

**Neutral Citation No: [2017] NICC 7**

**Ref: 2017NICC7**

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

**Delivered: 29/09/2017**

**IN THE CROWN COURT SITTING AT LAGANSIDE**

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**R**

**v**

**JOHN AUGHEY**

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**Her Honour Judge Patricia Smyth**

[1] You are before the court to be sentenced in respect of:

- (i) One count of causing grievous bodily injury to Phoebe Clawson by dangerous driving.
- (ii) Two counts of assault occasioning actual bodily harm in respect of Roisin McGlone and Andrew George.
- (iii) And three counts of assault in respect of Keira Moss, John O'Hara and Mark Richardson.

**The Background**

[2] You were convicted of all of these offences by a majority jury verdict of 11 to 1.

[3] Before turning to the facts, it is important that the public understands at the outset, that it has never been the prosecution case that you deliberately drove into pedestrians at the Ardoyne shops or that you intended to hurt anyone.

[4] However, the purpose of the legislation is to punish those who cause serious injury to others by driving in a manner which falls far below that to be expected of a competent and careful driver, irrespective of any lack of intention to cause harm.

In this case you raised the defence of duress of circumstances.

[5] In short, the jury was asked to consider whether you were put in fear by the actions of some members of the crowd at the Ardoyne shops and if so, whether you genuinely and reasonably believed that you had no choice but to drive as you did because otherwise you would have been killed or seriously injured either immediately or almost immediately.

[6] This defence required the jury to consider your state of mind and also to consider whether another member of the Orange Order, of your age, might have responded to the threatening circumstances in the same way.

[7] The jury rejected your defence.

[8] The court has been referred to Blackstone 2017 edition D 20.30 which states -

*“Where the accused is convicted following a trial, it is for the sentencer to form his own view as to the facts of the offence established by the evidence, and to sentence accordingly.”*

at D 20.31 and D 20.32 it indicates -

*“The court is not obliged to accept the version of events most favourable to the defence consistent with the jury’s verdict... The court should, however, be extremely astute to give to the offender the benefit of any doubt about the facts of the offence.”*

[9] It is not disputed that you found yourself snarled in traffic and in a very hostile and threatening situation as a consequence of being identified as an Orangeman. Nor can there be any doubt that this was the reason you carried out the dangerous U-turn which caused serious injury to Phoebe Clawson and injury to others.

[10] In those circumstances, I accept the defence submission that I should pass sentence on the basis that in rejecting your defence, the jury was not satisfied that another member of the Orange Order, in similar circumstances, may have responded to that situation by driving in the manner that you did.

[11] The prosecution makes no contrary submission.

[12] The facts are that on 13 July 2015, a large gathering of approximately 200 to 250 people had gathered at the Ardoyne shops protesting in a peaceful manner against the Orange Order parade that had been allowed to pass through the area that morning but not allowed to pass through on its return.

[13] There was a heavy police presence in the area consisting of around 200 to 250 police whose intention was to normalise the area and keep traffic moving.

[14] You were driving past the Ardoyne shops on your way home after having attended the parade that day. You became snarled in traffic and consequently you were identified by the insignia on your clothing as a member of the Orange Order. The crowd reacted in a hostile manner, one bottle was thrown at your car and one member of the crowd approached your vehicle and kicked at the wing mirror.

[15] You put on a full right lock and did a U-turn into a parking bay where members of the public were standing. You struck a number of people some of whom went over the car bonnet and one person, Phoebe Clawson, slipped off the bonnet and underneath your vehicle.

[16] When you began your manoeuvre, police officers close to your vehicle shouted at you to stop repeatedly. Your driver-side window was open. The police surged forward to stop your car and the crowd reacted in a very hostile manner.

[17] Police banged on your car window, gesticulated and shouted repeatedly to you to stop. You continued to drive your vehicle.

[18] An engineer who examined the CCTV said that the period of time from when you applied the right lock to the steering wheel and moved forward until the car came to a stop was eight seconds.

[19] The period of time from when Phoebe Clawson was hit by your car until she fell to the ground was two seconds.

[20] Your car continued to drive, with the front of your vehicle travelling over her and dragging her citywards for three seconds until your car stopped.

[21] Therefore the time from when Phoebe Clawson hit your bonnet until your car stopped was five seconds.

[22] Your car was surrounded by both police and the very hostile crowd at that point.

[23] Police removed you from your vehicle and took you to a Land Rover whilst they raised your car on its side in order to rescue Phoebe Clawson to whom they administered first aid.

## **The Consequences**

### **Phoebe Clawson**

[24] Phoebe Clawson was 16 years old when she was seriously injured as a result of your dangerous driving. The video stills show her on the bonnet of your car before slipping underneath, when you failed to stop.

[25] The video footage is harrowing and there is no question that this must have been a terrifying experience. In evidence, Phoebe described your car going over her legs. She tried to move herself over because her head was underneath the wheel and she believed that if your car went over her one more time she would be dead.

[26] She sustained the following physical injuries: a shattered pelvis, a broken collar bone and a broken ankle.

[27] Thanks to the immediate and effective action of the police who were at the scene, the car was lifted on its side within seconds and first aid was administered to Phoebe.

[28] I have been provided with a victim impact report. It is clear that Phoebe has suffered a great deal psychologically as well as physically and that the impact of your offence has had long-lasting effects.

[29] It is also clear that Phoebe has tried her best to move forward with her life and that she recognises her recovery will take time.

### **Roisin McGlone**

[30] Roisin McGlone was present at the Ardoyne shops in the capacity of a community activist and as an independent member of the Policing Board and a member of the board of the Community Relations Council. She has spent the past 30 years involved in reconciliation and peace building work in interface communities in North and West Belfast.

[31] Mrs McGlone stepped in to calm the crowd when she saw the hostile reaction to you. As her son described, she made the same gestures that she had made on many previous occasions in order to resolve conflict situations and prevent tensions escalating.

[32] She was hit by your car sustaining a broken arm and soft tissue damage to her legs and the left hand side of her body.

[33] I have also been provided with a victim impact statement from Mrs McGlone and it is clear that the physical and emotional impact of your offending has been wide-ranging. Plans that she had made for her future have not been achievable and she has been unable to continue making the invaluable contribution to peace and reconciliation that has been the hallmark of her career.

### **Andrew George**

[34] Constable George gave evidence that he was shouting and signalling to you to stop. He was waving his arms because he saw Phoebe on the bonnet of your car and he then saw her slipping onto the ground. He sustained injury when your car struck him on the knee. He said he was hitting your window as hard as he could but your car was still moving.

### **John O'Hara**

[35] John O'Hara gave evidence that he was pushed out of the way by your car which hit him on the left hand. He has provided a victim impact statement describing the traumatic effect of seeing Phoebe Clawson trapped underneath the car.

[36] He has also described the emotional impact of your offending upon him and his belief that he could have sustained more serious injury had he not responded in the manner that he did.

### **Kiera Moss**

[37] Kiera Moss gave evidence that she saw your car bonnet heading towards her and that it wasn't slowing down. She said your car hit her on the left leg and she was knocked over onto the ground.

[38] She said she saw your back wheel turning and she thought it was going to hit her. She closed her eyes, and when she opened them she saw Phoebe Clawson under the car. She said her left leg was very badly bruised, she had a bruise under her left eye and was sore all over.

### **Mark Richardson**

[39] Constable Richardson has described how he was struck on his right leg by your car. He said he banged on the window of your car to try and get you to stop. He saw Phoebe coming off the bonnet and your car going up and over her.

### **Sentencing guidelines**

[40] In Northern Ireland, the sentencing guidelines are contained in the judgment of R v Thomas Anthony McCartney [2007] NICA 41. Those guidelines were considered more recently in the judgment of R v David Lee Stewart Director of Public Prosecutions Reference (number 1 of 2016) [2017] NICA 1.

[41] Before turning to the submissions of the parties in this case it is important to set out the background to the sentencing guidelines.

[42] McCartney was concerned with the effect of the increase in the maximum penalty for dangerous driving offences from 10 to 14 years and the relevance of the English judgment in R v Richardson which revised the starting points depending on the level of culpability.

[43] Richardson considered the aggravating and mitigating factors identified in the earlier case of Cooksley, and the different levels of culpability before setting out how the starting points should be reassessed. The court stressed that the list of factors should not be regarded as an exhaustive statement and that it was important to appreciate that the significance of the factors can differ. 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.

[44] The list of factors set out is as follows:

### **Aggravating Factors**

#### *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 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 his 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 of 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.

### **Mitigating factors**

- (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 friend).
- (e) The offender's age (but only in cases where lack of driving experience has contributed to the commission of the offence).
- (f) The fact that the offender has also been seriously injured as a result of the accident caused by the dangerous driving

[45] In Richardson, before reassessing the different levels of culpability set out in Cooksley, the court noted that:

*“Given the multiple circumstances covered by these offences, and the numerous even if incomplete potential aggravating features, all arising from the single activity of driving a car, it seems to us unwise to be over prescriptive and the identification of a single starting point which would normally be appropriate for the different categories of culpability and seriousness.”*

[46] Paragraph 32 of Cooksley sets out four starting points:

- no aggravating circumstances – 12 to 18 months
- intermediate culpability – 2 to 3 years
- higher culpability – 4 to 5 years
- most serious culpability – 6 years or over.

[47] The court made clear that starting points only indicate where a person sentencing should start from when seeking to determine what should be the appropriate sentence. It also warned of the danger in relation to the higher starting points of double accounting by using the same aggravating factors to place the sentence in a higher category and then add to it because of the very same aggravating features.

[48] Those starting points were reassessed in Richardson as follows:

- no aggravating circumstances – 12 months to 2 years
- intermediate culpability – 2 to 4 ½ years
- higher culpability – 4 ½ to 7 years
- most serious culpability – 7 to 14 years

[48] In McCartney, the Northern Ireland Court of Appeal concluded that these guidelines should now be applied in Northern Ireland.

## **The submissions of the parties**

### *The prosecution submissions*



[49] The prosecution submits that in respect of the offence of causing grievous bodily injury to Phoebe Clawson by dangerous driving, the manner of your driving falls into the “higher culpability” bracket as defined in Richardson, which indicates a range of 4½ to 7 years in prison.

[50] In order to fall into that bracket, one or two of the non-exhaustive list of aggravating factors set out in Cooksley must be present. The prosecution submits that there are three aggravating circumstances in this case:

[51] Under the heading *highly culpable standard of driving at the time of offence*, the prosecution says that you drove in a manner which involved you driving into a crowd of people situated on or adjacent to the roadway in circumstances where their presence and the inevitability of collision should have been glaringly obvious.

[52] Under the heading *outcome of events*, the prosecution says that more than one person was injured as a result of the offence albeit not seriously.

[53] Under the heading *irresponsible behaviour at the time of offence* the prosecution says that you drove on after the collisions for a short but nonetheless perceptible distance in the face of efforts by police to have you stop the vehicle. The prosecution says that your claim that you were unaware that you had collided with multiple members of the crowd is an affront to common sense.

[54] The first point to note is that none of the factors set out in Cooksley as examples of *highly culpable standard of driving at the time of offence* are present in this case. However, the list is non-exhaustive and therefore the court has to consider whether the manner of your driving which involved a collision with people on the roadway in the circumstances set out should be considered as an aggravating factor.

[55] It is important that the court takes account of the nature of the dangerous driving which constitutes the offence in this case so that double accounting does not arise. In my view, the U-turn manoeuvre that you carried out was dangerous *because* of the presence of persons on the roadway and the inevitability of collision. Therefore, the manner of your driving and the circumstances in which you carried out that manoeuvre constitutes the offence and is not an aggravating feature.

[56] In relation to the *outcome of offence* as an aggravating factor, the factors set out in Cooksley include more than one person “seriously injured” or the death of more than one person. In this case, fortunately, Phoebe Clawson was the only person seriously injured. In my view, when the court is considering sentencing brackets which reflect the fact that serious injury was caused to a person, it would be wrong in principle to increase the sentence because of injuries caused to others which are not serious.

[57] However, it is of course relevant that others were injured and you have been convicted of separate offences in respect of each of those persons. In order to reflect an appropriate punishment, I have taken this matter into account by considering your culpability overall and imposing concurrent sentences.

[58] I turn now to the submission that *your behaviour was irresponsible at the time of the offence*, in that you continued to drive after the collisions for a short but nonetheless perceptible distance in the face of efforts by police to have you stop your vehicle. Whilst the relevant factor set out under this heading in Cooksley envisages a situation where a defendant fails to stop after an accident in the sense that he drives away, the list of factors is non-exhaustive.

[59] I consider that your behaviour in continuing to drive after the collisions despite the clear indications by police to stop is an aggravating factor. Your window was down and it was police officers who were closest to your vehicle rather than any hostile member of the crowd when you began your U-turn.

[60] The evidence of the police is that they shouted at you to drive on up the road rather than carry out a U-turn as the traffic suddenly cleared. The CCTV stills confirm the close presence and gesticulation of police officers as they tried to stop your vehicle, some of whom were injured as they did so.

[61] Whilst it is possible that you may have no recollection of colliding with anyone as a result of temporary amnesia caused by the stress of the situation, the agreed medical evidence does not suggest any reason why you would have been unaware of the obvious collisions as they occurred or the efforts of the police to stop your vehicle.

[62] The prosecution accepts that your good driving record and the absence of relevant previous convictions are mitigating factors.

### *The Defence Submissions*

[63] It is submitted on your behalf that there are no aggravating circumstances in this case. The defence submit that in line with McCartney the starting point should be a custodial sentence of perhaps 12 to 18 months and further submit that in the highly unusual circumstances the justice of the case can be met with a suspended sentence of imprisonment.

[64] However, it should be noted that the sentencing bracket suggested in a case of no aggravating circumstances was increased by Richardson and approved in McCartney as being 12 months to 2 years.

[65] In mitigation it is submitted that the following matters ought to be considered by the court:

- (i) Your good driving record.
- (ii) The absence of any relevant convictions and your previous good character as evidenced by the references from a wide range of persons from across the community.
- (iii) The unusual circumstances that you found yourself in immediately prior to these offences. It is submitted that the court is dealing with a unique set of circumstances.
- (iv) Your genuine shock and remorse.
- (v) Your age, physical ill-health and the stress that these offences have had upon you, in particular the death threats that you have received.
- (vi) Your wife's physical ill health and the impact upon her of a custodial sentence being imposed.
- (vii) The loss of your employment which has been occasioned by the consequences of these offences.
- (viii) The assessment of the Northern Ireland Probation Board that you pose a low likelihood of reoffending and that you do not pose a significant risk of harm to the public.
- (ix) I have been provided with a very helpful presentence report. You are now 63 and live with your wife and adult son in North Belfast. For a two month period after these offences you lived in Ballymoney due to personal safety issues which have necessitated police safety advice and bail restrictions.
- (x) You had a full employment history but felt unable to sustain employment as a result of the emotional impact of these offences upon you, lack of access to a car which was essential to your role and the negative publicity which has occurred.
- (xi) Both you and your wife have suffered ill health over a number of years and details have been set out in medical reports from Prof Farnan and Dr Curran.
- (xii) Your wife has significant mobility problems and requires a walking aid. It has been reported that she has suffered depression and the impact of a prison sentence upon you will have a significant impact upon her.

- (xiii) You told Dr Curran that you deeply regret what happened and that it has never been out of your mind during the years that have followed. You have required treatment from your GP to cope.
- (xiv) In discussing the impact on the victims you insisted that you had no recollection of colliding with the named victims but you stated that you feel terrible.
- (xv) The probation officer reports that while you accept that the resulting incident caused significant physical harm and distress to those involved in the short term, you struggled to identify any possible long-term consequences to the victims in any detail.
- (xvi) While you were open to challenge and discussion during interview you appeared somewhat detached from the impact to others insisting you did not see them and maintaining that you had no other options available to you because you genuinely feared for your safety and believed that you would be killed if you did not drive in the way that you did.
- (xvii) The probation officer reports that it is apparent that you feel the resulting impact on your personal circumstances in terms of the loss of employment, health concerns and negative publicity acutely and that this appears to contribute to your detachment from the situation.
- (xviii) You said that you acted out of blind panic and that you had thought there was enough room in the road to make the U-turn. You did not consider that your actions putting others at risk.
- (xix) The probation officer concluded that while you showed some insight into the significant impact on the victims, your insight appeared somewhat overshadowed by the circumstances around the offence, your rationale and resulting personal consequences.

## **Conclusion**

[66] I accept that the circumstances of your offending are unique. Had it not been for the fact that you found yourself in a threatening situation, you would have continued on your journey home and no offence would have been committed.

[67] That is a powerful mitigating factor in terms of your culpability.

[68] In Cooksley, the court emphasised at paragraph 14 that culpability must be the dominant factor when assessing as precisely as possible just where in the level of serious crimes the particular offence of causing death (or serious injury since the courts in Northern Ireland draw no distinction) comes when the offence involves no

intention to kill or injure. At paragraph 13 of McCartney, the Northern Ireland Court of Appeal cited the judgment in R v Sloan [1998] NI 58 to the same effect.

[69] However, in order to properly assess your culpability the court has to consider *all* of the circumstances. In carrying out a U-turn manoeuvre, there was an obvious danger that members of the public who were present both on and off the road would suffer serious injury.

[70] The jury rejected your assertion that you had no choice but to drive in this way because you feared for your life. Whilst members of the crowd did react in a hostile manner towards you, with one person throwing a bottle at your vehicle and another kicking at your wing mirror, the fact is, that the closest persons to your vehicle before you made the U-turn were police officers.

[71] In deciding to carry out that manoeuvre, you could not have been unaware of the heavy police presence and the phalanx of armoured vehicles on both sides of the road.

[72] Whilst I have accepted only one of the proposed aggravating factors submitted by the prosecution, I am mindful that the court cannot approach this matter in a mechanistic manner.

[73] The court has to consider the potency of the aggravating factor that you continued, albeit for a short period, to drive after you collided with members of the public.

[74] In so doing, you drove over Phoebe Clawson who had slipped from the bonnet of your car and ended up underneath it, sustaining serious injuries.

[75] But for the determined and frantic efforts of the police, clearly identified as such, to stop your vehicle, the consequences could have been catastrophic.

[76] This is an extremely difficult sentencing exercise. I consider that this case falls into the category of intermediate culpability. Such cases may involve one aggravating factor. The starting point for cases in this category is 2 to 4½ years in prison. Taking account of the aggravating factor that you continued to drive after the initial collision with victims in the face of obvious police attempts to stop you, causing serious injury to Phoebe Clawson and injury to others, a starting point of 4 to 4½ years would be justified.

[77] However, in order to reach the appropriate starting point in this case, I also have to take into account all of the mitigating factors, including the threatening circumstances which were the catalyst to these offences as well as your personal mitigation.

[78] Taking into account all of the mitigating factors, I consider that a starting point of two years imprisonment reflects your culpability in this case.

[79] In reaching that determination, I am mindful of the guidance at paragraph 15 of R v James John Stewart Caswell [2011] NICA 71 that there will continue to be cases in which the broad guidance in Cooksley will remain appropriate, and “*exceptional situations where even shorter sentences, or non-custodial sentences, may be appropriate*”. The court added that it could see no advantage in identifying such exceptional situations, which by definition will only arise very rarely.

[80] It has been submitted on your behalf that the circumstances of this case would justify the court in suspending your sentence. Whilst I am satisfied that the mitigating circumstances justify a lower starting point than would otherwise have been determined, I do not consider that there are grounds to suspend the sentence.

[81] The fact that you contested the charges is not an aggravating factor however it does mean that you are not entitled to the credit that you would have received had you pleaded guilty.

[82] I therefore sentence you to a determinate sentence of:

- (i) two years imprisonment in respect of Count one;
- (ii) twelve months imprisonment in respect of Count two and count three concurrent to count one; and
- (iii) six months’ imprisonment in respect of counts four, five and six also concurrent.

[83] You shall serve 50% of that sentence in custody with the remaining 50% on licence.

[84] I am required to disqualify you from driving for two years and until tested and I therefore impose that disqualification.