SUPREME COURT OF NOVA SCOTIA
Citation: *R.v. Gerald Desmond*, 2018 NSSC 338

Date: 20181219
Docket: CRH. No. 473279
Registry: Halifax

Between:

Her Majesty the Queen

v.

Gerald Desmond

SENTENCING DECISION

Judge:	The Honourable Justice Christa M. Brothers
Heard:	December 18, 2018 in Halifax, Nova Scotia
Sentence:	December 19, 2018
Written Decision:	March 12, 2019
Counsel:	Steve Degen, Crown Counsel Laura McCarthy, Defence Counsel

Overview

[1] Gerald Desmond entered a guilty plea on November 29, 2018, before the Honourable Justice Peter Rosinski, to a charge under s. 221 of the *Criminal Code*, that is, criminal negligence in the operation of a motor vehicle causing bodily harm to Terrie-Lynn Atwood. Section 221 states:

> Everyone who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[2] This plea was entered well before the first day of trial, which was scheduled to commence on May 27, 2019, and run for eight days.

[3] The following is my decision concerning a fit and proper sentence for Mr. Desmond.

Agreed and Uncontested Facts

[4] The following facts are agreed to by the parties:

- During the evening of May 24, 2017, and into the early morning of May 25, 2017, Mr. Desmond and Ms. Atwood consumed alcohol and cocaine. Specifically, Mr. Desmond consumed crack cocaine. The two were at Mr. Desmond's home at the time, 2-89 Pinecrest Drive in Dartmouth;
- Mr. Desmond stopped drinking alcohol at 1 a.m. and stopped consuming crack cocaine at 5:00 a.m.
- At 6:00 a.m. on May 25, 2017, Mr. Desmond and Ms. Atwood left his residence in his vehicle. Mr. Desmond intended to drive Ms. Atwood home.
- Mr. Desmond was driving while Ms. Atwood was in the front passenger seat.
- While driving, Mr. Desmond noticed his wallet was missing and reached across the seat to retrieve it from Ms. Atwood. After a scuffle between the two, Mr. Desmond stopped his vehicle in the right-side lane of travel on Farrell street. Ms. Atwood exited the vehicle.
- Mr. Desmond drove a short distance and stopped his vehicle perpendicularly across the oncoming lane of traffic with the front of the vehicle facing the curb of the opposite lane of travel. Up until this point, Ms. Atwood indicated, Mr. Desmond's driving was fine.
- Mr. Desmond got out, and he and Ms. Atwood had an altercation outside of the vehicle. The altercation started with Ms. Atwood kicking the rear of Mr. Desmond's car and lasted a few minutes. They both ended up on the ground. Mr.

Desmond got to his feet and was above Ms. Atwood for a few moments. He then returned to the vehicle.

- Ms. Atwood also stood up and walked behind the vehicle. While she was approaching the vehicle, Mr. Desmond reversed, in order to complete a three-point turn and return home.
- Ms. Atwood was by the rear passenger side of Mr. Desmond's vehicle, opening the rear door, when the vehicle struck her.
- When the vehicle struck her, Ms. Atwood was knocked to the ground. She was then dragged under the vehicle. Mr. Desmond continued to reverse into the correct lane of travel, hitting a vehicle that was approaching and continuing over the sidewalk curb, onto a lawn, and down and embankment.
- Mr. Desmond remained on the scene and acknowledged immediately to officers attending the scene that he was responsible.
- Cst. Brewer, at the scene, observed that Mr. Desmond had slow, slurred speech, bloodshot glossy eyes, and was unsteady on his feet. One civilian witness described Mr. Desmond as "out of it", as if he had been up for days, and another indicated that he had bags under his eyes. Mr. Desmond was arrested for impaired operation of a motor vehicle and attempted murder, read his rights, and cautioned. It was determined that Mr. Desmond had low blood sugar and had to be assessed by medical professionals at the Dartmouth General Hospital, interfering with his transport to the police station to provide samples of his breath. As a result, Mr. Desmond was read a blood demand and a sample of his blood was obtained at 9:26 a.m., approximately three hours after the incident.
- At the time of the offence, Mr. Desmond had 19.2 grams of crack cocaine in his possession.
- The sample of Mr. Desmond's blood was sent for analysis. It was determined that there was no alcohol present in his blood at the time the blood sample was obtained. Other drugs were contained within Mr. Desmond's blood, however, including cocaine, cocaethylene, methylecgonine, benzoylecgonine, and methylecgonidone. The report of the toxicologist, Christopher Keddy, indicates that cocaine is a potent central nervous system stimulant; cocaethylene is a metabolite of cocaine that only forms when cocaine and alcohol are present in the blood together; methylecgonidine is a cocaine breakdown product that is formed when cocaine is heated to high temperatures (smoked); and benzoylecgonine and methyloegonine are cocaine metabolites and breakdown products. The report indicates that the stimulant effects of cocaine may last 15 to 45 minutes, depending on the amount and type of use. When the stimulant effects wear off, fatigue, agitation, and anxiety may follow. Where cocaine is used in a binge fashion, a post use depression or crash may take place where the user experiences reduced control of body movement, fatigue, and a strong desire to sleep. Although the amount of cocaine in Mr. Desmond's body was too low to be quantitatively determined at the time of testing of the blood, cocaine converts into

benzoylecgonine during storage and it is expected that the levels of cocaine would have been higher when Mr. Desmond's blood sample was taken. The level of cocaine-related compounds in Mr. Desmond's blood was consistent with high dosage/binge cocaine use.

- Mr. Desmond was hyperglycemic, causing many physical symptoms similar to impairment that required medical attention after his arrest.
- Ms. Atwood was taken to hospital with life-threatening injuries. She suffered fractures to her cervical spine, resulting in paralysis from her neck down. In addition, she suffered a fractured breast bone, seven broken ribs, a broken femur, and bruising.
- Ms. Atwood is mobile through the use of a specialized wheelchair, which she controls through the utilization of a device manipulated by her mouth.
- Ms. Atwood spent several months recovering in hospital, involved in rehabilitation efforts.
- Ms. Atwood was hospitalized until January 2018.

Evidence at Sentencing

[5] By way of agreement, the Crown entered five exhibits. These are:

1. Mr. Desmond's criminal record;
2. Forensic Science Identification Services Laboratory Report;
3. Various photographs of Ms. Atwood in hospital, and photographs of the scene;
4. Civilian cell phone video taken on May 25, 2017, showing the altercation between Mr. Desmond and Ms. Atwood before she was struck by his vehicle; and
5. Video surveillance from the Dartmouth Boys and Girls Club at 60 Farrell Street from the morning of May 25, 2017, showing the motor vehicle accident.

[6] The Defence entered two exhibits by way of consent:

6. A printout of Mr. Desmond's LinkedIn page, which the Court was advised was not edited since his incarceration on May 25, 2017; and
7. A Certificate of Achievement certifying that Mr. Desmond has successfully completed the Substance Abuse Management Program at the Northeast Nova Scotia Correctional Facility as of November 9, 2017.

[7] I have taken into account all of this evidence and I will touch upon it in my review of the factors to be considered on sentencing.

[8] I have reviewed the video entered as Exhibit #5, both in the courtroom and for a second time, before finalizing my decision. The video is not of the best quality. The movements of vehicles and persons are not fluid and are seen from a distance, but the video is of assistance to situate the Court to the circumstances of the offence. The facts as described by the Crown and Defence are confirmed by this video.

[9] The video has a time stamp on the frames. Mr. Desmond's vehicle is seen backing up at 6:33:39. It comes to a stop at approximately 6:33:47. In these eight seconds, Ms. Atwood's life is irrevocably changed.

Circumstances of the Offender

[10] The Crown submits that it is difficult to consider Mr. Desmond's specific circumstances as an offender because there is not a lot of information provided by the Defence. There was no pre-sentence report or cultural assessment report, nor was there much third- party confirmation of Mr. Desmond's circumstances, including work history, volunteerism, and education.

[11] The Crown agrees that I could consider the information provided by the Defence, but argues that I must be cautious concerning the weight I afford the information.

[12] This is the information I have before me which I have considered. Mr. Desmond is 54 years of age. He is not in a relationship and does not have children. Mr. Desmond is African Nova Scotian.

[13] Mr. Desmond was taken from his home, as an infant by the Department of Community Services. I have heard, and the Crown did not contest the admission of this evidence, that Mr. Desmond spent time at the Nova Scotia Home for Coloured Children and was in foster care away from his parents and siblings until he was twelve years of age. He was placed in a foster home for a period of time, but returned to the Home for Coloured Children when he was approximately seven years old. I certainly can take judicial notice that the Nova Scotia Home for Coloured Children was not then a place of refuge for children but a place where physical, psychological, and sexual abuse was perpetrated. This is the history of that institution. What I do not know, however, is what effect this stay had on Mr. Desmond. No information or representations were made to the court. I cannot draw any conclusions because no evidence was presented.

[14] Mr. Desmond was eventually returned to his mother at the age of twelve, but has described an unstable childhood.

[15] Mr. Desmond has had struggles with substances throughout his adult life. Despite this he obtained diplomas in Mechanical Drafting (1984) and Architectural Technology (1995). He also completed courses towards a Bachelor of Arts at Carleton University between 1995 and 1997. He has worked in the field of Architectural Technology and Mechanical Drafting since 1995. He intends to continue that work.

[16] While Mr. Desmond has been employed, I have heard this is largely self-employment and he has struggled at times to make ends meet.

[17] Mr. Desmond has volunteered at the Salvation Army, the North End Library, and Metro Housing.

[18] Mr. Desmond has two sisters in Ontario and another sister in the Halifax Regional Municipality. He intends to move to Ontario to have the benefit of the support of his sisters, and to re-establish himself.

[19] I heard that given his arrest, and remand, Mr. Desmond lost his apartment and all of his belongings. The only asset he has is his car.

[20] I have taken all of this into account as enhancing my knowledge of this offender to assist in fashioning a proportionate sentence.

Mitigating Factors

[21] The Crown argued that there was not much objective support for the comments in the Defence brief or oral arguments concerning the mitigating factors relating to Mr. Desmond's work history, but conceded that I could consider that information in mitigation, with caution as to the weight I could give the statements. This is in contrast with the admissions by Mr. Desmond concerning his consumption of alcohol on the night of the offence and the 5 a.m. consumption of crack cocaine. While the Crown readily accepted the admissions made by the Defence that are detrimental to Mr. Desmond's case, they are asking me to be cautious about any comments that are supportive of a pro-social lifestyle. I find this to be an inconsistent approach.

[22] I conclude that the following mitigating factors are present:

1. Mr. Desmond has admitted guilt well in advance of the trial and has saved time, resources, and, most noteworthy, he has spared Ms. Atwood from having to testify at trial. As his counsel noted: “it excuses victims from the stress of having to testify”. In addition, he has saved civil witnesses and police officers from testifying at a trial.

2. Mr. Desmond has largely led a pro-social life. He has been employed as an Architectural Technologist performing the services of drafting and design with such tools as Auto CAD. The court was advised that prior to this offence he maintained employment and a residence. I do not have any verification of the extent of his work history but was told he worked as an independent contractor and was hired by companies to perform work on specific projects.

3. In addition, the Defence tendered Exhibit 7, which is a Certificate of Achievement in relation to a Substance Abuse Management course at the Northeast Nova Scotia Correctional Facility. Mr. Desmond undertook this on his own initiative and completed the course successfully on November 9, 2017. This is a mitigating factor.

4. Mr. Desmond addressed the Court before sentencing. He expressed sincere remorse for his actions and the affect they had on Ms. Atwood.

5. We have heard, and the Crown does not contest, that Mr. Desmond cooperated with Police, immediately accepted responsibility at the scene of the accident, and has continued to accept responsibility throughout. In addressing the Court, he said the following:

    1. He acknowledged the severity of harm he caused Ms. Atwood;
    2. He acknowledged, as he said, he "took a young mother away from her kids”;
    3. He acknowledged that he got behind the wheel and that he alone is responsible for the harm done;
    4. It was clear he struggled for the words to express his remorse, but he did so and made it clear to me and I think to the Crown (as I heard the Crown’s comments in reply) that he was sincerely remorseful and that he appreciates the gravity of the harm, as best he can, and injuries he alone caused Ms. Atwood.

Cultural Background

[23] I have been asked by the Defence to take into account Mr. Desmond’s cultural background. I was not given much by way of submissions on the connection between institutional racial inequality in general and the circumstances of the offender being sentenced. I conclude there is certainly some connection between Mr. Desmond’s circumstances and his cultural background.

[24] The Crown conceded that I could and should consider Mr. Desmond's cultural background in fashioning a fit and proper sentence. Despite there not being a Cultural Impact Assessment provided to the Court, I conclude it is proper for me to consider the issues. In doing so, I make reference to ***R. v. Jackson,*** 2018 ONSC 2527. This decision of Justice Nakatsuru is of significant guidance in considering culturally significant issues when sentencing African Canadians. Justice Nakatsuru had an Impact of Race and Cultural Assessment (IRCA) report before him. He stated that while IRCAs were invaluable, cultural background factors could be considered in the absence of an IRCA. I accept this.

[25] Justice Nakatsuru made the point that the principles of restraint are applicable to all offenders. He further contends that judges should take judicial notice of background and systemic factors suffered by African Canadian offenders.

[26] The Defence submits that Mr. Desmond's cultural background, as an indigenous Black Nova Scotian, can be considered by this Court. I am asked to consider systemic and background factors impacting Mr. Desmond when determining an appropriate sentence for him. In particular, I am asked to consider that there is an overrepresentation of African Canadians in custody in Canada as a result of systemic discrimination. I have been referred to ***R. v. "X",*** 2014 NSPC 95, and ***R. v. Downey***, 2017 NSSC 302.

[27] I have considered those cases as well as ***R. v. Jackson***, *supra* and ***R. v. Gabriel***, 2017 NSSC 90. I quote from ***R. v. Jackson,*** *supra* as follows:

> [82] I find that for African Canadians, the time has come where I as a sentencing judge must take judicial notice of such matters as the history of colonialism (in Canada and elsewhere), slavery, policies and practices of segregation, intergenerational trauma, and racism both overt and systemic as they relate to African Canadians and how that has translated into socio-economic ills and higher levels of incarceration. While this does not in and of itself justify a different sentence, it is an important first step in providing the necessary context in which to understand the case-specific information in sentencing. I have come to this conclusion not simply because it provides substance to the principle of restraint found in s.718.2(e), but also because it is in keeping with the development of the doctrine of judicial notice and the legal recognition in the jurisprudence of the discrimination against African Canadians.
>
> [83] A sentencing judge is given the opportunity to obtain relevant information about the offender and his background without the restrictive evidentiary rules common to a trial. The judge has wide latitude as to the sources and type of evidence upon which to base their sentence: *R. v. Gardiner*, 1982 CanLII 30 (SCC), [1982] 2 S.C.R. 368 at para. 109. This includes taking judicial

notice of the social framework in which the law is to operate at sentencing: see D.M. Paciocco (as he then was) "*Judicial Notice in Criminal Cases: Potential and Pitfalls*" (1998), 40 C.L.Q. 35 at 51.

[84] Judicial notice dispenses with the need for the proof of facts that are clearly uncontroversial or beyond reasonable dispute: *R. v. Find*, 2001 SCC 32 (CanLII), [2001] 1 S.C.R. 863 at para. 48; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 (CanLII), [2004] 3 S.C.R. 381 at para. 56. For social framework facts, the test for judicial notice is even more relaxed. A judge is entitled to take judicial notice of a fact if it would be accepted by reasonable people who have taken the trouble to inform themselves of the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used: *R. v. Spence*, 2005 SCC 71 (CanLII), [2005] 3 S.C.R. 458 at para. 65.

[85] It is well accepted that judges can apply their knowledge and experience they have acquired while on the bench in sentencing. In *R. v. Lacasse*, 2015 SCC 64 (CanLII), [2015] 3 S.C.R. 1089, the Supreme Court of Canada found it appropriate for a trial judge to take judicial notice of the local conditions of the community where the crime took place. See also *R. v. M. (T.E.)*, 1997 CanLII 389 (SCC), [1997] 1 S.C.R. 948 at para. 16; *R. v. R.D.S.*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 59.

[86] Taking judicial notice of the historical and systemic injustices committed against African Canadians and African Canadian offenders is preferable to a strict adherence to the traditional rules of evidence which will only serve to advantage the *status quo.* The offender should not be burdened with the requirement to bring such evidence, usually in the form of expert evidence, to their sentencing when these social and historical facts are beyond reasonable dispute.

[87] This has indeed been the trend of the case law in other areas of the criminal law...

[90] In my opinion, there are some very practical advantages in taking this judicial notice. The offender will often have limited or no resources to retain experts. Not every offender will be able to access or afford the type of information provided by Mr. Wright. Taking judicial notice of these systemic issues is a good way to avoid this problem. For instance in *R. v. Bryce*, [2016] O.J. No. 6868 (S.C.J.) at para. 32, taking judicial notice could have assisted when scant evidence was presented about the social context of the African Canadian offender who was being sentenced for gun crimes. In *R. v. Duncan*, [2012] O.J. No. 2966 (S.C.J.) at para. 86, the sentencing judge declined to apply *Gladue* principles or to consider systemic and racial bias for an African Canadian offender given the lack of any evidentiary basis to do so.

[91] Permitting this is not unfair to the Crown since it applies only to those matters that properly should be subject to judicial notice. Any particular dispute about what is a suitable subject of such notice can be resolved on a case-by-case basis.

> [92] It is my belief that provided it is not forgotten that this social context is an aid that complements but does not supplant the traditional sentencing process which is focused on proportionality, no harm will be suffered and only benefit will be gained. Taking judicial notice of such uncontroverted matters will make effective use of the limited resources of the courts. It will encourage better education of sentencing judges about these important systemic issues and increase their sensitivity to them.
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> …
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> [115] Let me conclude this part of my decision. In criminal law, whether Indigenous or non-Indigenous, there is no discount simply because of your ethnicity or the color of your skin. For the Indigenous person, the sentencing judge is required to pay particular attention to the circumstances of an Indigenous offender in order to achieve a truly fit and proper sentence. However, this is really another illustration, albeit a very special one, of the individualization of sentencing. That has always been the fundamental duty of a sentencing judge in sentencing anyone. Thus, I ask rhetorically what is wrong in paying particular attention to the circumstances of the African Canadian offender to achieve a truly proportionate sentence. The answer is self-evident. Nothing.

[28] It would have been helpful to have an IRCA prepared. It would have been of assistance for the parties and the Court to more thoroughly connect the issues of Anti-Black racism, over-incarceration of African Canadians, and historical and systemic injustices committed to the issues before this Court and the charge Mr. Desmond pleaded to.

[29] I have considered Mr. Desmond's cultural background as an African Nova Scotian. I understand and have considered the systemic and background factors impacting Mr. Desmond. I agree with the representations made by his counsel: "There is an overrepresentation of Black persons in custody in Canada as a result of systemic discrimination and its lifelong impact on those from racialized backgrounds."

Aggravating Factors

[30] I must consider any aggravating factors relevant to the sentencing of Mr. Desmond. There has been some agreement on the aggravating factors and I will discuss those shortly.

[31] In relation to Mr. Desmond's criminal record and his motor-vehicle related offences, I have considered those and have determined they are not aggravating. Mr. Desmond's record is very dated. The most recent offence was committed on

August 13, 2008. That was an offence contrary to s. 334(b) of the *Criminal Code* for theft under $5,000. No time was served for that offence. Prior to that, Mr. Desmond's last offence was committed in 1994, 24 years ago. Of the offences that are listed (two in 1994, three in 1993, and one in 1986), none resulted in substantial jail time. The most serious sentence imposed on Mr. Desmond, prior to the current offence was in 1993, for trafficking in a narcotic contrary to the then ***Narcotic Control Act.*** This conviction resulted in a four-day intermittent sentence with 15 months probation.

[32] With regard to Mr. Desmond's driving record, the Crown concedes that it is not an aggravating factor. The Crown asks me to consider it as evidence of apathy to the rules of the road. Mr. Desmond's record with regard to motor vehicle infractions is fairly dated and also not particularly relevant given the infractions listed. I find it is not an aggravating factor.

[33] The Crown submits that I should accept as an aggravating factor Mr. Desmond's consumption of alcohol and crack cocaine before this offence. Mr. Desmond admits that he consumed alcohol at 1:00 a.m. and crack cocaine at 5:00 a.m. He then got into a vehicle to drive Ms. Atwood home at approximately 6:30 a.m. The Toxicology Report does not provide any evidence about Mr. Desmond's level of impairment, if at all, at the time of the event. Exhibit 2, the Toxicology Report, was entered by agreement. I have concluded the following from this report:

1. Mr. Desmond's blood contained cocaine and cocaine-related compounds, but no alcohol;
2. The levels of cocaine-related compounds present in Mr. Desmond's blood were consistent with high dose and/or binge cocaine use.

[34] The Crown is unable to prove that Mr. Desmond was impaired at the time of the offence. The Crown readily concedes this and agrees that I cannot conclude Mr. Desmond was impaired by either alcohol or cocaine at the time of the incident.

[35] The Crown submits that the fact Mr. Desmond decided to drive after this consumption, regardless of impairment, is an aggravating factor. There is no evidence before me that his ability to drive was impaired. He did not plead to an impaired driving charge. However, Mr. Desmond has admitted to consumption within an hour and a half of the offence. He said in court that he did not feel he was intoxicated at the time, but then stated, "But, it's too late for all of that". I am satisfied that it is aggravating to have consumed this illegal substance so close in time to driving.

[36] I accept that Mr. Desmond had approximately 19 grams of crack cocaine on his person in the vehicle at the time of the offence. He entered a guilty plea to a possession charge and already served time for that offence. I accept that the Crown has discharged its burden and proved beyond a reasonable doubt that Mr. Desmond had 19 grams of crack cocaine on his person at the time of the commission of this crime. I accept that this is aggravating.

Victim Impact Statement

[37] As required by s. 722(2) of the *Criminal Code*, I made inquiries of Crown counsel concerning his attempts to provide an opportunity for Ms. Atwood to provide a Victim Impact Statement (VIS). I accept that counsel has contacted her on at least two occasions to provide that opportunity, and that Victim Services have also been in contact with Ms. Atwood. The Crown has advised that, while Ms. Atwood spoke with him briefly about her circumstances, she made it very clear that she did not want to be involved in the court process and declined to provide a VIS.

[38] I respect and understand Ms. Atwood's position. It is clear she has suffered extensively since May 25, 2017. While having her voice to articulate and provide context concerning her day-to-day life and how she has coped and the details of the impact of her significant and life-altering injuries would have been helpful to the Court, I accept from the Crown that I can take judicial notice of many of her circumstances.

[39] With consent of the Defence, the Crown provided information to the Court about Ms. Atwood's circumstances. She is 27 years old. Ms. Atwood has three children, aged seven, five and two. Ms. Atwood is confined to a power wheelchair that she cannot operate with the use of a hand-controlled joystick. She has no use of her arms or legs. She is paralyzed from the neck down. She uses her mouth to control her wheelchair. While she can take an Access-a-Bus for transportation, it is difficult for her to leave her residence.

[40] I have heard that Ms. Atwood was hospitalized until January 2018, recovering from her injuries and participating in rehabilitation.

[41] She currently has two hours of assistance a day and is seeking a greater amount of home care. She cannot care for herself. Given the extent of her injuries, I accept that she cannot feed, dress, toilet, or bathe herself or her three children. Given her physical impairments, she is unable to do the things that the vast

majority of people who are not in wheelchairs take for granted every day of their lives. It struck me that she cannot even embrace her three children in the way most mothers take for granted.

[42] Without Ms. Atwood's voice being heard at this sentencing, I suspect I am unable to fathom completely the gravity of the consequences to her. Quite clearly, every aspect of her life, as it was before May 25, 2017, has been impacted. As I impose sentence upon Mr. Desmond, I do not lose sight of Ms. Atwood and the fact that while Mr. Desmond has been imprisoned since May 25, 2017, so has she. Confined to a wheelchair, Ms. Atwood's sentence will not end. That is not to say she cannot lead a full and productive life, but it is a life vastly and forever changed. While I take judicial notice that paralysis changes the capabilities of one's body, it is apparent it does not change one's purpose as a person. Ms. Atwood's approach to life and to her daily activities is forever altered.

[43] In sentencing Mr. Desmond, I cannot improve Ms. Atwood's physical circumstances but, I can take into account the grave harm he caused her and I have done so in fashioning a fit and proper sentence.

Law and Analysis

[44] The maximum penalty for a charge under s. 221 of the *Criminal Code* is ten years' imprisonment. There is no mandatory minimum. A conditional sentence is not available in the circumstances: see s.742.1(e)(i).

Crowns' Position

[45] The Crown conceded in argument that sentencing is difficult for a variety of reasons. The Crown noted the vast array of conduct that can fall within a conviction for criminal negligence causing bodily harm. The conduct can range from mere inadvertence to gross negligence. To use Crown counsel's expression, the sentencing decisions are all over the map and no general range emerges from the case law.

[46] The Crown seeks a sentence of 36 months' incarceration.

[47] The Crown agrees with the Defence position that Mr. Desmond should be given 1:1.5 credit for his time on remand. The Crown and Defence agreed that the number of days in total served when remand credit is calculated is 852 days or 28 months to the day. The Crown is seeking an additional period of eight months' incarceration to what Mr. Desmond has already served.

[48] In addition, the Crown seeks the following ancillary orders:

1. A DNA order under s. 490 of the *Criminal Code.* The Crown acknowledges that this offence is not a primary designated offence.
2. A five-year driving prohibition.
3. Forfeiture of Mr. Desmond's car pursuant to s. 490.1(a) of the *Criminal Code*.

Defence Position

[49] The Defence contends that a sentence of 28 months is appropriate in the circumstances. The Defence agrees that denunciation and deterrence are important factors. The Defence refers to Mr. Desmond's separation from society since May 25, 2017, as sufficiently reflecting specific and general deterrence as well as denunciation. The Defence submits that a further period of eight months of incarceration, as proposed by the Crown, does not provide a message to the community or to Mr. Desmond that has not already been provided by a sentence of two years and four months.

[50] The Defence argues that a longer period of incarceration is unnecessary to promote responsibility or rehabilitation.

[51] What the parties do agree on is that the range of sentences for such offences is vast. The cases I was referred to provide a series of examples for sentencing that are driven by a variety of circumstances in which this offence can be committed.

Sentencing Principles

[52] The general purpose and principles of sentencing are found in s. 718 of the *Criminal Code*, which states:

> Purpose and Principles of Sentencing
>
> Purpose
>
> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;

> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[53] The sentencing exercise involves a balancing of the objectives set out in this section.

[54] Section 718.1 of the *Code* requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 identifies specific sentencing principles which must be considered, including the following:

> Other sentencing principles
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> > **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> >
> > > **(i)** evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,
> >
> > > **(ii)** evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
> >
> > > **(ii.1)** evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
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> > > **(iii)** evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
> >
> > > **(iii.1)** evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
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> > > **(iv)** evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,
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> > > **(v)** evidence that the offence was a terrorism offence, or
> >
> > > **(vi)** evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*

> shall be deemed to be aggravating circumstances;
>
> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> **(c)** where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> **(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
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> **(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[55] Any sentencing hearing requires a careful consideration of the unique circumstances of the offender and the offence. It requires the balancing of sentencing objectives.

Deterrence, Denunciation, Rehabilitation and Proportionality

[56] These important principles are at the heart of the sentencing process. Denunciation and deterrence emphasize society's interest in protecting the public by imposing appropriate punishment for criminal conduct. It tends to focus more on the nature of the offence and less on the individual offender. The exception is the principle of specific deterrence, which has the goal of ensuring that the particular offender before the Court is discouraged from repeating their criminal behaviour.

[57] Rehabilitation requires the Court to consider the individual offender and what options may be available to maximize the likelihood that they can be rehabilitated. It is generally accepted that imprisonment is not an effective tool for rehabilitation.

[58] In some sentencing hearings the objectives of deterrence, denunciation and rehabilitation are at odds with each other. The Court must strike a thoughtful balance between the need to demonstrate that criminal behaviour is sanctioned with the goal of helping the offender become a productive member of the community.

[59] Proportionality requires the Court to consider the seriousness of the offence and the degree of responsibility of the offender. In other words, the sentence must first and foremost fit the specific crime and the specific offender.

[60] The Crown concedes that in the range of negligent conduct captured by s. 221 of the *Criminal Code*, the facts before the Court are not at the most grievous level.

[61] The criminal negligence in this case was committed with a motor vehicle. Real people suffer because of driving offences, and real people are suffering in this case. The sentence I impose must recognize that this driving offence is a true crime which caused grievous injuries and lifelong harm to Ms. Atwood and her family. I accept that denunciation and deterrence are important considerations and must be stressed.

Case Authorities

[62] I will review the cases the Crown has asked me to consider,

[63] ***R. v. A.A.B.***, 2006 NSPC 4, involved a youth who, at the age of 16, was, at the time of the offence, awaiting trial on 36 *Criminal Code* offences, but had not been convicted of any. The offender stole a motor vehicle and drove around with two other young passengers. He consumed marijuana in the car a half hour before the offence. The offender was high or under the influence of drugs at the time of the offences. When AAB failed to stop at a stop sign, the police pursued the vehicle. AAB did not pull over but fled. He was travelling between 60 and130 km/hr, with an estimate of 100 km/hr at the time of the collision, in a 50 km/hr zone. The victim, a mother and teacher on her lunch was proceeding legally through a green light, when AAB struck and killed her. An adult sentence was imposed. Pre-sentence reports did not paint a particularly flattering picture of AAB. The Court imposed a 54-month period of incarceration.

[64] I have distinguished this case given the outcome to the victim, the presentence report, and the lack of other mitigating factors which are present in this case before me.

[65] In ***R. v. Brewer***, 2014 BCSC 1075, the offender was driving at a high speed and crossed lanes into oncoming traffic. The offender tested positive for cannabis and crack cocaine at the time. In causing a violent collision, he injured four people. The collision was intentional and was a failed suicide attempt. In this case, the offender was pursued by police officers, was fleeing, and refused to pull over. The sentence given was 4.5 years.

[66] The Crown conceded in argument that this case is more serious than the facts that are agreed in relation to Mr. Desmond.

[67] The Crown submits that this case is on the continuum of serious because Mr. Desmond had an opportunity to take action to alleviate the extent of the harm caused to Ms. Atwood. He did not brake, but continued driving, dragging Ms. Atwood with his car. The Crown says Mr. Desmond should have known where she was standing when he backed up.

[68] I quote ***R. v. Brewer, supra***, at para. 61, and accept the following as a guide in fashioning a sentence:

> The cases also demonstrate that the age of the offender, circumstances of the incident, duration of the deficient driving, existence or not of a criminal record, degree of aberration of the driving from the norm, particulars of the highway and the usual use of it, and driving conditions are all factors that bear upon the question of moral culpability. Further, the use of alcohol or drugs, even if not to the point of intoxication or impairment, is a factor that the court will consider.

[69] Many of the cases presented for my consideration are dangerous driving offences, not criminal negligence cases. What is clear is that the more blameworthy the conduct, the more severe the consequences to the offender. Here the Crown could not and did not argue there was a deliberate endangerment. The Crown argued for a consideration of more than mere inadvertence. I accept, that, on the continuum of blameworthiness, Mr. Desmond's conduct is more severe than mere inadvertence. But, he is not at the highest end of moral blameworthiness.

[70] I have also considered ***R. v. Scott***, 2008 BCCA 307, where a 42-month sentence was imposed for one count of dangerous driving causing death and one count of dangerous driving causing bodily harm. The victims were aged 11 and 13 years old. Alcohol was a factor (the offender was drinking at the time of the offence). There were five prior convictions for alcohol-related offences. That offender made no attempts to seek treatment. This case is distinguishable on the facts.

[71] The other cases I have reviewed, which provide terms of incarceration at the level the Crown has proposed, have elements of deliberation, or proven influence of alcohol, or more serious consequences.

[72] In the last case provided by the Crown, ***R. v. Roby,*** 2015 BCSC 1929, the circumstances were severe. The offender was convicted of dangerous driving, having caused the death of one victim and serious injuries to another. He also fled the scene. His speed was excessive, and alcohol was involved. He received a global sentence of four-and-one-half years. For these reasons, and because of the

other mitigating factors present for Mr. Desmond, I do not find this decision should be followed in these circumstances.

[73] The Defence has provided me with ***R. v. Sullivan***, 2015 NSPC 40. I have both read that decision and considered all of the cases mentioned in it. There are a vast range of sentences. This further confirms that a proper sentence for Mr. Desmond needs to be focused on his particular circumstances and the particular offence committed.

DECISION

[74] I have considered all the submissions and evidence and I have arrived at what I have determined to be a just sentence to hold Mr. Desmond accountable for his crime and provide meaningful consequences. I am satisfied that denunciation and deterrence are stressed by this sentence. I have also determined that this sentence will promote his rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

[75] Anything I say about this event will be inadequate. It had tragic consequences. No matter what I say or what sentence I impose on Mr. Desmond, Ms. Atwood's life cannot be restored to what it was before this incident.

[76] The following sentence is intended to ensure that Mr. Desmond accounts for that behaviour, by facing meaningful consequences, and to assist in his rehabilitation.

[77] I have heard the remorse in Mr. Desmond's voice and appreciate that he certainly did not intend to cause the significant, life-altering consequences to Ms. Atwood. However, she is left with a sentence of confinement to the wheelchair and, despite not having a Victim Impact Statement, I think it is accepted by all that I can take judicial notice that the injuries and their long-term consequences mean that every aspect of her life is forever altered.

[78] The following sentence takes into account general and specific deterrence as the primary focus.

[79] A term of incarceration greater than two years but less than three years is required.

[80] I sentence Mr. Desmond to two years and four months incarceration for the offence of criminal negligence in the operation of a motor vehicle causing bodily

harm contrary to section 221 of the *Criminal Code*. When one considers the remand credit, Mr. Desmond has served his sentence.

Ancillary Orders
DNA

[81] The Crown seeks a DNA Order under s. 487.04 of the *Criminal Code* which states:

> **487.04** In this section and in sections 487.05 to 487.0911,
>
> ***adult*** has the meaning assigned by subsection 2(1) of the *Youth Criminal Justice Act*; (*adulte*)
>
> ***designated offence*** means a primary designated offence or a secondary designated offence; (*infraction désignée*)
>
> ***DNA*** means deoxyribonucleic acid; (*ADN*)
>
> ***forensic DNA analysis***
>
> > **(a)** in relation to a bodily substance that is taken from a person in execution of a warrant under section 487.05, means forensic DNA analysis of the bodily substance and the comparison of the results of that analysis with the results of the analysis of the DNA in the bodily substance referred to in paragraph 487.05(1)(b), and includes any incidental tests associated with that analysis, and
> >
> > **(b)** in relation to a bodily substance that is provided voluntarily in the course of an investigation of a designated offence or is taken from a person under an order made under section 487.051 or an authorization granted under section 487.055 or 487.091, or to a bodily substance referred to in paragraph 487.05(1)(b), means forensic DNA analysis of the bodily substance; (*analyse génétique*)

[82] This offence is classified as a secondary designated offence which makes such an order discretionary. The Crown argued that this order is necessary given the severity of the crime. The Crown submitted a brief in support of their position which stated only the following:

> In addition, the Crown is seeking a 5-year driving prohibition under section 259 of the *Criminal Code*, a secondary DNA order under section 487.04 of the *Criminal Code*.

[83] The Defence argues this is not a primary designated offence and, given the intrusion on Mr. Desmond's personal privacy and integrity, the Court should not

exercise its discretion to order a DNA sample. I agree, and I make note of the decision in ***R. v. Sullivan***, 2015 NSPC 40, on this issue.

[84] The burden is clearly on the crown. As stated in *R.v. Sullivan*, supra, at para. 59:

> The Supreme Court of Canada in *R. v. R.C.*, 2005 SCC 61 (CanLII), [2005] S.C.J. No. 62 has held that "Parliament has…drawn a sharp distinction between "primary" and "secondary" designated offences, which are defined in s. 487.04 of the *Criminal Code*. Where the offender is convicted of a secondary designated offence, the burden is on the Crown to show that an order would be in the best interests of the administration of justice." (*paragraph 20*)

The Crown, in oral arguments, said the objectives to order this are two-fold:

1. To prevent wrongful convictions; and,
2. To ensure crimes can be investigated more effectively.

[85] The Crown argues such orders were given in relation to other similar matters but did not refer the Court to any cases. I am not satisfied the Crown has discharged its burden. Mr. Desmond has a dated criminal record. The Crown has not demonstrated how it is in the best interest of the administration of justice. In these circumstances, I am not prepared to grant an order to take a sample of Mr. Desmond's bodily substances.

Victim Fine Surcharge

[86] The parties agreed in the circumstances, in light of ***R. v. Boudreault***, 2018 SCC 58, and the fact that Mr. Desmond has no means, I will not order a Victim Fine Surcharge. His counsel noted that since he has been incarcerated since the offence, he has no means.

Vehicle Forfeiture

[87] The Crown seeks an order under s. 490(1)(a) of the *Criminal Code*, which states:

> Order of forfeiture of property on conviction
>
> **490.1 (1)** Subject to sections 490.3 to 490.41, if a person is convicted, or discharged under section 730, of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that offence-related property is related to the commission of the offence, the court shall

> **(a)** if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and
>
> **(b)** in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purpose of this paragraph.

[88] The Crown acknowledged that the forfeiture requested is not utilized often. During the sentencing, the Court inquired as to the factors which should be considered in reaching a decision in regards to this order. The Crown argued this was a presumptive provision in the *Criminal Code*. The Crown argued the vehicle was offence related property. The Crown acknowledged that s. 490.41(3) gives the Court discretion to refuse such an order. Subsections 490.41(3) provides:

> **(3)** Subject to an order made under subsection 490.4(3), if a court is satisfied that the impact of an order of forfeiture made under subsection 490.1(1) or 490.2(2) would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person charged with or convicted of the offence, as the case may be, it may decide not to order the forfeiture of the property or part of the property and may revoke any restraint order made in respect of that property or part.

[89] It is clear the vehicle, a 2005 Chevy Aveo, was used in the offence. It was therefore offence-related property. However, I am not convinced this is an appropriate case to make such an order.

[90] Because the vehicle is offence-related property the onus shifts to the offender to establish the impact of the forfeiture is disproportionate.

[91] Mr. Desmond lost his work and his apartment along with his possessions when he was incarcerated on May 25, 2017. When leaving custody, he will be re-entering society with little more than his vehicle. I accept the representations of Defence counsel that forfeiting the vehicle would be a substantial consequence whereas Mr. Desmond has limited initial means and resources to re-establish himself.

[92] Given the sentence of imprisonment and the significant driving prohibition and, given the dated criminal record and the little means the offender has to start to

rehabilitate himself, it would be disproportionate in this case to order forfeiture of his only asset, given the importance of his rehabilitation and transition into society.

[93] I was provided with no authority from the Crown to assist me in reaching a decision on this matter. Pursuant to s. 490.41(3), a court may decline to order vehicle forfeiture if the order would be disproportionate. Given the nature of the offence, the circumstances of the offender (including that he is African Nova Scotian) the mitigating and aggravating factors, and given, as his counsel stated, that the vehicle is the only asset he has and could be sold to help him get on his feet, it would be disproportionate to order forfeiture.

Driving prohibition

[94] I have considered the case law in relation to driving prohibitions. In particular I have reviewed ***R. v. Belanger***, 2009 ONCA 867. In that case, the offender was speeding when he struck the victim and severed her leg, as well as causing other serious injuries. The sentence of sixty days' intermittent jail time, two years probation and three-year driving prohibition, was held to be unfit on appeal. The court increased the driving prohibition to five years.

[95] The Crown seeks a five-year driving prohibition. The Defence has advised that Mr. Desmond was already prohibited from driving for a year, although this had no real impact on him given his incarceration. In addition, the Defence argues a prohibition will detrimentally affect his ability to attend to employment.

[96] Driving is a privilege, not a right. Given the harm occasioned by Mr. Desmond's negligence, I conclude that a driving prohibition is necessary in the circumstances. A lengthy driving prohibition is a more meaningful way to promote general deterrence and denunciation. I make note of the comments by the court in ***R. v. Belanger, supra***. I order a four-year driving prohibition on Mr. Desmond. I understand that this will be an inconvenience, but given the gravity of the circumstances, this is a fit and appropriate order.

Conclusion

[97] In conclusion, Mr. Desmond caused tragic consequences, significant harm and everlasting impact on not only Ms. Atwood but her children, family, and friends. This harm is immeasurable.

[98] Mr. Desmond can achieve reformation and rehabilitation. He will need to make a conscious effort every day to abstain from substances and commit to do so.

[99] Taking into account all of the circumstances the following sentence is fit and proper:

1. 28 months incarceration – considering remand credit, Mr. Desmond has served his sentence.
2. Ancillary Order: a four-year Driving Prohibition Order.

Brothers, J.