that case. The Court of Appeal wrote:

As the Crown points out, the offences had a significant effect on the young victim, a 16-year-old woman, who suffered serious physical and emotional injuries, as well as property and income loss. With respect to the physical injuries, she sustained a severe head injury, which was a flap laceration that needed 15 stitches and a major concussion, whiplash

and bruises. With regard to the emotional injuries, the victim suffered, amongst other things, shock, distress, fear, aggravation, anxiety, and depression. The victim continues to suffer from recurring headaches that preclude normal activities and which require three types of medication. Finally, her family vehicle was "totalled" in the collision.

[13] Some remarkable similarities.

[14] The offender blew 140 and 130, which in some eyes is a low reading but not in my eyes. Statutorily, if a person blows 160 or more, twice the legal limit, that is always taken as an aggravating factor; 140 and 130 are perhaps considered mid-range.

[15] Having taught at Memorial University of Newfoundland and having been at a student social night where we brought in two police forces in St. John's Newfoundland, that is the Royal Newfoundland Constabulary and the RCMP, to conduct breathalyzer tests on the students voluntarily -- these people were just at a party, they were not about to go driving, just to show the students what the effects of alcohol were -- some of the people who blew even as low as 110 and 120 were grossly impaired. And certainly Mr. Heathcliff at 130 and 140 was certainly impaired, both in terms of his skills to drive the motor vehicle and also in his judgment.

[16] What is a little bit different in this case is that Mr. Heathcliff owned up to this right away. This is rare, unfortunately, in the criminal justice system. Most people try to avoid the inevitable and will make excuses and will make denials, and so on. Mr. Heathcliff owned up to this right away and kept inquiring about the state of the victim. Of his own accord, he wrote a letter of apology. Other mitigating factors, of course,

include the plea of guilty and the compliance with a strict recognizance over the course of 15 months or so.

[17] However, the Supreme Court of Canada, the Yukon Court of Appeal, the B.C. Court of Appeal, and every court in the land have held that when it comes to drinking and driving, the main principles are denunciation and deterrence. And by "deterrence", we mean discouraging not only this offender but other persons from committing the offence of drinking and driving.

[18] Of course, we do not lose sight of the other principles set out in the *Criminal Code*, but these are the primary ones for sure.

[19] Madam Justice Ryan of the B.C. Court of Appeal in *R. v. Johnson* (1996), 112 C.C.C. (3d) 225 at para. 30 had this to say about drinking and driving:

Drinking driving causing death or bodily harm offences are senseless crimes because they are so easily avoided and at the same time they are so easily committed by ordinary citizens. They are unlike any other crimes in the sense that nothing much can be offered to justify driving drunk. Crimes of theft may be motivated by poverty, crimes of assault may be motivated by fear, but what excuse can be offered for driving drunk, except that alcohol allowed the offender to lose all sense of judgment? It is for this reason that communities rightfully express outrage when victims are killed or injured as a result of such conduct. It is for this reason that both deterrence and denunciation are legitimate objectives to pursue for this type of offence. ...

[20] The impact on the victim is well known to all of us in the room and no doubt to many more as well. It is a substantial impact to date and may continue to be of some significance in the future. We all hope that it is not. But at this point, it is merely a hope.

[21] I indicated before that I was impressed with the detail and the organization to the breakdown of losses and costs for Linda Miller.

[22] Sentencing Mr. Heathcliff is a little bit more difficult than sentencing a person who might be 15 or 20 years older and has eight or 10 priors for drinking and driving. That case is easy because we just sentence that person to 10, 15, or 20 years in jail. But with Mr. Heathcliff, he was only 22 years old at the time of the offence, he is from a First Nation in Dawson, and he has no prior record. His father told us that he was no trouble growing up. That is what makes this case difficult and that is why I said earlier that sentencing is very much a human process.

[23] But having said that, we do have certain strong guidelines from the Yukon Court of Appeal that, in cases of this nature, we really should be starting at four months and working up.

[24] I think the submission by the Crown and defence of five months in jail is adequate but that may not be the most important part of this case. The Court will impose a jail sentence of five months, recognizing that he has been under virtual house arrest and serious restrictions already for 15 months. If that had not been the case, the sentence would be closer to the one-year range.

[25] The offender has already been prohibited from driving a motor vehicle for a year and three months by the bail conditions. The Crown is seeking a further year. I think that request is reasonable, perhaps even a little bit on the low side, but I will address that a bit later in my judgment.

[26] As to the restitution order, again, it is really unfortunate that the Millers had a glitch in their insurance coverage. I understand what that is all about. My wife has a business and she gets billed once a year. It is for a commercial operation. Every now and then there are reminders. My daughter who runs the business will usually take care of that in due course, but I understand how these things can slip through unattended. It is really unfortunate in this case that the victim did not have insurance coverage at the time.

[27] Quite clearly, an aggravating factor in this case is the fact that Mr. Heathcliff also did not have insurance at the time of this accident.

[28] The Court has no hesitation whatsoever in making a restitution order for the losses that have been clearly demonstrated and set out with precision by Linda Miller. Under s. 738 of the *Criminal Code*, the Court will order a restitution order in the amount of \$101,008.

[29] What this means is that Mr. Heathcliff, who is of limited ability to pay, is not required to come up with all of this money in a short period of time. Rather, what happens is that this amount will be filed as a judgment in the Supreme Court of the Yukon and will remain on the books for a minimum of 10 years, and I believe that can be extended.

[30] So like I said, in explaining to Mr. Heathcliff's father when he addressed the Court, this does not go away, and nor should it. Ms. Miller has suffered a great deal and, at the very least, should recover her financial losses. There is nothing I can do in the criminal court about the pain and suffering but -- and, in terms of any future losses,

that can be covered by a civil suit; and you are not precluded -- that is, you are not forbidden -- from seeking out further damages in a civil suit against Mr. Heathcliff should the pain, suffering, and lack of being able to be employed continue.

[31] I want the thrust of any financial obligations on the part of Mr. Heathcliff to go clearly and only towards Linda Miller. Thus, I am not going to impose what we call in the law a victim surcharge. Ms. Miller is already a very hurt victim and the priority is to her rather than an overall victims' fund. Therefore, there will be no victim surcharge ordered.

[32] Now, while the Crown and defence did not in any significant way talk about probation, I am going to impose a probation order for one reason only, and that has to do with encouraging Mr. Heathcliff to make substantial efforts to start paying back this restitution.

[33] The probation order will be in effect for the full three years, but the terms will only be three:

1. Keep the peace and be of good behaviour;
2. Report to the probation officer as required, including within 48 hours of your release from custody;

[34] Here is really the important one. While he is going to be prohibited from operating a motor vehicle anywhere in Canada for one year, I want to make sure that, at least for the length of probation, that he never operates a motor vehicle again until he is properly insured. The term is very specific and that is:



3. You are not to operate a motor vehicle anywhere in Canada unless and until you have a valid licence, registration, and insurance, and that you have paid a minimum of \$15,000 in restitution to the Court in favour of Linda Miller.

[35] While the s. 259 prohibition order is for one year, nonetheless, the probation order prohibits you from driving for up to three years unless you have satisfied these conditions: one, the valid licence, registration, and insurance; and secondly, that you have paid a minimum of \$15,000 to the Court in favour of Linda Miller.

[36] Mr. Heathcliff, would you stand, please.

[37] It is really unfortunate that you made that bad decision. It has cost you and, more importantly, it has cost Ms. Miller greatly. Hopefully she can recover to the point that she can resume her work and get to the point medically that she can be healthy enough to attempt to conceive a child.

[38] With regard to yourself, you are going to be going to jail for a period of five months. You strike me as the type who is quite capable of behaving yourself. You certainly did very well while you were on your bail bond and I am sure you will do well on the inside. You have good support from your family and that should be greater impetus for you to do well while you are on the inside. Avail of any programs that they have and in all likelihood you will get released somewhat earlier than the five months that I am imposing today.

[39] Then there is, in my view, not only a legal but a moral obligation on yourself to make every effort to obtain lawful and gainful employment to not only support yourself and your child but to get going on the road to satisfying this substantial judgment which will be filed in the Supreme Court.

[40] Are there any questions then, Ms. Atkinson?

[41] MS. ATKINSON: No.

[42] THE COURT: And is there anything from the Crown?

[43] MR. LANE: I wonder, Your Honour -- my concern that the last condition of probation is -- I wonder if instead the language used by Your Honour, if Your Honour would consider mirroring the language in the driving prohibition, which says you cannot operate a motor vehicle on any road, highway, et cetera, or other public place.

[44] And the reason I say that is I do not want it to interfere unduly with his ability to get a job, say, at a remote worksite or a private worksite, like a mine because --

[45] THE COURT: Okay.

[46] MR. LANE: -- I know that is an exemption that may be allowed. And if he cannot get a job then he cannot make any payments towards Ms. Miller.

[47] THE COURT: Yes, point well taken.

[48] The probation term then, Madam Clerk, will be changed. He is ordered not to operate a motor vehicle on any street, road, highway, or other public place for that period of three years unless and until he has a valid licence, registration, and insurance,

and has paid a minimum of \$15,000 in restitution to the Court in favour of the victim, Linda Miller.

[49] THE CLERK: Thank you, Your Honour.

[50] THE COURT: Okay.

[51] THE CLERK: And on any counts remaining?

[52] MR. LANE: Stay of proceedings.

[53] THE COURT: And again, I would like to thank both families and both support networks for being here. It is important. This is a tragedy that affects both sides but, like I said before, it affects the victim, Linda Miller, a lot more.

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LUTHER T.C.J.