Neutral Citation No: [2017] NICA 32 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **WEI10312** *Delivered:* **02 .06. 2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

Respondent;

-v-

LUKASZ OKRASA

Applicant.

_____

Before: Morgan LCJ, Weir LJ and Stephens J

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WEIR LJ (delivering the judgment of the court)

The nature of the Application

[1] The applicant applies for leave to appeal out of time against his conviction and sentence on one count of causing grievous bodily harm by driving a motor car at Whitepark Road, Ballycastle, Co Antrim without due care and attention. He further applies for the reception of fresh evidence which is said to support the application. Leave to appeal out of time had been refused by Gillen LJ. Mr O'Donoghue QC and Mr Rafferty appeared for the applicant and Mrs Kitson for the prosecution. We acknowledge the assistance afforded by their helpful written and oral submissions. Following the conclusion of the hearing we indicated that the Court had determined that the application be refused and we now give our reasons.

The factual background

[2] The applicant and his partner, now his wife, live near Limerick in the Republic of Ireland. On 13 September 2014, they drove in their Ford Focus car for a short holiday in Northern Ireland. Having called at Belfast where they found that their hotel room was not yet available they therefore decided to drive on up the North Antrim coast. At around 3.30 pm they were travelling on the Whitepark Road in the direction of Ballintoy when they noticed a sign to a view point for the Carrick-a-Rede rope bridge. It was by then too late to turn into the road for the view point, so the applicant drove on until he reached a layby on his own side and pulled in,

intending to turn round and return in the direction of Ballycastle to the view point. In that direction was a bend which limited the view of someone in the applicant's position to about 77 yards and a vehicle coming from the Ballycastle direction would have had a similar view of the applicant's car at its position at the layby. The applicant said that he checked that nothing was coming in either direction and commenced to make a U-turn. Most unfortunately a motorcycle, which the crash investigator estimated was travelling at between 50 and 60mph at the point of collision, came round the bend from the Ballycastle direction and collided heavily with the off-side of the applicant's car. At that stage the car was broadside across the road, straddling the centre line and moving slowly at an estimated 5mph in the course of executing the U-turn.

[3] The motorcyclist sustained extensive injuries which were described by a Dr Maguire, Consultant at the Spinal Injuries Unit of Musgrave Park Hospital, in her witness statement as follows:

> "1. Traumatic brain injury with bruising and subarachnoid haemorrhage.
>
> 2. Fracture of the vertebral bodies of T1, T2, T7, T8, T9 and T10.
>
> 3. Fractures of the transverse processes of T6, T7, T8, T9, L1 and L2.
>
> 4. A bifacetal fracture of T6.
>
> 5. 'Open book' fracture of the pelvis.
>
> 6. Fractures of both the radius and ulna of the left arm.
>
> 7. Trauma to the chest and a right pneumothorax."

Significantly, as will subsequently become clear in the context of the present application, Dr Maguire also reported "complete spinal cord injury from T4 level mid-chest" and later in the report said:

> "… he required numerous surgical procedures, including … spinal stabilisation 15.9.14 and revision of this on 16.9.14. He was intubated and ventilated in ICU for 2 weeks. He was transferred to the Spinal Injuries Unit, Musgrave Park Hospital on 23.10.14 and remains here as an outpatient. He has complete paralysis of the muscles of the lower and mid-chest,

> abdomen, pelvis and lower limbs … He will not recover and will remain wheelchair dependent for life."

[4] The applicant was arraigned and pleaded not guilty. On the day fixed for his trial before His Honour Judge Marrinan, discussions took place between Mr O'Donoghue and Mrs Kitson which resulted in the following agreed basis for a plea of guilty:

> "The basis upon which the defendant pleads guilty is that he failed to check to his right a second time contrary to the Highway Code. Had he done so he probably would have seen the motorcyclist to his right."

[5] The applicant having thereupon been re-arraigned and pleaded guilty, he was remanded on bail for the preparation of a Probation Report which was entirely favourable to him and on 30 September 2016, the learned judge sentenced the applicant to one year's imprisonment suspended for 3 years, a fine of £500 and disqualified him from driving for one year and until a driving test had been passed.

Subsequent events

[6] The matter would have rested in that way but for certain information that came to the attention of the applicant's solicitors as a result of a communication that they received from another firm of solicitors instructed by the applicant's motor insurers to defend the claim for damages brought on behalf of the motorcyclist. An amended Statement of Claim dated 7 December 2015 had been delivered and medical reports on the motorcyclist by Mr Paul Nolan, Consultant Trauma and Orthopaedic Spinal Surgeon, had been prepared at the request of the applicant's civil claim solicitors. From an examination of such of the medical notes and records as he had been provided with, Mr Nolan concluded, in the first of his two reports, that dated 30 August 2015, *inter alia* as follows:

> "… It appears to me that the plaintiff potentially was neurologically intact at the time of injury. … At the moment it would appear that he was neurologically intact and then underwent a significant neurological injury during surgery. … I would have to suggest that at the moment the available evidence suggests to me that the plaintiff's treatment was sub-optimal in the Royal Victoria Hospital in that he may well have been neurologically intact prior to his surgery and has undergone a catastrophic neurological injury during his operative procedure."

[7] Mr Nolan expressed dissatisfaction at the incompleteness of the hospital notes made available to him and requested that further notes be obtained. Some further notes having been obtained and provided to him, Mr Nolan gave a further opinion by letter signed on 1 October 2015. In it he said *inter alia*:

> "The additional information suggests to me that the plaintiff was neurologically intact on arrival in the Royal Victoria Hospital on 13 September 2014 … The documentation re-confirms that his thoracic pedicle screws were sub-optimally positioned and were placed in the spinal canal causing a significant injury to the spinal cord.
>
> In my experience misplacement of pedicle screws is not infrequent. In some circumstances it is felt that 15-20 per cent of pedicle screws may be misplaced. … In many circumstances misplacement of a pedicle screw does not lead to any significant problem. It would however appear that in this particular case, two if not three of the pedicle screws were significantly misplaced leading to serious spinal cord injury.
> …
> I would have to suggest that at the moment the documentary evidence indicates to me that his care in the Royal Victoria Hospital was below a standard that one would normally expect."

The lodging of the present application

[8] After this material had been brought to the attention of the solicitors who had acted for the applicant in his criminal prosecution, they applied by Notice dated 9 February 2017 for leave to appeal out of time against the conviction and sentence and for leave to introduce in support of that application fresh evidence consisting of the amended Statement of Claim in the civil action together with Mr Nolan's two reports.

The hearing of the application

[9] Mr O'Donoghue submitted that when the applicant entered his guilty plea, he did so in the belief that the motorcyclist's permanent paralysis had been caused in the accident. Prosecution evidence did not suggest otherwise and the statement of Dr Maguire, which failed to mention that the paralysis was due to the operation and not to the collision, was "singularly misleading". This information ought also to have been brought to the attention of the Police and the PPS. It was submitted that had this information been known in advance of the plea, the applicant would have

been able to make "a properly informed decision as to the risk of inviting the jury to consider the issue of whether his driving was careless, in the knowledge that the consequences of his driving could not be shown to be anywhere near as catastrophic …" It was also submitted that had the prosecution known the true position it might not have proceeded with the prosecution since the injuries "while technically amounting to GBI", were neither life-threatening nor life-changing in the longer term."

[10] Mrs Kitson for the prosecution submitted that, quite apart from the spinal cord injury, the other injuries sustained as a result of the impact were grave and serious. The guilty plea was entered into on an agreed basis as to the nature of the careless driving whose quality is unaffected by the subsequent information concerning the cause of the paralysis. The other injuries completely satisfied the prosecutorial test. Furthermore, it is foreseeable that the victim of injuries may require medical treatment and that the injuries may be misdiagnosed or not treated correctly so that it is only in very exceptional cases that the courts will categorise incorrect treatment as amounting to a *novus actus interveniens*. Even where incorrect treatment leads to death or more serious injury, it will only break the chain of causation where it is (a) "unforeseeably bad" and (b) "the sole significant cause of the death or more serious injury with which the defendant is charged."

Consideration

[11] It is uncontroversial that a defendant who has pleaded guilty may nonetheless seek by appeal to challenge his conviction where it can be shown that the conviction was either a nullity or unsafe. However a plea of guilt is normally regarded as an acknowledgement of guilt and so the content of any appeal will need to displace that presumption. Where the defendant is fit to plead, had received professional advice and intended to plead guilty those factors are highly relevant to any consideration of the safety of a conviction - see R v Lee [1984] 1All ER 1080.

[12] However, in a proper case, the admission of fresh evidence which undermines the safety of the plea of guilty may lead to the conviction being quashed – see R v Swain [1986] Crim LR 480. In the present case the material sought to be introduced was not available either at the time of the plea or before the subsequent sentence was passed, is capable of belief and would have been admissible in the proceedings in respect of which this application is brought. However in deciding whether to admit the evidence under section 25(2) of the Criminal Appeal (Northern Ireland) Act 1980, this Court must also consider whether it appears that the evidence may afford any ground for allowing the appeal. We accordingly determined to receive the material *de bene esse*, deferring our decision on whether to admit it pending argument as to its effect upon the safety of the conviction.

[13] We agree with Mr O'Donoghue that Dr Maguire's statement did not provide the Police, the Prosecution Service, the applicant and his advisors or the Crown Court with an accurate picture. Everyone was given the false impression, as a result

of what was omitted from her statement, that the motorcyclist's permanent paralysis was directly caused by the injuries sustained in the accident. That was, to say the very least, most unfortunate and had it resulted in the imposition of an immediate custodial sentence would have caused the applicant a grave and irremediable injustice. Fortunately that did not occur.

[14] However Mrs Kitson is undoubtedly correct to draw attention to the very high two-part hurdle that is required to be surmounted before incorrect medical treatment can be held to constitute a *novus actus interveniens*. For example, in R v Smith [1959] 2 QB 35, Smith had stabbed a fellow soldier, C, who later died and with whose murder Smith was then charged. On the way to the medical centre C had been dropped twice by comrades carrying him and on arrival the doctor failed to notice that one of C's lungs had been pierced causing haemorrhage and the treatment provided was, as it later turned out, inappropriate and harmful. Had he had appropriate treatment he might not have died. Lord Parker CJ delivering the judgment of the Courts-Martial Appeal Court said at p.48:

> "If at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death did not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound."

This principle was later approved of by the English Court of Appeal, Lord Lane CJ presiding, in R v Malcherek, R v Steel [1981] 2 All E R 422 at 428e.

[15] The reports of Mr Nolan do not describe what happened here as "unforeseeably bad". On the contrary, Mr Nolan makes clear in the passage from his second opinion quoted at [7] above that the complication which occurred in this case was foreseeable; pedicle screws are apparently misplaced in perhaps 15 to 20 per cent of operations such as that which had to be performed here to stabilise the spinal injuries sustained in the accident and that such misplacement may lead to a "significant problem". Therefore it is plain from the new material which Mr O'Donoghue asks the Court to receive that what happened in this necessary operation, when performed to a sub-optimal standard, was quite foreseeable. This Court accordingly considers that the evidence if admitted would not afford any ground for allowing the appeal and the application for its reception is therefore refused.

[16] Turning to consider whether in any event the injuries, other than the paralysis, constituted "grievous bodily injury", we have no doubt that they did. The catalogue of injuries suffered and their severity has only to be stated for them to be plainly seen to so amount and no prosecutorial or judicial decision to treat them as such and no charge to a jury that they amounted to such, could be susceptible of the least criticism. Accordingly, this Court has no sense of unease as to the safety of the conviction in this case based upon the nature of the injuries and the agreed basis of plea entered on behalf of the applicant.

[17] Finally, as to the sentence imposed, even had paralysis not resulted from the treatment of the injuries, we consider that the imposition of a suspended sentence of one year, a fine of £500 and disqualification for one year and until tested, could not remotely be characterised as either wrong in principle or in any way excessive. The quality of the driving resulting in these injuries was certainly not of the most careless description but it should have been plain to the applicant that he was embarking upon a slow U-turn at a point on the road where his view of potential traffic from the Ballycastle direction was very limited as would the view of his manoeuvre be for a driver approaching from that direction. He ought also to have been aware that any such approaching vehicle might legitimately be travelling at a speed of 60mph. It therefore behoved him to keep the most careful lookout and this, by his agreed basis of plea, he acknowledges that he unfortunately failed to do.

[18] Accordingly we refused the application to appeal out of time against both conviction and sentence.