IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2019-009-011852
[2022] NZHC 1899

THE QUEEN

v

NIKLAS GEBHARDT

Hearing:	3 August 2022
Appearances:	M N Zarifeh and A M Harvey for the Crown A M McCormick and D J Curnow for the Defendant
Judgment:	3 August 2022

SENTENCING NOTES OF DOOGUE J

Introduction

[1] Mr Gebhardt, you appear for sentence having pleaded guilty to the motor manslaughter of your son, Lachlan.[1]

Facts

[2] You and your ex-partner, Lachlan's mother, Ms Manson, shared custody of Lachlan. After you separated you both negotiated an agreement, with Lachlan spending half of the week with you and half with Ms Manson.

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[1] Crimes Act 1961, ss 150A, 160(2)(c), 171 and 177 – maximum penalty of life imprisonment.

[3] On the morning of 5 November 2019, you sent a text message to Ms Manson, who was supposed to have custody of Lachlan that day, asking if you could pick Lachlan up. Ms Manson agreed, and an arrangement was made for you to pick Lachlan up at about 4.00 pm from the Dudley Swimming Pool Complex in Rangiora.

[4] You arrived at the pool complex at about 3.46 pm. You collected Lachlan and at about 4.08 pm you and Lachlan left in your Mazda motor vehicle. Lachlan was sitting in the rear of the vehicle. The vehicle was registered and had a current warrant of fitness.

[5] You drove out of Rangiora into Lehmans Road, travelling in a northerly direction. You knew that stretch of road very well, having travelled along it many times before. As you drove along Lehmans Road you began to accelerate, driving in excess of the posted speed limit of 80 km/h.[2] Approximately one kilometre prior to the end of Lehmans Road you overtook another vehicle in your lane. You swerved sharply back into your lane to avoid a collision with an oncoming vehicle.

[6] You continued to drive at high speeds towards the end of Lehmans Road to the right turn where it intersects at a sharp right-hand bend into River Road. This intersection has an advisory speed limit of 25 km/h. To the west of the intersection is an unsealed stop bank road which runs parallel to River Road and perpendicular to Lehmans Road. Beyond the stop bank is a forested area with well-established trees.

[7] You approached the intersection without braking or slowing the vehicle down, or attempting to swerve or take the corner. You continued driving in a straight line off the sealed road and onto the grass. You struck the bottom left-hand corner of the speed sign with the right side of the vehicle. Your vehicle continued up the rise towards the stop bank, which caused the vehicle to vault and become airborne. Preliminary results from the Police Serious Crash Unit show your vehicle travelled approximately 24 metres through the air before it impacted with a tree, seven metres higher than its

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[2] Counsel for Mr Gebhardt, Mr McCormick noted in his written submissions that what Mr Gebhardt's speed was while driving along Lehmans Road has not been able to be quantified and the assessment of his speed by various eyewitnesses should be treated with caution given the circumstances in which they observed his driving.

take-off point. The vehicle spun to the left, coming to rest on the ground where it caught fire.

[8] Members of the public who witnessed the incident contacted emergency services. As the fire began to spread, a member of the public was able to partially open the front passenger door where they located you in the front passenger seat. They extracted you from the vehicle. Lachlan tragically died in the vehicle at the scene.

[9] Once you were out of the vehicle, you were heard to say: "put me back in, swap me with my son, I want to swap"; "my son's in the back, he's such a good boy, he's such a nice boy, I want to swap"; and "I need a bullet". You sustained burns to approximately 30 per cent of your body, a fractured femur and facial injuries. You also sustained a traumatic brain injury, causing some cognitive impairment which is yet to be fully investigated.

[10] The speed of the Mazda at the point it left Lehmans Road was calculated by an expert, Professor John Raine, to be not less than 130 km/h and potentially higher.

Impact on the victims

[11] I have heard a number of victim impact statements being read to the Court today. The victims eloquently described the heartbreak, the pain, the torture, the torment and the anger that they continue to experience as a result of Lachlan's death. Any sentence I impose, irrespective of its nature and length, will not address the victims' loss. That must be especially so for Ms Manson. No mother should have to attend the funeral of her six-year-old son and live with the manner of his death. No mother should have to live without seeing her son grow up.

Approach to sentence

[12] In sentencing you a two-step approach is required.[3] The first step is to calculate an appropriate starting point in light of the culpability of your offending. In setting that starting point, I will consider the aggravating and mitigating features of your offending and sentences imposed in other manslaughter cases. Then I will adjust the

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3 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [46].

starting point, having regard to the aggravating and mitigating features personal to you.

[13] I also have regard to the statutory purposes of sentencing, which include holding you accountable for the harm you have caused, promoting a sense of responsibility in you, denouncing your conduct, deterrence and the protection of the community.[4] I must also take into account the principles of sentencing, which include the gravity of your offending, the seriousness of the offence, the effect on the victims, and your personal circumstances.[5]

Starting point

The law

[14] There is no tariff or guideline judgment for manslaughter. The appropriate starting point is normally to be set by comparison with other cases.

[15] The Crown submitted an appropriate starting point in your case is between eight and nine years' imprisonment. Your counsel, Mr McCormick, submitted it should be between four and five years' imprisonment.

[16] Manslaughter can encompass a wide range of circumstances, therefore sentencing for manslaughter is an intensely factual exercise for which there is no guideline decision. Sentencing for motor manslaughter poses particular difficulties for sentencers because:[6]

> By definition, it is one which always gives rise to extremely serious harm: the death of at least one victim (and in some cases serious injury to others). Understandably this often leads to calls from victims' families, and from the wider community, for tough sentencing. On the other hand, an offender sentenced for causing death by dangerous driving did not *intend* to cause death or serious injury, even in the extreme case where he or she deliberately drove for a prolonged period with no regard for the safety of others.

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4 Sentencing Act 2002, s 7.
5 Sentencing Act, s 8.
6 *Gacitua v R* [2013] NZCA 234 at [24], citing *R v Cooksley* [2003] 3 All ER 40 (Crim App) at [1] (emphasis in original).

[17] The sentencing exercise invites an assessment that compares the culpability of the driving with the outcome. That is, an assessment is required of the overall risk created by the defendant's conduct and the gravity of the likely consequences of that conduct. The greater the risk and likelihood of the consequence occurring from the conduct, the more culpable the driver will be.

[18] In *Gacitua v R*, the Court of Appeal provided a list of aggravating and mitigating circumstances in cases involving motor manslaughter, in addition to the aggravating factors provided in s 9 of the Sentencing Act 2002.[7] That case concerned a charge of reckless driving causing death which carries a lower maximum period of imprisonment, but the list of factors has subsequently been cited in a number of manslaughter decisions.

Aggravating factors

[19] In the present case, I find the following aggravating factors were present:

(a) you engaged in a course of excessive speed — you reached not less than 130 km/h as your vehicle moved from the road towards the stop bank. This is more than 50 km/h above the speed limit and 105 km/h more than the advisory speed limit for the ninety-degree corner;

(b) you were driving in an aggressive and highly deliberate manner without explanation — you accelerated heavily over the course of one kilometre at least;

(c) you overtook another vehicle and put yourself in a position where you had to swerve sharply back into your lane to avoid a collision with an oncoming vehicle;

(d) the path of your vehicle from the road to the stop bank was consistent, sustained and targeted, in other words you drove in a direct straight line towards the stop bank; and

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7 *Gacitua v R*, above n 6, at [25]-[26].

(e) there was no evidence of you swerving or taking evasive action, nor of braking or slowing down as you had done when you overtook the other vehicle.

[20] There is no external explanation for the crash. Ordinarily the Court is dealing with cases involving a confluence of other factors which include impairment, distraction, racing, inexperienced or disqualified drivers or police pursuit.

[21] In this case you were an unimpaired driver. Your vehicle had no mechanical issues. You knew the road well. There were no environment or road factors that caused the crash. There is no explanation for your grossly excessive speed. There were no attempts to slow down, brake or take any evasive action at all.

[22] After consideration of these factors, it is difficult to conclude other than that this was a sustained effort by you to crash your vehicle at high speed. It is accepted, in keeping with your guilty plea to this charge, that no murderous intention can be attributed to you. However, the only available conclusion for the Court is that you aimed to drive your vehicle up and over the stop bank in a manner that was grossly reckless and was highly likely to cause significant physical trauma to you and Lachlan, or even the death of both or one of you.

[23] I consider your high level of recklessness is a significant aggravating factor which warrants particular denunciation. You were deliberately engaging in highly dangerous and reckless driving which was likely to cause injury or death.

[24] I am fortified in that view by the expert evidence of Mr Metoui, who says in his report:

> What can be clinically determined was that there was no evidence that Mr Gebhardt was psychiatrically unwell at the time of the index offence, nor that he was experiencing psychiatric disturbance of any type that prevented him from being in full volitional control of his actions.
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> Prior to the offending, Mr Gebhardt was not known to specialist mental health services and he did not previously suffer from any type of psychopathology. Similarly, all indications were that he was cognitively very much intact, an intelligent and able man. There were no indicators of any type of personality dysfunction.

[25] Therefore, you must have known the risk that such driving posed to you and your son. How a father could knowingly disregard the welfare of his vulnerable child in such circumstances would be an anathema to any responsible parent. Lachlan should have expected to be safe in the hands of his father. You breached the precious trust inherent in the father-son relationship, particularly in circumstances where your child was a minor.

[26] How a father could knowingly breach the trust of the mother and family to keep Lachlan safe from harm while in his care would also be an anathema to any responsible parent. Ms Manson and her family expected you to keep him safe. They entrusted him to you. You breached the trust of Ms Manson as a co-parent.

[27] While all passengers in such cases are highly vulnerable to the whims of the driver, in this case Lachlan was particularly vulnerable by virtue of his young age. He was unable to take any preventative action to inhibit or dissuade you, his father, and he was completely at the mercy of your decision-making on that day.

[28] I must observe, however, in assessing the driving, that this was not as prolonged as has been in other cases.

[29] I also observe that the starting point should reflect that you did not initially take the wheel of a car in circumstances where you were inevitably presenting a risk to the public by driving whilst intoxicated, disqualified or otherwise impaired.

Comparative cases

[30] It is evident from the cases that counsel have provided to me that a starting point of between five to nine years' imprisonment is commonly adopted for motor manslaughter offending.[8] I have considered the large number of cases counsel have provided to assist the Court in determining the appropriate starting point.[9] The starting

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8 See *R v Tranter* [2020] NZHC 884 at [37]; and *R v Makaore* [2020] NZHC 2289 at [17].

9 *Mundy v Police* [2020] NZHC 240; *R v Prince* HC Whanganui CRI-2011-083-1775, 5 December 2011; *Richards v R* [2017] NZCA 232; *R v Vanstone* HC Hamilton CRI-2010-068-603, 19 April 2011; *R v Breakwell* [2019] NZHC 3338; *R v Fleming* [2022] NZHC 1517; *R v Griffiths* [2018] NZHC 1104; *R v Barclay* HC Nelson CRI-2006-042-4085, 31 May 2007; *R v Murcott* [2014] NZHC 971; *R v Gosling* [2019] NZHC 1233; *R v Green* [2016] NZHC 513; *Ormsby v R* [2013] NZCA 578; *R v Makoare*, above n 9; *R v Tranter*, above n 9; *R v McGrath* [2014] NZHC 1583; *R*

point in the cases I have been provided range from three years to 10 years' imprisonment.

[31] Comparisons are difficult for such offending as each turns on its own facts, so those cases can only therefore serve as a general guide. That is particularly so in this case, where none of the more common features of the cases are present. This case is truly exceptional on its facts and therefore comparison with more common factual scenarios has limited utility.

Analysis

[32] The Crown submitted your deliberate driving places your offending towards the upper end of seriousness for offending of this type. As I have said, they submitted a starting point of between eight to nine years' imprisonment is appropriate and they rely on the earlier evidence from Mr Metoui that I have referred to.

[33] This was a deliberate crash at very high speed. I note a very unusual feature of this case is that your lack of impairment actually needs to be characterised as an aggravating, rather than mitigating, feature.

[34] None of the cases I have had cited to me have involved a parent in charge of their son or daughter.

[35] In summary, for the reasons I have given I find you to be seriously culpable, putting you in the higher range of sentencing parameters for this offence. Accordingly, I adopt a starting point of seven years six months imprisonment.

[36] I will now turn to the personal mitigating circumstances.

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v Pomare [2017] NZHC 3193; *R v Guest* [2013] NZHC 2432; *R v McKelvey* CA372/97, 25 November 1997; *R v Whiu* [2007] NZCA 591; and *R v Hawthorn* HC Wellington CRI-2003-035-3840, 28 May 2004.

Personal mitigating circumstances

Guilty plea

[37] You have pleaded guilty and you should get credit for that. The Crown acknowledged that and submitted that a discount of only 15 per cent is appropriate. Mr McCormick submitted you should receive at least 20 per cent, if not full credit, for the entry of your guilty plea.

[38] The benefits to the judicial system and participants in it supply the principal justification for a guilty plea discount.[10] Your guilty plea saved the substantial costs associated with a trial and there are therefore benefits for the witnesses, particularly Lachlan's mother and her family, who were not required to give evidence.[11]

[39] A guilty plea discount requires an evaluative assessment reflecting all the circumstances of the case, which must engage any applicable rationales for the discount. These include the strength of the prosecution case, the scale and complexity of the trial, the proximity of the plea to first appearance or to trial, the justification for any delay and the point when the defendant had the opportunity to be informed of all the implications of the guilty plea.[12]

[40] This matter has had a complex and unusual procedural history. I accept the submissions made by your counsel that you should receive 20 per cent discount for your guilty plea in the unusual circumstances of this case.

[41] I turn now to psychological and physical injury sustained by you.

Psychological and physical injury

[42] Mr McCormick submitted on your behalf that the starting point should also be reduced to take into account:

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10 *Moses v R*, above n 3, at [22].
11 *Lynn v R* [2020] NZCA 616 at [38].
12 *Moses v R*, above n 3, at [19] and [23], citing *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

(a) the diagnosis of complicated grief you have suffered since the crash, including its impact on your family;

(b) the current and future effect of the physical injuries you suffered in the crash;

(c) your remorse; and

(d) your good character, including your clean driving record.

Psychiatric evidence

[43] The Crown submitted your diagnosis of complicated grief is not something that existed at the time of the offending, meaning there is no nexus or causative link that can be made between it and the offending to justify a discount. It was further submitted by the Crown that there is no suggestion your condition would render a custodial sentence more difficult.

[44] Finally, the Crown posed what is the most uncomfortable question in the context of this case. That is this question: what is appropriate or expected grief from parent who unintentionally causes the death of their child? They suggest it is implicit that your grief is simply the foreseeable consequence of what you did. That question is a very uncomfortable one. I cannot speculate on what expected grief a parent in your situation is likely to endure, as grief is so personal and variable between individuals. But one can usefully accept that any parent suffering the loss of a child will have lifelong grief of some form or another. That applies equally to you and to Lachlan's mother.

[45] The experts explain the difference between normal grief and your diagnosis of complicated grief in these terms and here again I rely on the evidence of Mr Metoui:

> … in the case of normal grief, the person still feels immense sadness and hardship and particularly in the early phases, and those feelings may well return in a series of waves throughout their lifetime; even years after the death of the person they were close to. These are 'normal' reactions and clinicians would not pathologise them. But unlike in the case of Complicated Grief, a normal grief reaction does not become pervasive and all-consuming in the person's life, meaning the mourner can still have moments of happiness and

> contentment in a variety of contexts outside their internal state of grief. A normal grief reaction involves a successful mourning process where the person is also able to imagine a satisfying future without them and progress their life accordingly. In Complicated Grief quite the opposite occurs, they essentially remain 'stuck' in their lives unable to accept, adjust, or integrate the death into their lives as time passes.

[46] Mr Metoui was unable to estimate how long your complicated grief process will endure. He observed that it showed little signs of remitting and could well prove to be a long persisting issue. However, he emphasised there could be no certainty about this.

[47] I note Dr Monasterio, a consultant psychiatrist who assessed you, reported that you told him as recently as April this year you had noticed a slow and steady improvement in your emotional and psychological state for the past 14 to 16 months, which is consistent with your mother's observations. This appears to suggest that your complicated grief, given that it is uncertain, may improve itself.

[48] Given the fact that this case is about a father who caused the death of his son, I accept that you will have lifelong grief. I also accept that Lachlan's mother will as well. Given that your presentation may very well resolve with the assistance of those experts who have been helping you, it is not a particularly compelling factor in mitigation in my view. Having said that, I do take it somewhat into account.

Physical injuries

[49] Your physical injuries are significant. You suffered extensive burn injuries and a traumatic brain injury to an extent that is unclear at the moment, but it is evident that there is evidence of cognitive impairment. Both of those injuries will likely require careful management throughout the rest of your life.

[50] A small number of cases have considered whether serious injury to the offending driver should warrant a discount as a mitigating factor or not.[13]

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[13] *R v Ormsby*, above n 10; *R v Millar* [2018] NZHC 625; *Millar v R* [2019] NZCA 570 at [34]; *R v Holdem* [2018] NZHC 1739; *R v Paul* [2018] NZHC 2783; *N v R* [2019] NZHC 2083; *R v Dods* [2021] NZHC 2666.

[51] The primary principled basis for serious injury as mitigation that I can extract from the cases that have been provided me is that it reflects punishment the defendant has already been subject to as a result of the offending. However, this discount has to necessarily be limited given that such injury will be the direct (and likely) result of the defendant's own actions. In my view, a high degree of long-term physical or mental debilitation resulting from the offending, which must be verified by independent expert evidence, is required to justify a discount on this basis.

[52] In all the circumstances, I am satisfied your psychiatric condition, coupled with your burn injuries and the as yet to be fully investigated impairment you sustained as a result of your brain injury are sufficiently debilitating and the prognosis sufficiently serious and uncertain to justify a discount of 10 per cent.

[53] I come now to the equally difficult issue of remorse.

Remorse

[54] It is uncontroverted that you presently lack insight into your offending and that you presently lack willingness to accept any responsibility for it. As Mr Metoui has said:

> … until Mr Gebhardt takes real stock of the psychosocial context (whatever they may be) that give rise to him engaging in dangerous driving behaviour and gain insight into it, he will likely remain an undue risk of similar dangerous driving behaviour. …

[55] To an extent, however, he is suggesting that your denial of responsibility and your changing accounts of the crash are a product of the complicated grief syndrome.

[56] Mr McCormick submitted that it is patently obvious that a father who has killed his son will be remorseful.

[57] Certainly you are in grief, there can be no doubt about that. But you do lack insight and that has caused you to not have taken any positive actions to attempt to atone for the offending.

[58] I consider that I have given you sufficient credit for the psychological grief you are experiencing, which overlaps directly with the issue of remorse, so that there should be no further discount in addition to that covered by the psychological evidence I have traversed.

[59] I come to previous good character.

Previous good character

[60] I am satisfied that prior to the offending you were a well-regarded member of your family and community, who many people viewed as a caring and empathetic man. Your parents, friends and neighbours have written to the Court in support of you, to emphasise that you were a devoted father who has since been a shadow of your former self.

[61] You previously had a clean driving record and no previous convictions. You come before the Court as a first-time offender.

[62] I shall give you a discount of five per cent for good character.

[63] I come now to disqualification.

Discussion of disqualification

[64] The Crown seeks an order for disqualification from driving pursuant to s 124 of the Sentencing Act 2002.

[65] They submitted that this disqualification ought to commence on your release from imprisonment.

[66] Having regard to the evidence of Mr Metoui, it is obvious that until such time as you gain insight into the context that gave rise to you engaging in dangerous driving behaviour you will remain a risk, a high risk, for causing fatalities and/or serious injuries to others and yourself.

[67] In the circumstances of this very unusual case and your psychological presentation, I consider that you should be disqualified for seven years following your release from imprisonment.

Conclusion

[68] In conclusion, I take a starting point for the offending of seven years six months' imprisonment, reduced by discounts totalling 35 per cent. The end sentence is therefore one of five years' imprisonment, together with a finite disqualification from holding or obtaining a driver's licence for a period of seven years after your release from prison.

Doogue J

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