

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

Delivered:	12/11/09
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**REGINA -V-ANDREW McGLINCHEY**  
**BILL No 09/080207**

**Grant J**

1. You have pleaded guilty to:

Count 1: Careless Driving with excess alcohol causing the death of David Leo Brennan then aged 20 years

Count 2: Doing an act tending to pervert the course of justice.

Count 3: Failing to report

Count 4: Failing to stop

Count 5: Failing to remain

Count 6: Driving with no insurance

2. These offences occurred on the 3rd of April 2009, after the relevant commencement dates of the Criminal Justice (N I) Order 2008. The offence at Count 1 is both a serious offence and a specified offence as adumbrated in schedules 1 and 2 of the Order.

3. I am obliged to consider if there is a significant risk of serious harm occasioned by you committing further violent or sexual offences as included within schedules 1 and 2 of the 2008 Order. I directed and have considered a pre-sentence and I am satisfied from the opinion expressed in that report and the facts as outlined by prosecution counsel that you do not present a significant risk of serious harm to the public from future offending.

4. I am obliged to consider the seriousness of the offences and the combined gravity of those offences and determine under Article 5 (2) whether only a custodial sentence can be justified for these offences. I consider that the gravity of the offences committed and the combination of those offences is so serious that only a custodial sentence can be justified. In these circumstances I intend to pass a

sentence of imprisonment for a determinate period under the provisions of Article 8 of the Criminal Justice (NI) Order 2008, to which I will refer as the "2008 Order".

5. On the third of April 2009 you were the driver of a Peugeot motor vehicle on the Madam's Bank Road, Londonderry. You had been drinking earlier that evening. You stopped beside Adam Deery who described you as looking hyper, talking really fast and revving your car. You asked him and his girlfriend if they wanted to go for a run but they declined and instead got into the car of Darren Duddy who moved off. You followed behind. Mr Duddy described you as drunk in that you were shouting and slurring your words. You took a can of beer from a friend and finished it in two or three gulps. Mr Duddy described that he moved off and he noticed you were following behind him and gaining on him at speed. He passed a male standing by the bus stop and a short time later saw this male stepping across the road and being hit by your vehicle. You did not stop driving but started swerving all over the road. The male was on the windscreen of the car and fell off the side of the car some distance down the road. Mr Duddy drove round a roundabout and returned to the scene. As he saw you leave the scene he noted that your windscreen was completely shattered and opaque.

6. It is clear from the photographs, statements and police sketch map that the deceased, Mr Brennan, was carried a considerable distance up the road on the front of your vehicle before being thrown off close to the pavement on the wrong side of the road.

7. Later that morning a burned out vehicle was found at the Carnmoney Road County Londonderry close to the Faughan Bridge. All windows were missing as were the number plates and all model and make badges. This was your car driven by you and used in the course of this incident.

8. When arrested and cautioned later that morning you denied any involvement in the incident. Subsequently, in interview, which took place on the afternoon of the 3rd April you admitted your involvement but claimed that the deceased had run out in front of you giving you no chance to avoid him. It is clear from the independent witnesses that the deceased did not run out into your path but walked out onto the road from the bus stop. I am satisfied that the deceased did not run out and that given the layout of the footpath and roadway you should have had ample time to see him, warn him by blowing your horn or take evasive action so as to avoid this collision.

9. In interview you admitted that you left the scene, that you had no insurance and only a provisional licence. You admitted setting fire to the vehicle. You said that you left the scene and destroyed the vehicle because you panicked. I am satisfied that panic alone was not the explanation for your actions on this occasion. I am satisfied that your deliberate removal of all identification from his vehicle and your setting it on fire had as its primary purpose and intention your escape from detection by the police.

10. A breath test was administered which gave a reading of 57 microgrammes of alcohol per hundred millilitres of breath. This reading shows that you were significantly under the influence of alcohol. Your reading was two thirds in excess of the legal limit.

11. It is clear that the deceased Mr Brennan had consumed a considerable amount of alcohol and must have been under the influence of alcohol at the time of his death. It is also clear that Mr Brennan should have been aware of the presence of your vehicle on the road and was at least unwise to step out onto the road.

12 You were first arraigned on the 4 September 2009 and pleaded guilty to all counts on the indictment other than count 2. On the 23rd of September 2009 you applied to be re-arraigned and pleaded guilty to this remaining count. I was advised by both counsel that this re-arraignment occurred following discussions between counsel with a view to clarifying certain matters. Counsel for the prosecution informed me that he considers that the approach adopted by the defence on this occasion in relation to this single count was perfectly reasonable and accepts that I should approach the defendant's pleas on the basis that they were entered at the first opportunity. I consider this to be a proper and appropriate concession by Crown counsel and accordingly I propose to allow you full credit for your guilty pleas.

13 I must now consider the appropriate sentence to be imposed. Before I do so I acknowledge the great loss suffered by the Brennan family. Their grief at the loss of a son in such dreadful circumstances will remain acute for a very long time, probably for much of their lives. Their loss is an irreplaceable loss. Your Counsel, on your behalf, expressed your sorrow, regret and remorse at what you have done and the injury that you have caused. I note that you have expressed such remorse before and elsewhere. You will have to carry a considerable burden for the rest of your life. I mention this at this stage in the hope that this will help the family to cope with their loss. I also recognise that any sentence imposed by me will not bring Mr. Brennan back to his relatives and will do little to repair or remove the upset and hurt suffered by them.

#### SENTENCING CONSIDERATIONS.

14 The Court of Appeal in Northern Ireland set out the considerations to be taken into account by courts in sentencing in death by driving cases. In R -v- Thomas Anthony McCartney [2007] NICA 41 the Court of Appeal cited with approval the analysis of principle as set out by the then Lord Chief Justice Lord Carswell in Attorney General's references 2, 6, 7 and 8 of 2003 and the wisdom of adopting the approach advocated by the Sentencing Advisory Panel which was adopted in England and Wales by the Court of Appeal in R-v-Cooksley. These

principles have been repeated and approved more recently by the Court of Appeal in AG Reference 2 of 2008 (McGinn) NICA 2008. At paragraph 20 of its judgment in McCartney the Court of Appeal set out a substantial portion of the judgment of Carswell LCJ which adumbrated both the aggravating and mitigating factors to be considered in such cases. I set out this portion below:

[20] An extensive analysis of sentencing for this type of offence is to be found in the judgment of this court Attorney General's References 2, 6, 7, and 8 of 2003. The court followed the approach advocated by the Sentencing Advisory Panel and adopted in England & Wales by the Court of Appeal in R v Cooksley. At paragraph [11] *et seq.* Carswell LCJ set out the guidelines to be followed in cases of dangerous driving causing death or grievous bodily injury: -

[11] "The Sentencing Advisory Panel propounded a series of possible aggravating factors, which were adopted by the Court of Appeal in R v Cooksley, with the caveat that they do not constitute an exhaustive list. The court also pointed out that they cannot be approached in a mechanical manner, since there can be cases with three or more aggravating factors which are not as serious as a case providing a bad example of one factor. The list is as follows:

*'Highly culpable standard of driving at time of offence*

(a) the consumption of drugs (including legal medication known to cause drowsiness) or of alcohol, ranging from a couple of drinks to a 'motorised pub crawl' (b) greatly excessive speed; racing; competitive driving against another vehicle; 'showing off' (c) disregard of warnings from fellow passengers (d) a prolonged, persistent and deliberate course of very bad driving (e) aggressive driving (such as driving much too close to the vehicle in front, persistent and inappropriate attempts to overtake, or cutting in after overtaking) (f) driving while the driver's attention is avoidably distracted, e.g. by reading or by use of a mobile phone (especially if hand-held) (g) driving when knowingly suffering from a medical condition which significantly impairs the offender's driving skills. (h) driving when knowingly deprived of adequate sleep or rest (i) driving a poorly maintained or dangerously loaded vehicle, especially where this has been motivated by commercial concerns

*Driving habitually below acceptable standard*

(j) other offences committed at the same time, such as driving without ever having held a licence; driving while disqualified; driving without insurance; driving while a learner without supervision; taking a vehicle without consent; driving a stolen vehicle (k) previous convictions for motoring offences, particularly offences which involve bad driving or the consumption of excessive alcohol before driving

*Outcome of offence*

(l) more than one person killed as a result of the offence (especially if the offender knowingly put more than one person at risk or the occurrence of multiple deaths was foreseeable) (m) serious injury to one or more victims, in addition to the death(s)

*Irresponsible behaviour at time offence*

(n) behaviour at the time of the offence, such as failing to stop, falsely claiming that one of the victims was responsible for the crash, or trying to throw the victim off the bonnet of the car by swerving in order to escape (o) causing death in the course of dangerous driving in an attempt to avoid detection or apprehension (p) offence committed while the offender was on bail.'

We would add one specific offence to those set out in paragraph (j) that of taking and driving away a vehicle, commonly termed joy-riding, which is unfortunately prevalent and a definite aggravating factor.

[12] The list of aggravating factors was followed by one of mitigating factors, as follows:

(a) a good driving record; (b) the absence of previous convictions; (c) a timely plea of guilty; (d) genuine shock or remorse (which may be greater if the victim is either a close relation or a friend); (e) the offender's age (but only in cases where lack of driving experience has contributed to the commission of the offence), and (f) the fact that the offender has also been seriously injured as a result of the accident caused by the dangerous driving.

Again, although this list represents the mitigating factors most commonly to be taken into account, it is possible that there may be others in particular cases.

[13] The Court of Appeal went on in *R v Cooksley* to set out sentencing guidelines, stating firmly that in these cases a custodial sentence will generally be necessary and emphasising that in order to avoid that there have to be exceptional circumstances.

It ranked the cases in four categories:

- (a) Cases with no aggravating circumstances, where the starting point should be a short custodial sentence of perhaps 12 to 18 months, with some reduction for a plea of guilty.
- (b) Cases of intermediate culpability, which may involve an aggravating factor such as a habitually unacceptable standard of driving or the death of more than one victim. The starting point in a contested case in this category is two to three years, progressing up to five years as the level of culpability increases.
- (c) Cases of higher culpability, where the standard of the offender's driving is more highly dangerous, as shown by such features as the presence of two or more of the aggravating factors. A starting point of four to five years will be appropriate in cases of this type.
- (d) Cases of most serious culpability, which might be marked by the presence of three or more aggravating factors (though an exceptionally bad example of a single factor could be sufficient to place an offence in this category). A starting point of six years was propounded for this category.

The Court of Appeal added in paragraph 32 of its judgment in *R v Cooksley* a warning that in the higher starting points a sentencer must be careful, having invoked aggravating factors to place the sentence in a higher category, not to add to the sentence because of the same factors.

[14] We are conscious that we stated in this court in R v Sloan [1998] NI 58 at 65 that it is inadvisable, indeed impossible, to seek to formulate guidelines expressed in terms of years. When that view was expressed the court did not have the benefit of a carefully thought out scheme of sentencing in these difficult cases, such as that constructed by the Panel and the Court of Appeal in R v Cooksley. We consider that it should be adopted and followed in our courts, and that these guidelines should be regarded as having superseded those contained in R v Boswell [1984] 3 All ER 353. We would, however, remind sentencers of the importance of looking at the individual features of each case and the need to observe a degree of flexibility rather than adopting a mechanistic type of approach. If they bear this in mind, they will in our view be enabled to maintain a desirable level of consistency between cases, while doing justice in the infinite variety of circumstances with which they have to deal."

15 These guidelines were revised in R v Richardson and the revised guidelines were approved by the Northern Ireland Court of appeal in R v McCartney. In the following terms:

- (i) No aggravating circumstances - twelve months to two years' imprisonment;
- (ii) Intermediate culpability - two to four and a half years' imprisonment;
- (iii) Higher culpability - four and a half to seven years' imprisonment;
- (iv) Most serious culpability - seven to fourteen years' imprisonment."

I apply these tariffs.

16 I remind myself that the case before me is one of causing death by careless driving with excess alcohol rather than causing death by dangerous driving. Parliament has however recognized the seriousness of such offences and has imposed a maximum penalty of 14 years imprisonment. As was acknowledged in The Attorney General's Reference Number 4 of 2006 (Kevin McManus) 2006 NICA 39 it is appropriate to apply the principles set out above with appropriate adjustments taking into account the nature of the driving which is the subject of the charge.

17 On the evidence before me it is clear that your driving on this occasion was of a seriously poor and careless standard but was not dangerous driving.

18 I have carefully considered what if any aggravating factors inform me as to the culpability of the defendant in this case: Four of the aggravating factors listed in the authorities are present in this case:

- a) the consumption of alcohol,
- b) driving without insurance
- c) you have an extensive criminal record given your age of 21 years and in particular previous convictions for motoring offences which reflect a wholly irresponsible, criminal approach to motor vehicles.
- (d) Despite the fact that you must have been aware that you had collided with Mr Brennan, carried him some distance on your car bonnet and that he had fallen from it on to the ground, with the likelihood that he had suffered serious injuries you did not stop but made your escape from the scene.

20 I must, take into account when considering the totality of the appropriate sentence to be imposed the fact that you abandoned and destroyed this vehicle in an attempt to avoid detection and escape responsibility for what you had done. I leave this out of account at this stage as an aggravating factor in my assessment of the appropriate sentence to be imposed under Count 1. I will, however, in determining whether it is appropriate to impose a consecutive or concurrent sentence under Count 2, take this into account.

21 In relation Count 2 this is a serious offence as it is clear that you took significant and calculated steps to avoid detection by destroying a substantial and important source of evidence. It is well settled principle that offences of this kind should in general attract a custodial sentence. This is to reflect the seriousness of such offences and to act as a deterrent to others who may be tempted to act in the same way.

22. Apart from your timely plea and the remorse which you have expressed and which I accept as genuine there are no mitigating factors that I can properly take into account. Although you are 21 years of age this does not have any bearing upon your experience and capability or competence as a driver.

23. I have obtained a pre-sentence report and I have considered and taken into account the contents of the report. I have taken into account the very helpful and eloquent submissions made on your behalf by your counsel, Miss McDermott QC.

24. Having regard to the sentencing guidelines and considering them in the context of a case of careless driving causing death it is clear that this type of offence is generally to be regarded as so serious that an immediate custodial sentence is justified. In accordance with the revised starting points set out in Cooksley and



adopted by the Court of Appeal in McCartney I take the view that the degree of culpability reflected in this case straddles the second and third categories of culpability. I remind myself that these are guidelines and cases will not necessarily fall neatly within the parameters of each category. I also remind myself that guidelines are provided by the Court of Appeal to assist the sentencer and not to take away the sentencers judgment and discretion. In both McCartney and A G's Reference 2003 and more recently in McGinn the Court of Appeal recognised that this is a difficult area where a wide range of circumstance and factors might arise. Above all the sentencing court should strive to impose a sentence that is both fair and just and reflects the culpability of the offender. I have considered carefully whether it is appropriate to make the sentences of imprisonment, which I consider necessary and justified, under Counts 1 and 2 consecutive or concurrent. I have decided to make the sentences concurrent but to reflect the seriousness of the offence under Count 2 in the sentence that I will impose under Count one. I consider it to be a significant aggravating factor which must be reflected in the totality of the sentence imposed. Accordingly I impose the following determinate sentences.

Count 1: Careless Driving with excess alcohol causing death. I impose a term of four years. You will be disqualified from driving for seven years. You will also be required to take an extended driving test.

Count 2: Doing an act tending to pervert the course of justice. I impose a term of two years, concurrent to the term to be served under Count 1.

Count 3: Failing to report:- disqualification from driving for 12 months

Count 4: Failing to stop:- disqualification from driving for 12 months

Count 5: Failing to remain:- disqualification from driving for 12 months

Count 6: Driving with no insurance:- disqualification from driving for 12 months.

Each of the periods of disqualification will be concurrent to each other meaning that you will be disqualified for a total period of 7 years.

I have determined and that the period after your release during which you will be supervised by a probation officer in order to protect the public from harm and to prevent the commission of further offences shall be 2 years. This period is called the Licence Period

I am obliged to deduct this licence period from the term of the sentence and accordingly the Custodial Term which you must serve will be a period of 2 years in custody. After you have served that period of 2 years you will be released to serve the licence period.

I am recommending that the Secretary of State impose the following licence conditions:

- a) That you attend the Think First programme,
- b) That you attend an alcohol management programme.

I consider that these are necessary and appropriate to address your problems with alcohol, victim awareness; negative peer association; limited consequential thinking skills and structured use of your lifestyle. All of these problem areas had been identified by the reporting officer in the pre-sentence report and I note that these have been discussed with you and that you have expressed your preparedness to undertake such rehabilitation programmes.