

**Neutral Citation No. [2011] NICC 33**

Ref:

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

Delivered: **27/09/11**

**IN THE CROWN COURT IN NORTHERN IRELAND**

**REGINA**

**-v-**

**KEELAN LEE O'NEIL**

**BILL NO. 011/012260**

**HIS HONOUR JUDGE GRANT**

[1] You have pleaded guilty to: Causing the death, by dangerous driving of Anthony McCloskey on 17<sup>th</sup> September 2009 on Glenshane Road, Dungiven.

[2] This offence occurred, after the relevant commencement dates of the Criminal Justice (NI) Order 2008. The offence 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 your 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 report and I am satisfied from the opinion expressed in that report and the facts outlined by prosecution counsel that you do not present a significant risk of serious harm to the public from future offending.

[4] You were first arraigned on the 17<sup>th</sup> February 2011 and pleaded not guilty to the substantive charge but pleaded guilty to Causing death by careless driving. At that time it was indicated by your legal advisers that you were seeking a medical report in relation to the circumstances in which you fell asleep at the wheel of your car immediately prior to the accident. It was further indicated that a forensic engineer was to be instructed. A trial date was fixed. On the 21st of June 2011 you applied to be re-arraigned and pleaded guilty to the charge on the indictment, of causing death by dangerous driving. In addition I am informed and it is also clear from your police interviews that at all material times, you fully admitted your involvement in the offence and culpability in the death of Mr McCloskey. I was informed by both Counsel that this re-arraignment occurred following

discussions between counsel with a view to clarifying certain legal issues. Miss Orr QC, for the prosecution informed me that you had indicated an acceptance of the prosecution evidence as a result of which most of the witnesses were stood down at an early date. She considers that the approach adopted by the defence on this occasion in relation to this single count was perfectly reasonable. Miss Orr QC accepts that I should approach the defendant's plea on the basis that substantial credit should result from this. I consider this to be a proper concession by Crown counsel and accordingly I propose to allow you full credit for your guilty plea.

[5] I must now consider the appropriate sentence to be imposed. Before I do so I acknowledge the great loss suffered by the McCloskey family. Their grief at the loss of a father and grandfather, just short of his 70th birthday, in such dreadful circumstances, will remain acute for a very long time, probably for much of their lives. Their loss is an irreplaceable loss.

[6] Your Counsel, on your behalf, expressed your sorrow, regret and remorse at what you have done and for the fatal injury that you caused. I note that you have expressed such remorse, before and elsewhere. These expressions of remorse gain considerable support from the fact that you attended the funeral and the wake for Mr McCloskey.

[7] In the medical report provided on your behalf, Dr Hanley records, that this incident has affected you considerably with sleep disturbance and continuing nightmares. It is clear that 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 McCloskey family to cope with their very great loss. I also recognise that any sentence imposed by me will not bring Mr. McCloskey back to his relatives and will do little to repair or remove the upset and hurt suffered by them.

[8] The facts of this case have been fully outlined by counsel and I do not intend to repeat them in great detail. It is however clear that on the day of this accident you set off early in the morning to Belfast. You were returning to Dungiven. Mr McCloskey was driving his tractor in the same direction and was clearly established on the main road having turned onto the road some 500 or so yards earlier. Your vehicle, a Volkswagen golf came up behind his tractor and collided with the rear right wheel of the tractor. The tractor pulled or was pushed sharply to the left and Mr McCloskey was thrown out onto the road and under your car. Your vehicle came to rest on his left arm. An ambulance was called and passing motorists came to his assistance and gave first aid. Tragically Mr McCloskey was pronounced dead a short time later. Sadly Mr McCloskey's son came to the scene where he witnessed his father trapped under your vehicle and assisted in lifting the vehicle so that he could be removed.

[9] There is no suggestion and that you were travelling at excessive speed or in breach of the speed limit applicable on this road.

[10] The only explanation for this accident is that you fell asleep at the wheel. You have made it clear, both through your counsel and in your police interview that you did not see the tractor at any time prior to the collision. There was nothing to obstruct your view ahead and in the absence of falling asleep, there is no explanation for your failure to see and avoid the tractor.

[11] Other motorists, in statements made to the police, have described that on eight to ten occasions your car veered to the left and on two other occasions then veered to the right almost crossing into the oncoming lane. One also described that a car coming towards you flashed its headlights. You clearly should have been alerted to the need to take care by this occurrence. It appears that you did not notice any headlights being flashed at you and this adds support to the probability that you had fallen asleep.

[12] On this evidence it is clear that you did not suddenly fall asleep without warning but were at times sufficiently alert to realise that you were veering from side to side and you took steps to correct these manoeuvres. It is obvious that you received a number of warnings which should have alerted you to the need to take great care and the need to stop driving your vehicle before it might put others in jeopardy as it did on this occasion.

### SENTENCING CONSIDERATIONS.

[13] The Court of Appeal in Northern Ireland set out the considerations to be taken into account by courts in sentencing in death by dangerous driving cases. In R -v- Thomas Anthony McCartney [2007] NICA 41 the Court of Appeal cited with approval the analysis of principles 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

[14] At paragraph 20 of the 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 repeat some of this portion below:

- (i) The list is as follows:
- (ii) *'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

(iii) *Outcome of offence*

Where more than one person is killed as a result of the offence or serious injury to one or more victims occurs in addition to the death

(iv) *Irresponsible behaviour at time offence and joy riding which are not applicable to this case*

[15] 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.

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

[16] 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 custody there have to be exceptional circumstances.

[17] 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."

These tariffs are applicable following conviction after a contest.

I intend to apply these tariffs.

[18] I have carefully considered what if any aggravating factors inform me as to the culpability of the defendant in this case. I am satisfied that there are no factors which should be regarded as aggravating factors.

[19] I must now consider any mitigating factors. I take into account the following factors:

- a) Your plea of guilty to this count and the circumstances surrounding that plea for which I give you full credit
- b) You have a clear record with no convictions for any offence
- c) You were aged 19 years at the time of the offence and had limited driving experience. I am prepared to accept that your inexperience might well have caused or contributed to your error of judgement on this occasion

- d) You have made real and practical expressions of remorse and regret by attending both the funeral and the wake of the deceased. You live and were brought up in the same area and are part of the same community as the McCloskey family and the upset flowing from this event is in that sense more acute.
- e) You come from a good and stable family background achieved well at school and at the time of this incident you had taken a gap year to earn sufficient funds to pay for your university course. In order to do so you obtained a job with Sky and were returning from an appointment in Belfast when the accident happened. Although you did not have to do so you resigned from that job and have effectively lost a career with that company.
- f) You have since started an IT business in Dungiven, repairing laptop computers and building websites. In the course of this you developed a smart card system, for students and others which is being piloted at UCD, Dublin and in doing so have demonstrated hard work commitment and ingenuity.
- g) Your mother suffers from multiple sclerosis and you provide significant care and support to her.
- h) I have considered a large number of references submitted on your behalf which speak very highly of you and your character. The picture that emerges is that of a highly conscientious and responsible individual who would be a person least likely to be expected to appear before a court.

[20] This view is endorsed by the Pre-sentence report which assesses you as posing a low risk of future offending. No issues are identified which would benefit from a period of probation. The report whilst recognising that a custodial sentence is justified suggests that suspension of that sentence or Community service might be appropriate.

[21] Having regard to the sentencing guidelines and considering them in the context of this case, in accordance with the revised starting points set out in Richardson and adopted by the Court of Appeal in McCartney, I take the view that the degree of culpability reflected in this case is at the lower end of the first category.

[22] I remind myself that these are guidelines, that cases will not necessarily fall neatly within the parameters of each category and the need to reflect the justice of the circumstances. 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.

[23] In both McCartney and AG's Reference 2003 and more recently in McGinn the Court of Appeal recognised that this is a difficult area where a wide range of circumstances and factors might arise. Above all the sentencing court should strive to impose a sentence that is both fair and just and that reflects the culpability of the offender. I have considered carefully whether it is appropriate to impose a sentence of immediate imprisonment. In earlier sentencing guidelines, the Court of Appeal stated in clear terms that in these cases a custodial sentence will generally be necessary and emphasised that in order to avoid the imposition of immediate custody there would have to be exceptional circumstances. I am satisfied that this is such a case

Accordingly I impose the following sentence:

15 months custody suspended for 2 years.

You will be disqualified from driving for 5 years. You will be required to take the extended driving test.