SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hine* [2002] QCA 212
PARTIES:	**R** **v** **HINE, Paul Thomas** (applicant)
FILE NO/S:	CA No 31 of 2002 DC No 2140 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2002
JUDGES:	McPherson JA, Mackenzie and Atkinson JJ Separate reasons for judgment of each member of the Court, McPherson JA and Mackenzie J concurring as to the orders made, Atkinson J dissenting
ORDER:	**Application for leave to appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – where appellant convicted of dangerous driving causing grievous bodily harm with a circumstance of aggravation – whether sentence imposed manifestly excessive
	Penalties & Sentences Act, s 9(2)(c), s 9(2)(e)
	Lowe v The Queen (1984) 154 CLR 606, applied *R v Byrne*, CA No 3 of 1995, considered *R v Cusack; ex parte Attorney-General* [2000] QCA 239,CA No 90 of 2000, 16 June 2000, considered *R v de Rooy*, CA No 105 of 1991, 1 August 1991, considered *R v McCormick* [2000] QCA 522, considered *R v Melano; ex parte Attorney-General* (1995) 2 Qd R 186, considered *R v Purcell; ex parte Attorney-General*, CA No 192 of 1999, considered *R v Rowley*, CA No 240 of 1998, 26 August 1998, considered

R v Visconte [1982] 2 NSWLR 104, applied

COUNSEL: A J Rafter for the applicant
S G Bain for the respondent

SOLICITORS: Deardens Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** This is a difficult case to resolve, as is demonstrated by the division of opinion among the members of the Court. The sentence imposed was imprisonment for four years with a recommendation for release after 18 months for a single count, to which the applicant pleaded guilty, of dangerous operation of a motor vehicle causing grievous bodily harm while adversely affected (.139%) by an intoxicating substance.

[2] In arriving at the sentence he did, the learned District Court judge must, I consider, have attached considerable significance to the severity of the impact and the seriousness of the lasting physical and personal effects on the complainant driver of the vehicle with which the applicant's vehicle collided. It was stationary at traffic lights, when the front right hand corner of the applicant's vehicle struck the rear left corner of the complainant's vehicle. The force of the impact was such as to propel her vehicle into a telephone pole some 70 metres distant from its original stationary position. It was presumably this collision that inflicted the brain injuries from which the complainant continues to suffer. In addition, the applicant's vehicle spun into another vehicle in the same or an adjoining lane.

[3] As a result of the accident, the complainant sustained injury to the left temporal lobe of her brain, with accompanying amnesia, and lacerations to the nose and right cheek, bruising to both arms, legs and back and whiplash and back injury. She was in hospital for some ten weeks, where she was admitted to the brain rehabilitation unit receiving treatment from, among others, a speech therapist, an occupational therapist, a physiotherapist and a social worker. She continues to suffer from amnesia, headaches and neck and back pain. There has been an improvement in her condition but the prognosis is that she will never entirely recover from the effects of her injuries.

[4] At the date of the accident, the complainant was some 42 years of age, had separated from her husband after some 14 years of marriage, and was the sole carer of her two teenage children. In order to support herself and her children, she was employed in two jobs in which she worked up to 43½ hours a week. She was paying for both her house and her car, which was wrecked in the collision. It is improbable that she will be able to return to her former employment as a data processor, and will have to work as a cleaner or in some other menial form of employment. Her financial position has seriously deteriorated and the wrecking of her car has made her reliant on public transport. The complainant's amnesia is such that on occasions she had caught, or put her children on, the wrong bus, and has had to use a taxi to return to the correct destination. She has become generally forgetful and has had to rely on friends and family, who are not easily accessible, to help with the children. She has problems with ordinary domestic chores; her balance has been affected, and, no doubt because of the lobe damage, she has become irritable and

has suffered a change of personality. Social activities in which she engaged, such as playing tennis and swimming, are now no longer possible for her.

[5] I am, in describing these effects and consequences, relying largely on the complainant's victim statement. Its contents are confirmed by the medical and psychological reports, in which the opinion is expressed that she is not disposed to exaggerate her problems. It is, of course, true that her condition now was not intended by the applicant. The offence is, however, not one of which intention is an ingredient. Had her injuries and their consequences been less severe, he would no doubt have received a lighter sentence. In that sense, it is a misfortune to him as well as to her that she has suffered so much, and he has expressed his remorse for his conduct. The results of any accident may often be a matter of chance; but, in sentencing in cases like this, it is impossible to ignore the outcome of the offending conduct and its impact on the individual who is the victim of it, the more so after all the effort which has been invested in recent campaigns offering graphic warnings to the public of the risks of driving fast and of the dire consequences of doing so while intoxicated.

[6] When these matters are considered, together with those discussed in the reasons of Mackenzie J, with which I agree, the sentence imposed on the applicant for this offence is not so severe as to be excessive or outside the range of a proper sentencing discretion. The application for leave to appeal should in my opinion be dismissed.

[7] **MACKENZIE J**: The applicant pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm with the circumstance of aggravation that at the time of the offence he was adversely affected by an intoxicating substance. When breath analysis was performed about one and three quarters hours after the incident his blood alcohol concentration was .139%. He was sentenced to four years imprisonment with a recommendation for release on parole after 18 months. The maximum penalty for the offence is ten years imprisonment.

[8] The incident occurred at about 9.00 pm on Logan Road, Holland Park, a major arterial road, at its intersection with Abbotsleigh Street. The applicant was travelling in one of the three southbound lanes as was the vehicle with which he collided from behind when it was stationary at traffic lights at the intersection. About 100 to 150 metres before the intersection with Abbotsleigh Street there is an intersection of Logan Road with Birdwood Road, also controlled by traffic lights. Three motorists in the vicinity of the Birdwood Road intersection saw the applicant drive through it while the lights were red, without slowing down. All observed that he was travelling noticeably in excess of the speed limit, one estimating his speed at about 80 kph.

[9] The complainant has no memory of the incident. However, a motorist had been travelling behind the complainant's vehicle, which was in the right lane. This eye-witness moved into the centre lane and stopped in obedience to the red light to the left of the complainant's vehicle, which had already come to a stop. Just as the witness had come to a complete stop she heard a roaring sound and then the sound of the collision.

[10] A motorist who was intending to turn left into Logan Road from Abbotsleigh Street saw the light change to green in his favour and saw vehicles stationary in Logan

Road. He commenced to turn into Logan Road but upon hearing a loud bang, stopped his vehicle and saw the complainant's car travel past the front of his. The complainant's vehicle came to rest 70 metres from the point of collision.

[11] Additional facts placed before the sentencing judge by the Crown Prosecutor were that, as the applicant approached the Abbotsleigh Street intersection, he moved from the centre lane to the right lane because there was a vehicle ahead of him in the centre lane and collided with the complainant's stationary vehicle. He applied the brakes only eight metres from the point of collision. At the time of the collision the road was dry, there was a system of street lighting, and visibility was good. The sentencing judge was also told that the applicant had admitted drinking four full strength stubbies, having consumed the last at about 8.45 pm. He admitted that he was driving at 80 to 90 kph.

[12] The complainant suffered the common motor vehicle accident injuries of bruising, lacerations, whiplash and back injuries. In addition she suffered grievous bodily harm, a closed head injury which has left her with continuing impairments of her memory and cognitive functioning, personality change and some problems with her balance. These are relevant circumstances, according to s 9(2)(c) and (e) of the *Penalties & Sentences Act.* She has suffered substantial economic loss and personal inconvenience, in addition to the ongoing physical effects of her injuries. The applicant was not injured.

[13] Counsel for the applicant at sentence said that the account of the driving given by the eye-witnesses was accepted by the applicant, although he had little recall of the incident. The sentencing judge was told that the applicant had been involved with bands for some time and had been at a friend's home where they had practiced. During the course of the evening alcohol was consumed. The applicant had no previous criminal history. In 1998 his Learner's Permit was cancelled for three months for traffic infringements, including exceeding the speed limit by at least 30 but less than 45kph. Since then he has one traffic infringement for exceeding the speed limit by less than 15kph. He was 26 at the time of the offence. He is married and has a child, born soon after the incident. He expressed remorse and apologised through counsel to the complainant and her family. He had good references from members of his extended family and former employers.

[14] The Crown Prosecutor submitted that four years imprisonment was appropriate and particularly relied on *R v Byrne*, CA 3 of 1995, where five years imprisonment was imposed for what was conceded to be a worse case of dangerous driving causing death and grievous bodily harm whilst adversely affected by alcohol (the concentration being .136%). Defence counsel, after referring to *R v Purcell; ex parte Attorney-General*, CA 192 of 1999, submitted that the appropriate range for the head sentence was two to three years.

[15] The learned sentencing judge referred to the facts that the applicant was under the influence of liquor, had driven above the speed limit, had collided with a vehicle stationary at a red light, had driven through a red light previously, and caused "tragic results" to the complainant.

[16] The learned sentencing judge said that the sentence must reflect the seriousness of the offence, which was a serious one. It must be calculated to deter others from endangering other road users by driving after drinking to excess. He imposed the

sentence of four years imprisonment with the recommendation that he be considered for release on parole after 18 months of that period.

[17] In the present application the Crown relied on *R v Byrne* (*supra*). The applicant submitted that *R v Purcell* (supra*)*, *R v Cusak; ex parte Attorney-General*, [2000] QCA 239, and *R v McCormick*, [2000] QCA 522, supported his submission that the sentence imposed was manifestly excessive.

[18] Because of the broad range of circumstances in which dangerous driving offences may occur, a correspondingly wide range of sentences can be found in the authorities. The schedule relied on by the Crown shows this clearly. True comparability because of identical facts is rare. For that reason it is necessary in an individual case to assess how serious an example of the offence it is and, giving appropriate weight to mitigating circumstances, other relevant factors and relativity with cases which are, broadly speaking, of similar seriousness to impose a sentence which achieves justice in the particular case.

[19] When considering previous decisions of the Court of Appeal, there will be cases where an error inferred from the nature of the sentence imposed or a specific discernable error required the Court to exercise its own sentencing discretion and those where the Court of Appeal has embarked on a comprehensive review of authority with a view to making an authoritative statement of principle. Where none of those kinds of cases provides clear guidance, the "range" is derived from cases where the issue was, in the case of an application by a convicted person, whether the sentence was manifestly excessive, and in the case of an Attorney-General's appeal, whether the sentence imposed was outside the scope of a proper sentencing discretion (*R v Melano, ex parte Attorney-General* (1995) 2 Qd R 186). Recognition by the Court of Appeal that circumspection is necessary in Attorney-General's appeals makes them an uncertain guide as to what would be manifestly excessive in similar circumstances. Conversely, cases where it was decided that an application for leave to appeal should be refused because the sentence was not manifestly excessive do not necessarily establish the point at which a sentence is beyond a proper exercise of discretion.

[20] It is understandable that the learned sentencing judge described the driving as serious. The applicant drove at 20 to 30 kilometres above the speed limit on a major suburban road. He was adversely affected by alcohol at the time. He collided with a stationary vehicle which had been stationary at a red light for some time. At best he realised that he needed to brake when he was only metres away from the point of collision. Road and visibility conditions were good and should have played no part in what happened. Since the applicant could offer no explanation of what had happened, there is no reason to think they did. It was not a case of momentary or inadvertent dangerous driving. He had driven through a red light 100 to 150 metres before the point of collision at similar speed. He inflicted a significant level of physical and emotional harm of a continuing nature on the complainant, another road user who was entirely blameless.

[21] There were no circumstances mitigating the seriousness of the driving itself which led to the collision. It was reckless. There are mitigating circumstances in factors personal to the applicant. He was relatively young at the time. He had no criminal convictions, although there was one previous example of driving at speed in excess of 30kph over the speed limit. In other respects he seems to have been a good

family man and a productive member of society. These personal circumstances entitled him to favourable consideration for early release from actual custody. So did his plea of guilty and his contrition.

[22] So far as the sentence of four years imprisonment is concerned, I am not persuaded that it was manifestly excessive in the circumstances. Of the principal authorities relied on, I consider *Byrne* to bear more resemblance factually to the present case than the others. The level of alcohol was similar. The road was an arterial road. In some respects *Byrne* has worse features. There was evidence of a course of erratic driving, of longer duration than in the present case. Byrne was driving a heavy vehicle which had the potential to cause great harm in the event that a collision occurred. One person was killed and two suffered grievous bodily harm. It was a more serious case than the present case in those respects, as the Crown conceded. As against that, the speed at which the vehicle was being driven at the time was at about the speed limit but was too fast in the circumstances, since he lost control on a curve and ran into oncoming lanes of traffic.

[23] I cannot persuade myself that the relativity between *Byrne* and the present case leads to the conclusion that the head sentence of four years was manifestly excessive. Of the authorities relied on by the applicant, *Purcell* and *Cusak* were Attorney-General's appeals. In *Purcell* and *Cusak* the complainants both were passengers who had voluntarily driven with the applicant after drinking together. According to *Cusak*, that is one of the circumstances to be taken into account in measuring the overall seriousness of the conduct in question although by no means decisive. In other authorities, including *Wurzbacher*, CA 264 of 1996, analysed in *Purcell*, serious injury to the applicant has also been treated as a relevant circumstance. In *McCormick* both Pincus JA and Helman J specifically noted that the only particularisation of dangerous driving was that the applicant was adversely affected by intoxicating substances.

[24] A variety of cases is analysed in *Purcell*. The second last paragraph of the judgment in that case points to particular distinguishing features in some where sentences markedly lower than the present one were imposed. *R v de Rooy*, CA 105 of 1991, was an Attorney-General's appeal in a momentary inattention case not involving excessive speed but, because the level of alcohol was 0.15%, subject to a higher maximum penalty. The grievous bodily harm was suffered by the offender's wife who was a passenger. *R v Quinlan*, CA 297 of 1994, involved an 18 year old sole parent of two with no criminal history who drove at excessive speed in a defective vehicle. In each of these, a head sentence of three years imprisonment was imposed. *R v King*, CA 516 of 1995, was an Attorney-General's appeal in a case where a higher maximum penalty applied because the concentration was 0.28%. Grievous bodily harm was done to a passenger when the driver ran the vehicle off an unfamiliar dirt road while driving at 100kph and searching for a cassette. She had sole custody of two children, had no previous convictions and had had an unfortunate upbringing. A sentence of three years imprisonment was imposed, the Court observing that notwithstanding those three matters and her remorse, a lower sentence was not appropriate.

[25] In *R v Ekstrom*, CA 229 of 1997, where the alcohol concentration was 0.215% (therefore attracting a higher maximum penalty) the female offender pleaded guilty, had no criminal record and good references, but had a drinking problem. She had demonstrated remorse by helping the injured person financially. A sentence of 3½

years without a non-parole recommendation was held to be not manifestly excessive. Since there were mitigating circumstances to be allowed for, they must be reflected in the head sentence. Although the judgment does not explain how the sentence was arrived at, an effective non-parole period of 21 months suggests that the nominal head sentence must have been about 4½ years. Even allowing for the fact of different maximum sentences, it is not support for a conclusion that the present sentence exceeds its proper range.

[26] *R v Rowley*, CA 240 of 1998, was also subject to a higher maximum because of a concentration of 0.182%. The applicant drove at speed on a major suburban road and collided with another vehicle when he failed to negotiate a bend. He pleaded to an *ex officio* indictment, and had a minor criminal record and one previous conviction for driving under the influence of liquor (0.071%). His sentence of four years with a recommendation after 16 months was held to be not manifestly excessive

[27] This kind of analysis demonstrates that each case depends very much on its own facts. In my view it cannot be maintained successfully that it demonstrates that the sentence of four years imprisonment was manifestly excessive. Having said that, it should also be said that relativity with *Byrne* suggests that a sentence of any greater period would have been vulnerable. With regard to the non-parole period, the proportion of the sentence to be served before the applicant may be considered for release is within proper limits of the sentencing discretion. Overall, the sentence is not manifestly excessive. I would refuse the application.

[28] **ATKINSON J:** On 18 January 2002, the applicant pleaded guilty to the charge that on 3 August 2000 at Holland Park he dangerously operated a vehicle in Logan Road and caused grievous bodily harm to Susan Mary Plumridge, with the circumstance of aggravation that at the time of the offence, he was adversely affected by an intoxicating substance. He was sentenced to four years imprisonment together with a recommendation that he be released on parole after serving 18 months of that sentence. He was also disqualified from obtaining or holding a driver's licence for a period of three years. The maximum term for this offence is ten years.

[29] The circumstances of the offence were that at about 9.05 pm, the applicant was driving south-bound along Logan Road at Holland Park. He was observed by witnesses to drive through a red light at the intersection of Logan and Birdwood Roads. As he proceeded towards the next intersection, he was travelling in the centre lane of three southbound lanes. Both intersections were busy intersections and there were many other vehicles in the vicinity. The traffic light facing that intersection, which was the intersection of Logan Road and Abbotsleigh Street, was red. There were two stationary vehicles in the intersection, one in the centre lane in which he was travelling and the other, a Mitsubishi Lancer, driven by the complainant, Susan Mary Plumridge, in the right hand lane.

[30] As the applicant approached the intersection he moved from the centre lane to the right hand lane. He applied his brakes at a distance of only eight metres from the complainant's stationary vehicle, and collided with that vehicle. The front right corner of the applicant's vehicle collided with the left rear corner of the complainant's vehicle. The force of the impact was so great that the complainant's vehicle finally came to rest about 70 metres from the point of the collision, when it hit a telephone pole and was almost totally destroyed.

[31] The police arrived and the applicant was spoken to at 9.45pm. He said he had consumed four full-strength stubbies of beer and estimated he had been travelling at about 80 or 90 kilometres per hour. This estimate was apparently consistent with the observations of witnesses.

[32] A road side breath test indicated that he was over the blood alcohol limit. A subsequent breath analysis produced a reading of 139mg of alcohol per 100ml of blood or 0.139%. He was not injured in the incident.

[33] The complainant sustained serious injuries which constituted grievous bodily harm. She suffered a closed head injury of moderate severity. In her victim impact statement, which is in the form of a statutory declaration, Ms Plumridge says that she suffered from a closed head injury to the left temporal lobe and acute post-traumatic stress amnesia, lacerations to the nose and right cheek, bruising to both arms, legs and back, whiplash and back injury. After the accident she was taken to Princess Alexandra Hospital and was unconscious for four days. When she awoke she had no recollection of anything. Medical records show that Ms Plumridge emerged from post-traumatic amnesia on 9 September 2000, a period of 37 days, which is said to be indicative of a severe head injury. Whilst she was in hospital she was admitted to the brain rehabilitation unit where she received treatment from a number of doctors, a physiotherapist, a social worker, a speech therapist and an occupational therapist. She remained in hospital for approximately ten weeks. She has not been able to undertake paid employment since the injury but has participated in unpaid volunteer work.

[34] In a report dated 8 November 2001, Dr Ohlrich, a consultant neurologist at the Royal Brisbane Hospital, said that she had made a good recovery although she still had significant neurological impairment. This neurological impairment was evident in her memory impairment, personality change and also probable high level but mild speech dysfunction. In addition, there was impairment of cognitive function and some balance difficulty. She also had insight into her neurological problems.

[35] His view that was her neurological condition might improve a little over the next 12 months although he did not consider it would be any major improvement. There was also a small risk of post-traumatic epilepsy occurring in the future as a result of the head injury. He said that it was not possible to make a final assessment until two years after injury.

[36] So far as future employment was concerned, Dr Ohlrich considered that she probably would not be able to return to her previous employment which was office and computer work. She would only be capable, in his view, of simple employment such as a part-time cleaner or child minder.

[37] The applicant was born on 18 May 1974 and so was 26 at the time of the offence and 28 when he was sentenced. He has no criminal history although he has a history of traffic offences. On 15 September 1998, he committed the offences of exceeding the speed limit in a speed zone by at least 30 but not less than 45 kilometres per hour, failing to produce a Queensland Licence when required and being a learner driver without a passenger with an open or provisional licence seated beside him. His licence was cancelled on 21 October 1998. On 10 July 1999, he was fined for exceeding the speed limit by less than 15 kilometres per hour.

[38] The applicant left school at the end of 1991 and was married in 1993. He worked in a number of jobs after leaving school but principally worked as a storeman. His wife gave birth to a child in October 2000. References were tendered on his behalf by his parents-in-law and employers. Those references speak very highly of the applicant. At sentence, he was said by his counsel to be consumed by guilt and remorse and his counsel had instructions to extend an apology to the complainant and her family.

[39] The learned sentencing judge did not specifically refer to the fact that the applicant had pleaded guilty. The fact that he did not refer to that point does not mean he did not take it into account and the structure of the sentence, being a recommendation for parole before 50 per cent of the sentence was served, suggests that he did take that into account.

[40] An examination of sentences in similar or more serious cases, however, tends to support the applicant's submission that the sentence was manifestly excessive in these circumstances.

[41] The Crown relied on a number of cases including *R v Byrne*, CA No 3 of 1995, 22 March 1995, in which an appeal against a sentence of five years imprisonment with a recommendation for parole after serving two years was dismissed. This case had some features that were more serious than the present case. The applicant was a professional driver being employed as a prime mover driver. He had consumed alcohol both on the previous evening and on the morning that he drove. He had previously stopped several metres into an intersection where the traffic lights had turned red, swerved off the side of the road and surged backwards and forwards towards a car he was following. When he attempted to negotiate a left hand bend at Burleigh Heads, doing 60 kilometres an hour, he changed from the left lane to the right lane and his vehicle overturned. Two hours later his blood alcohol content was 0.136. He was convicted of dangerous driving causing death and grievous bodily harm with the circumstance of aggravation of being affected by alcohol. The passenger in another vehicle was killed and the driver of that vehicle was seriously injured. Her nose was almost completely severed from her face. A pedestrian suffered severe injuries to her foot. The appellant in that case, as here, had no prior convictions and a good work history. He was aged 34. He was convicted after a trial.

[42] The applicant relied on the cases of *R v Purcell; ex parte Attorney-General of Queensland*, CA No 192 of 1999; *R v Cusack; ex parte Attorney-General of Queensland*, CA No 90 of 2000, 16 June 2000; and, *R v McCormick* [2000] QCA 522. Both *Purcell* and *Cusack* are appeals against sentence by the Attorney-General and so subject to the limitations which apply to appeals of that nature.

[43] Purcell was convicted of dangerous driving causing grievous bodily harm. The circumstance of aggravation was that he had a blood alcohol concentration exceeding 150mg of alcohol per 100ml of blood. In such a case, the maximum penalty is 14 years imprisonment. On appeal his sentence was increased from two years imprisonment with a parole recommendation after six months to three years imprisonment with the parole recommendation after 12 months. Purcell was only 24 years of age and had no criminal history. However, at the time of the offence, he had been charged with driving a vehicle with a blood alcohol concentration of

0.103 per cent and was on bail at the time he committed the offence. He pleaded guilty and showed genuine remorse.

[44] The complainant had been drinking with the respondent and willingly got into the car with him. Both the applicant and complainant were injured. The complainant was seriously injured but hoped to be able to complete his apprenticeship as a motor mechanic. Derrington J regarded the injury to the applicant as a mitigating factor. The Court was of the view that the sentence was manifestly inadequate and re-sentenced the respondent to three years imprisonment with a recommendation for parole after 12 months.

[45] A number of comparative cases were referred to in *Purcell* which are relevant to this case. In *R v de Rooy*, CA No 105 of 1991, 1 August 1991, de Rooy pleaded guilty to dangerous driving causing grievous bodily harm with a circumstance of aggravation. He was sentenced to a community service order which was increased on the Attorney-General's appeal to a period of three years imprisonment with a recommendation for parole after one year. He did not drive excessively but failed to observe a stop sign and collided with a van. He had a blood alcohol level of 0.15. His passenger suffered a fractured pelvis and a complex laceration over her left elbow. Minor injuries were suffered by others in the vehicle. de Rooy was unfamiliar with the roads upon which he was travelling and did not see the stop sign. He was 26 years old and had no prior convictions or traffic history. Ryan J, with whom de Jersey J (as his Honour then was) and Mackenzie J agreed, said that:

> "… Where a person drinks alcohol to an extent where he has a blood alcohol reading of 0.15 or in excess and drives a motor vehicle dangerously, as he did here, and causes death or grievous bodily harm, then the consequence would ordinarily be that he should receive a substantial period of imprisonment by way of punishment."

[46] In *R v Wurzbacher*, CA No 264 of 1996, 20 September 1996, the applicant pleaded guilty to dangerous driving causing grievous bodily harm with a blood alcohol concentration of 0.19 per cent. He was 24 years old. He drove his motor cycle dangerously, despite the protestations of his step-brother who was his pillion passenger, at speeds of up to 130 kilometres per hour, almost losing control on corners; he crossed an unbroken white centre line and collided with a motor vehicle travelling in the opposite direction and then with the rear of the motor vehicle which he had been trying to overtake. The applicant's step-brother recovered from his serious leg injuries but the applicant's badly broken leg was finally amputated. Wurzbacher was sentenced to four years imprisonment with a recommendation for release on parole after 12 months and was disqualified from holding or obtaining a driver's licence for three years.

[47] Wurzbacher had no criminal history and only three minor traffic matters, for which he was fined, when he was aged 19. He demonstrated genuine remorse, pleaded guilty and good references were tendered on his behalf. He was not sentenced until almost three years after the offence was committed but that delay was not his fault. He was himself grievously injured. The majority of the Court of Appeal held that the sentence was manifestly excessive and instead a sentence of two and a half years imprisonment with a recommendation for parole after 8 months was substituted without interfering with the order for disqualification.

[48] In *R v Rowley*, CA No 240 of 1998, 26 August 1998, the applicant pleaded guilty to dangerous operation of a vehicle causing grievous bodily harm with a circumstance of aggravation. He had a blood alcohol level of 0.182 per cent. The maximum period of imprisonment was 14 years. The complainant suffered severe, multiple injuries. Rowley was sentenced to four years imprisonment with a recommendation for release on parole after 16 months and appealed on the basis that his sentence was manifestly excessive. Although the dangerous driving occurred only over a short period of time and a short distance and the applicant was young, had a good work history, Navy service, favourable family circumstances and pleaded guilty by way of *ex officio* indictment, he had a prior conviction for driving a motor vehicle with a blood alcohol level of 0.71 and prior convictions for drug offences and stealing. His appeal against sentence was dismissed.

[49] Another case relied upon by the applicant was *R v Cusack; ex parte Attorney-General* (supra), in which the respondent had pleaded guilty to dangerous driving causing death whilst adversely affected by an alcohol concentration exceeding 0.15 per cent. He was sentenced to three years imprisonment wholly suspended for four years. He was also fined $10,000 and disqualified from holding or obtaining a driver's licence for four years. The Attorney-General's appeal was allowed and he was sentenced to three years imprisonment, suspended after nine months. The respondent had no convictions, a timely guilty plea and the person killed was a passenger who willingly got into the car and a friend. He was genuinely remorseful and had a good family background. After setting out the mitigating factors, Thomas JA said, at pp 4-5:

> "As against these factors the circumstances reveal deliberately reckless driving with a high blood alcohol level, and the knowledge that passengers were in a vulnerable position in the vehicle. It has been repeatedly laid down both in the Court of Criminal Appeal and in this Court that conduct of this type will be met with actual and substantial imprisonment."

His Honour referred to a number of cases before saying that, if anything, the attitude of the community and in turn of the courts towards offences of this kind has hardened.

[50] The final case relied upon for the applicant was *R v McCormick*, CA No 89 of 2000, 22 December 2000. The applicant was convicted after a trial on one count of dangerous driving causing grievous bodily harm with the circumstance of aggravation that he was affected by methylamphetamine and amphetamine. His application for leave to appeal against a sentence of three and a half years imprisonment was refused. The circumstances were that the applicant, a truck driver, drove his large prime mover off the roadway at Ipswich Road and onto the footpath, causing extensive damage to a shop awning and serious injury to five people. Each suffered multiple fractures and severe pain and discomfort. One had her right leg amputated below the knee. Upon analysis, his blood was found to contain 0.4mg/kg of methylamphetamine and 0.03mg/kg of amphetamine.

[51] In the case presently before the Court, the dangerous driving took place over a relatively short time by a person without a serious criminal history, with a good work history, a family for whom he was responsible and good prospects for the future, but involved high speed, going through one red light and then another in a relatively busy area, while intoxicated by alcohol. The applicant was not injured

but the effect on the complainant who was not known to the applicant and who was a completely innocent victim, has been most grievous.

[52] Consistency in sentencing is an important principle in achieving the objective of fairness in sentencing: *R v Zakaria* (1984) 12 A Crim R 386 at 388; *R v Visconte* [1982] 2 NSWLR 104 at 107; *Lowe v The Queen* (1984) 154 CLR 606 at 610-611. In my view that requires a reduction of this sentence which, when compared to sentences for similar or more serious offences, is manifestly excessive.

Order

1. Allow the application for leave to appeal against sentence;
2. Allow the appeal against sentence;
3. Substitute a sentence of three years imprisonment with a recommendation that the appellant be considered eligible for release on parole after serving 12 months of that sentence;
4. Retain the disqualification from obtaining or holding a driver's licence for a period of three years.