SUPREME COURT OF QUEENSLAND

CITATION:	*R v Danter* [2016] QCA 94
PARTIES:	**R** **v** **DANTER, Helen Marie** (applicant)
FILE NO/S:	CA No 192 of 2015 DC No 250 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Date of Sentence: 20 August 2015
DELIVERED ON:	15 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	18 March 2016
JUDGES:	Margaret McMurdo P and Philippides JA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The sentence imposed is varied to the extent that it is wholly suspended.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant was convicted of one count of dangerous operation of a vehicle causing grievous bodily harm – where the applicant was sentenced to three years imprisonment with a parole release date after 12 months of that term had been served – whether the sentencing judge erred in failing to characterise the case as one of momentary inattention – whether the sentence was manifestly excessive – whether the sentencing judge erred in imposing a sentence with a period of actual custody *R v Allen* [2012] QCA 259, cited *R v Conquest; ex parte Attorney-General* [1995] QCA 567, cited *R v Hall*, unreported, District Court of Queensland, Newton DCJ, DC No 328 of 2011, 22 December 2011, cited *R v Harris; ex parte Attorney-General* [1999] QCA 392, cited *R v Iaria* [2008] QCA 396, considered *R v MacDonald* [2014] QCA 9, considered

R v McGuigan [2004] QCA 381, considered
R v Nona, unreported, District Court of Queensland, Harrison DCJ, DC No 2847 of 2014, 26 November 2014, cited
R v Proesser [2007] QCA 61, considered
R v Towers [2009] QCA 159, considered
R v Wakefield (2008) 187 A Crim R 514; [2008] QCA 269, considered

COUNSEL: C J Rosser for the applicant
M B Lehane for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Philippides JA's reasons for granting this application for leave to appeal, allowing the appeal and varying the sentence by wholly suspending it.

[2] **PHILIPPIDES JA:** The applicant was convicted on her plea on 16 July 2015 of one count of dangerous operation of a vehicle causing grievous bodily harm. The applicant was sentenced on 20 August 2015[1] to three years imprisonment with a parole release date after 12 months of that term had been served, namely 19 August 2016. In addition, she was disqualified absolutely from holding or obtaining a driver's licence.

[3] The applicant seeks leave to appeal against the sentence imposed on the following grounds:

(a) the sentence was manifestly excessive;

(b) the learned sentencing judge erred in refusing to categorise the applicant's conduct as "momentary inattention" or alternatively incorrectly categorised the applicant's conduct as careless;

(c) the disqualification of the applicant's driver's licence on an absolute basis was unnecessary and excessive; and

(d) the sentencing judge erred in ordering the applicant's release on parole and ought to have ordered a suspended sentence instead.

[4] After filing the application for leave to appeal against sentence, the applicant applied for, and was granted, appeal bail on 26 August 2015.

Background

Circumstances of the offending

[5] The sentence proceeded on the basis of an agreed schedule of facts. The 13 year old complainant and her twin sister were waiting at the pedestrian crossing on Bayview Street, Hollywell on the Gold Coast. They were riding bikes and had on bike helmets. Bayview Street is a two lane road, with one lane that runs in a northbound direction

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[1] The hearing of the sentence was stood down on 16 July 2015 part heard and adjourned until 20 August 2015 so that additional medical reports could be obtained.

and the other lane running in a southern direction. The speed limit was 60 km/h. The weather was fine and the road was in good condition.

[6] The crossing has a large pedestrian refuge traffic island in the centre of the road. There is also a traffic island on the east side of the road, and a traffic island on the west side of the road. There are bicycle paths to the left of the road on both the northbound and southbound lanes. Further to the left of the bicycle paths are parking lanes on both the northbound and southbound lanes.

[7] The applicant was travelling along Bayview Street in a northbound direction. The two cars in front of the applicant had stopped at the crossing for the sisters. The two vehicles behind the applicant had also slowed in anticipation of stopping. Both of those drivers had also seen the girls waiting to cross. The first vehicle was a van. The second was a ute, which had a dashboard camera that recorded the events.

[8] The young complainant, seeing that both sides of the crossing had stopped, started riding across the road, with her sister riding in front of her. This was able to be seen on camera footage. It also showed that the applicant pulled out from behind two vehicles which were stopped in front of her and went over to the left side of those vehicles. She swerved to avoid the traffic island that was on the left hand side and then drove across the crossing. She almost hit the complainant's sister who had nearly crossed the northbound side of the crossing. The complainant was in the middle of the crossing. The applicant swerved right but hit the complainant who was thrown into the air, hitting the bonnet of the car, and then landing under the front wheels of the applicant's vehicle. She was dragged for about 10 metres. The applicant's vehicle ended up on the wrong side of the road, before she corrected the situation and eventually stopped.

[9] The applicant remained at the scene until the police arrived. She was breathalysed and returned a reading of 0.00. When speaking to the police the applicant said that she had noticed that the cars were slowing at the crossing and that she put her foot on the brakes but they did not work. She kept trying to slam on the brakes but her car "wouldn't stop". She believed her vehicle's faulty brakes were responsible for the collision. It was because of the difficulties with her brakes, that she pulled into the parking lane and ultimately hit the child. She also told police that she had a "scrape on [her] right foot where it got caught under the brake pedal". Several months later, when interviewed by the police, on 20 February 2014, the applicant maintained that the car's brakes had failed.

[10] The brakes of the applicant's vehicle were examined by a police expert and found to be in good condition and fully operational. That expert was cross-examined at a committal on 9 February 2015. The police officer maintained the brakes were in good condition.

Injuries sustained

[11] The complainant was rendered unconscious as a result of being struck and sustained serious injuries, including a closed head injury (a subgaleal haematoma, bruising to the brain, but a CT scan demonstrated no intracranial (brain) injury), fractured ribs, a fractured clavicle, a fractured pelvis, multiple friction burns to both thighs and her lower back and arm, and a puncture wound to the ankle. She was hospitalised for a period of about a month and treated conservatively, with no surgery required for the fracture to the pelvis, clavicle, ribs and bruising to the brain. The friction burns to the applicant's legs required management, including by way of debridement and skin

grafts. By 22 January 2014, the complainant was mobilised well and her burns had nearly healed. She continued however to require regular follow up including physiotherapy.

[12] A plastic surgeon, Dr Cockburn, provided a report concerning a number of complex areas of scarring, which he considered would continue to improve but would never disappear. The skin would be more liable for trauma, more prone to ultraviolet radiation and may be less stable than uninjured skin into the future. There were also multiple friction burns which required the skin graft and resulted in the scarring. A report from an orthopaedic surgeon, Dr Wallace, was also tendered at sentence. It described orthopaedic injuries including a fractured collarbone, fractured pelvis and fractured left ribs. Dr Wallace indicated that there was no residual impairment of her fractured left clavicle. There was some hypersensitivity of her left thigh wound of cosmetic concerns, but the complainant had problems with bilateral anterior knee pain. This would require analgesia and limit her ability to actively participate in sport in the future. A report by a second orthopaedic surgeon, Dr Journeaux, was also tendered. It indicated there was no deformity related to the clavicle fracture, but noted significant cosmetic disfigurement from abrasions and lacerations to the complainant's legs. A significant scar related to the posterior lateral aspect of the left fibula, resulted in some minor restriction in ankle movement.

[13] At the time of sentence, the complainant still had extensive scarring over both lower limbs. All scars were paling and pliable but still noticeable. She will be left with permanent scarring in those areas. She has reduced ankle range, walking and running with a more flat footed gait, which will impact on her dexterity for walking/climbing over rougher terrain. She also has significant bilateral anterior knee pain. Her ability to actively participate in sport in future was described as limited.

[14] A report was by a neuropsychologist, Mr Lloyd, was tendered in relation to the traumatic brain injury suffered by the complainant, her ongoing cognitive difficulties in a range of areas upon initial assessment and then subsequent general recovery in those areas. The psychologist opined there would be minor to no impact as to her brain injury on her future functioning. However, it was said to be difficult to anticipate the presence of any permanent deficits until she completed her schooling and entered further study or the workforce. By the time the matter came on for a further hearing on 20 August 2015, a report had been obtained from a Dr Beech, a psychiatrist, as to the emotional and psychological impact upon the complainant. He opined that the complainant suffers no psychological disorder and that her "prognosis now is very positive". She had returned to full-time schooling and her academic grades were back to pre-morbid level. She had been able to continue with friendships and had returned to social and recreational activities.

Sentencing remarks

[15] The applicant's counsel submitted at sentence that, bearing in mind the course of driving involved, the applicant's plea of guilty, that the applicant demonstrated remorse both at the scene of the accident and throughout the proceedings, her good employment record, lack of criminal history and only a minor traffic history, an actual term of imprisonment would be excessive. (The traffic history concerned a single old drink driving conviction (BAC 0.07) for which a $400 fine and one month disqualification was imposed.)

[16] In rejecting the submissions made by the applicant's counsel, the sentencing judge described the offending as a serious case of dangerous driving which had resulted in serious injuries and consequences for the complainant. He noted that the complainant was struck on the pedestrian crossing at a time when other vehicles had stopped to allow her and her sister to cross. The collision had occurred in sunny and dry conditions. His Honour characterised the case as one involving more than momentary inattention, albeit one where excessive speed was not alleged. His Honour observed that:[2]

> "The collision appears to me to have been caused by the fact that either you did not keep a proper lookout and swerved to the left to avoid two vehicles which had already stopped at the pedestrian crossing, or you tried to overtake those vehicles on the left regardless of the fact that they may have been stopped at the pedestrian crossing and regardless of the fact that the configuration of the crossing made that manoeuvre difficulty (sic).
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> Either way, it is a serious case of dangerous driving resulting in serious injuries and consequences for the complainant. She was struck on the pedestrian crossing at a time when other vehicles had stopped to allow her and her sister to cross. It was, in this sense, a senseless accident which should not have happened, had you been keeping a proper lookout. There was nothing wrong with the brakes of your vehicle. You initially said to investigating police that your brakes failed. They were inspected and tested and nothing wrong was found with them. No defects with the condition or operation of the brakes, as claimed by you, was found (sic)."

[17] The sentencing judge referred to the extent of the impact upon the young complainant and her family. His Honour had regard to principles of general deterrence. He also took into account the applicant's plea, the favourable references tendered on her behalf, her good employment history and that the applicant was remorseful. She had not driven since the collision. However, the sentencing judge considered he had no option in the circumstances but to impose a sentence that included a custodial component.

Error in characterisation of the applicant's driving?

[18] Before turning to consider whether the sentence imposed was manifestly excessive, it is convenient to address the submission that the sentencing judge erred in his characterisation of the driving the subject of the offence. The applicant's counsel submitted that the applicant's driving involved approaching a seldom used and poorly signed crossing, with a large vehicle in front of her obstructing her view. It was submitted that at first glance nobody would have appeared to be waiting and that the complainant and her sister approached the crossing quickly. While approaching the crossing, the applicant lost her immediate attention for a short moment. When she had regained focus the traffic had stopped but it was too late and she was unable to stop her vehicle but was unable to do so and took evasive action to avoid a rear-end collision. This resulted in the applicant crossing onto the pedestrian crossing and hitting the complainant.

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2 Record at 30.

[19] It is immediately apparent that much of this is speculative hypothesis. As the respondent submitted, the applicant was familiar with the route, including the crossing's location and the location of the bike paths. The driving conditions were good. Other motorists behind her and to the front had noticed both the crossing and the girls. The two front vehicles had time to completely stop. At that point, the complainant and her sister had begun to cross. Inexplicably, the applicant manoeuvred around the two stationary vehicles, narrowly missing the first girl and striking the second. It was open in those circumstances for the sentencing judge to conclude that the driving involved an element of recklessness.

[20] I do not consider that there was any error in the sentencing judge failing to categorise this case as one of momentary inattention. The vehicles in front of the applicant had come to a stop and that ought to have been apparent to the applicant had she been keeping a proper look out. The submission sought to be made on behalf of the applicant, if anything, confirms that more than mere momentary inattention was involved and that the applicant did not have proper control of her vehicle. The applicant swerved to the left in a manoeuvre that involved overtaking the vehicles in front of her.

[21] This Court has recently observed the limited usefulness of categorisation of driving as "momentary inattention" or otherwise. In *R v MacDonald*,[3] Fraser and Morrison JJA recently preferred a construction of the approach taken by Thomas JA in *R v Harris; ex parte Attorney-General*,[4] after a detailed review of the authorities where the question of "momentary inattention" had been considered. They observed:[5]

> "Furthermore, in every case the crucial issue is not what category ('momentary inattention' or otherwise) best fits the facts. Rather the crucial issue is as Thomas JA said in *Harris*, 'the level of seriousness of the actual driving of the offender ...'"

[22] Nevertheless, I do not take the sentencing judge's remarks about any attempt by the applicant to overtake on the left as meaning that deliberately reckless conduct was involved, as the respondent submitted at sentence.

Applicant's submissions as to whether the sentence was manifestly excessive

[23] It was contended that the learned sentencing judge failed sufficiently to take into account the plea of guilty; the applicant's cooperation with police at the scene; the fact that she had attempted to assist the complainant (but was held back by witnesses); and the fact that the applicant had no previous criminal history and only a single entry in a traffic history of a low-level drink driving offence in 2007.

[24] The applicant submitted that, even if the learned sentencing judge was correct in his characterisation of the case as not being one of momentary inattention, the applicant's antecedents, prior good character and expressions of remorse place the applicant in the same category of case where a wholly suspended term of imprisonment has been imposed. A sentence involving 12 months in custody before parole release was outside the proper exercise of the sentencing discretion so that the sentencing exercise

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3 [2014] QCA 9.
4 [1999] QCA 392.
5 [2014] QCA 9 at [17] (citations omitted).

miscarried. The applicant had no ongoing issues that suggested the imposition of parole was required. The sentence was manifestly excessive. Offenders who engaged in arguably worse examples of dangerous driving have received sentences of proportions less than that imposed on the applicant.

[25] Citing *R v Towers*,[6] it was submitted that the sentencing judge overlooked previous authority to the effect that, where alcohol was not involved, there was no excessive speed and the dangerous driving was the result of a short period of inattention, a custodial sentence was not inevitable. In *Towers*, the Court observed that although dealing with "not directly relevant" criminal history, what it meant is that the usual "hesitation in jailing a first time offender was absent".[7] Here no such hesitation is absent; the applicant has no criminal history.

[26] It was contended that the sentencing judge placed too much emphasis on the need for deterrence. This was not a case where given an offender's bad driving history, personal deterrence featured largely. In making that submission, reliance was placed on the observations of the President in *R v Allen*:[8]

> "The extent to which requiring this applicant to serve a ... period of actual custody would alter the driving habits of others, and thereby advance general deterrence is uncertain … [G]eneral deterrence has less of a role to play ... than 'in cases involving alcohol, speed, fatigue or a lengthy period of reckless driving'."

Consideration of comparable cases

[27] At sentence, the appellant had relied on two single judge decisions of the District Court, *R v Hall*[9] and *R v Nona*.[10] Before this Court, the authorities of *R v McGuigan*,[11] *R v Proesser*,[12] *R v Wakefield*,[13] *R v Iaria*,[14] *R v Towers*,[15] and *R v MacDonald*[16] were referred to by counsel. I turn to deal with the comparatives in chronological order.

McGuigan

[28] *McGuigan* concerned a plea to one count of dangerous operation of a vehicle causing grievous bodily harm with a circumstance of aggravation (the applicant having twice previously been convicted of offences of driving under the influence of liquor) in which case imprisonment was mandatory. That applicant had a serious traffic history, including the two driving under the influence of liquor offences. The applicant had failed to stop on a dual lane road at a pedestrian crossing, although there was already a vehicle stopped in the other lane. An elderly pedestrian was struck and seriously injured with the result that he required long term rehabilitation and was unlikely to be able to live independently as he had previously done. The applicant had accelerated away

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6 [2009] QCA 159 at [18] per Holmes JA.
7 *R v Towers* [2009] QCA 159 at [31].
8 [2014] QCA 9 at [99] per Fraser and Morrison JJA.
9 (Unreported, District Court of Queensland, 22 December 2011, Newton DCJ).
10 (Unreported, District Court of Queensland, 26 November 2014, Harrison DCJ).
11 [2004] QCA 381.
12 [2007] QCA 61.
13 [2008] QCA 269.
14 [2008] QCA 396.
15 [2009] QCA 159.
16 [2014] QCA 9.

from the scene, although without proven knowledge that he had injured the complainant. He was found early the following day in his vehicle with a blood alcohol content then of 0.2 per cent. However, he was not sentenced on the basis that alcohol was an aggravating factor, having left the scene of the accident, he was not able to be blood tested at the time. He denied involvement and gave a false alibi when initially spoken to, although he subsequently made admissions and entered a plea of guilty. On appeal, the sentence imposed of five years imprisonment with a recommendation for parole after 20 months was found to be manifestly excessive and was reduced to three and a half years imprisonment with a recommendation for parole after 18 months.

Proesser

[29] *Proesser* concerned a plea to dangerous operation of a vehicle causing grievous bodily harm for a sentence of 18 months imprisonment suspended after three months for an operational period of 18 months and disqualified from holding a licence for three years. Proesser was driving on a major arterial road at 70 km/h in a car with which he was not familiar. He looked down to adjust the radio and when he looked back up he saw that the traffic lights in front had turned amber and that the car in front of his was stopped at the intersection. In an attempt to avoid a rear-end collision with that vehicle, he applied the brakes and swerved his vehicle into the adjacent left turning lane. His vehicle then skidded and hit the complainant who was on a pedestrian crossing on that lane. The complainant sustained serious injuries requiring hospitalisation for four weeks. Proesser, who was 28 had a minor criminal history of no relevance and some history of traffic infringements. He had recently completed his university degree and had a good record of community service. He entered an early plea, remained at the scene and offered assistance, and was remorseful. In allowing the appeal by suspending the sentence immediately, Jerrard JA referred to previous statements of this Court to the effect that where alcohol was not involved, there was no excessive speed and the dangerous driving was the result of a short period of inattention, a custodial sentence was not inevitable. Jerrard JA observed that:[17]

> "The applicant's apparently brief period of inattention when driving, generally good previous character and conduct and his distress at what he had done make that sentence of actual imprisonment in those circumstances an unnecessarily hard one. The general circumstances point, in my opinion, to a non custodial sentence being appropriate in this matter."

Wakefield

[30] In *Wakefield*, a sentence of three years imprisonment with a fixed parole release date after 15 months on a plea of guilty to dangerous operation of a motor vehicle causing grievous bodily harm was upheld on appeal. Wakefield had driven past a group of pedestrians, then performed a U-turn and deliberately drove at the group, with the result that the complainant was struck, sustaining extensive and severe injuries. His conduct in swerving at the group was motivated by trying to scare the pedestrians, believing that they had thrown a bottle at his vehicle. After the incident, Wakefield drove a distance, then stopped to check his vehicle for damage, after driving to his home interstate. He was initially dishonest with police about what had occurred, telling them that the complainant had been on a bicycle and that he believed that he

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17 [2007] QCA 61 at 7 (Keane JA and Muir J agreeing).

had struck the bicycle, which version was not accepted by the sentencing judge. Matters of mitigation included Wakefield's plea, albeit a late one, he expressed remorse, suffered from depressive symptoms and was the full time carer for a disabled daughter. An aggravating feature of the offending was Wakefield's callous attitude in failing to remain at the scene, and to make any attempt to ascertain the consequences of his conduct, although he was aware he had hit someone. The Court[18] adopted the observations in *R v Conquest; ex parte Attorney-General*:[19]

> "The factors that would take a sentence further towards the maximum level would include the seriousness of the driving, callousness or attitude that falls in the murky area between recklessness and deliberate harm, the period for which the dangerous driving was sustained, the seriousness of the consequences to the victims, the seriousness of the offender's criminal record (with particular emphasis upon his driving history and his attitude to fellow citizens), and whether the offender has little prospect of rehabilitation."

Iaria

[31] In *Iaria*, a sentence of two years imprisonment, suspended after three months with a disqualification for 18 months was upheld by this Court. The dangerous driving involved reckless and dangerous driving over a sustained period by the groundsman of a soccer field who was attempting to intercept youths riding trail bikes, who had ridden over the field he tended. Iaria manoeuvred his van in such a way that it eventually collided with the young complainant who was one of the group of youths. Iaria left the scene but did go to a nearby dwelling and phoned the police at the resident's suggestion. He thereafter cooperated fully, making full admissions and entering a plea to dangerous operation of a motor vehicle occasioning grievous bodily harm. Iaria had a prior conviction for assault and four convictions for drink driving, but there was no suggestion that alcohol was a factor in the offence. Shortly before the conduct that was the subject of the offence, the maximum penalty had been increased to 10 years.

Towers

[32] In *Towers*, a sentence of 18 months imprisonment, with a parole release date fixed after six months, was imposed on appeal in lieu of a sentence of two and a half years imprisonment with parole release after 10 months on a plea to dangerous operation of a motor vehicle causing grievous bodily harm. Towers made a sudden decision to turn right at an intersection across a double white line, disobeying a "no right turn" sign and causing his vehicle to collide with a motorcyclist. The motorcyclist suffered a mild closed head injury, a left clavicle fracture, a left tibial plateau fracture, and some rib fractures. The most serious fracture was the left tibial fracture, which was treated with a plate and screws that remained in situ. The accident had a significant psychological impact on the victim. Towers remained at the scene, offered assistance and cooperated with the police. He was not affected by alcohol. He had a criminal record and a bad history of traffic offences covering over a decade.

[33] The Court observed that there was an element of risk taking in the sudden decision to turn right, but that it was a spontaneous act, not a deliberate or sustained course of

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18 [2008] QCA 269 at [13].

19 [1995] QCA 567 at 11 per McPherson JA and Thomas J.

action. Towers' criminal history was not directly relevant, although it meant that the usual "hesitation in jailing a first offender was absent".[20] His long traffic history was of more consequence. However, the offence did not involve the features of speed or unlicensed driving prevalent in it, but the driving in question did display a similar recklessness and disregard of road rules. The Court considered that disproportionate weight had been given to the bad traffic history, with insufficient attention paid to his actual culpability. The Court observed that had the applicant had no previous traffic or criminal history, he might reasonably have anticipated a non-custodial sentence. However, his extensive traffic history warranted the imposition of actual custody, and for a significant period. Nevertheless, the period of 12 months actual custody was excessive and replaced by a sentence requiring six months actual custody.

MacDonald

[34] The passage cited above from *Proesser* was referred to in *MacDonald*.[21] In that case, a sentence of 18 months imprisonment to be suspended after three months and a disqualification from holding a licence for 12 months was imposed on a plea to dangerous operation of a vehicle causing grievous bodily harm and not disturbed on appeal. MacDonald was driving a prime mover towing a tanker north along Ipswich-Boonah Road. He turned right at the intersection into the path of oncoming traffic. He believed the complainant's vehicle was turning into a slip lane. The maximum visibility of approaching traffic was 177 metres. The speed limit was 100 kilometres per hour. There were two complainants. The female driver suffered a severe traumatic brain injury which required an urgent craniotomy. She also sustained multiple fractures and required surgery on her left ankle. Over a year later she still had trouble remembering things. She had various scars and there was a prospect of further surgery on her ankle. She also had to give up her particular sport. The other complainant, the passenger, suffered relatively minor injuries. MacDonald had a limited traffic history. He offered help at the scene. He was remorseful and pleaded guilty in a timely fashion.

[35] Fraser and Morrison JJA stated that a review of the authorities revealed that they: [22]

> "…do not lay down any empirical formula by which one can say that one offence is an offence of momentary inattention such as to merit a non-custodial sentence, and another is not. Every case will depend upon its own facts. Furthermore, in every case the crucial issue is not what category ('momentary inattention' or otherwise) best fits the facts. Rather, the crucial issue is, as Thomas JA said in *Harris*, 'the level of seriousness of the actual driving of the offender'."

Discussion

[36] While the maximum penalty was increased in 2007, the sentence imposed on the applicant was excessively onerous, when consideration is given to that imposed in *Iaria* for deliberate conduct. Further, even bearing in mind the increase in penalty from seven to 10 years imprisonment for the offence of which the applicant was sentenced, both *McGuigan* and *Wakefield* concern more serious offending than the present case. Neither *McGuigan* nor *Wakefield* showed remorse and both left the

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20 *R v Towers* [2009] QCA 159 at [31].
21 [2014] QCA 9 at [11].
22 [2014] QCA 9 at [17] (citations omitted).

scene of the accident. In *Wakefield*, that conduct was particularly reprehensible. Unlike those offenders, the present applicant did not leave the scene and was remorseful. Furthermore, the present case can be distinguished from *Wakefield* in that, in addition to attending at the scene, this applicant did not engage in deliberately reckless or dangerous driving as did Wakefield. The observations made by Holmes JA in *Towers* in considering the comparatives are particularly pertinent:[23]

> "… *McGuigan* and *Wakefield* seem to me far more serious cases. In particular, Wakefield's action in deliberately driving at the group of pedestrians seems to me of an entirely different order from the applicant's conduct. Importantly, neither of those offenders showed any sign of remorse; both left the scene of the accident; and both did their best, through dishonesty, to avoid being held responsible. In contrast, the applicant showed concern for the man he had hit, and waited for and co-operated with police. If anything, I would regard *McGuigan* and *Wakefield* as operating to support the contention that the sentence imposed here was too high."

[37] Nor do I accept that the applicant can be said to have given a false version of events as was the case in *McGuigan*. Although she held the belief that she had attempted to brake and that there was something wrong with the brakes of her vehicle, that was not borne out by the expert evidence at the committal and it was not sought to be maintained. The applicant's counsel argued that the applicant had attempted to brake and that her foot had become caught. But I do not consider that it should be inferred that the applicant was, in so doing, seeking to minimise or downplay her role.

[38] The authorities examined indicate that, when regard is had to the nature of the dangerous driving and that it did not involve alcohol, speed, nor a prolonged period of dangerous driving, and that the applicant remained at the scene and was remorseful, a sentence requiring 12 months actual imprisonment was manifestly excessive.

[39] The complainant's recovery has been a painful one with permanent scarring. It is fortunate that the complainant's significant injuries were not even more serious and that she had made a good recovery. That is a relevant consideration.

[40] In the circumstances, I will allow the application to appeal against sentence to the extent of varying the sentence to suspend it forthwith.

Orders

[41] I propose that the following orders be made:

1. The application for leave to appeal is granted.
2. The appeal is allowed.
3. The sentence imposed is varied to the extent that it is wholly suspended.

[42] **BURNS J:** I agree with the reasons of, and orders proposed by, Philippides JA.

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[23] *R v Towers* [2009] QCA 159 at [32] (Muir JA and Douglas J agreeing).