In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

Case No. 10 of 2020

BETWEEN:

THE QUEEN

-and-

TERRANCE WALKER

Before: **The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Mr. Carrington Mahoney for the Prosecution
Mr. Marc Daniels for the Defendant

Date(s) of Hearing: 3rd February 2023
Date of Sentence: 3rd February 2023
Date of Reasons: 27th February 2023

SENTENCE

Causing Death by Careless Driving – Section 37A of the Road Traffic Act 1947 – Starting Point for sentencing - Aggravating and Mitigating circumstances – Whether any term of imprisonment should be suspended – Whether there are "special reasons" for the Defendant's disqualification from driving to be reduced (as per section 4 of the Traffic Offences (Penalties) Act 1976)

WOLFFE J.

1. On the 28th June 2022 the Defendant was found guilty by a jury for the offence of Causing Death by Careless Driving contrary to section 37A of the Road Traffic Act 1947 (the "RTA").

2. On the 3rd February 2023, after hearing submissions from Counsel, I sentenced the Defendant as follows:

    (i) Three (3) years imprisonment
    (ii) Disqualified from driving all vehicles for five (5) years
    (iii) Twelve (12) demerit points

3. Set out herein are my reasons for doing so. However, before providing my reasons it is necessary that I provide a brief history as to why it took approximately seven (7) months after conviction for the Defendant to be sentenced.

4. On the same date that the jury delivered its majority verdict a Social Inquiry Report ("SIR") was ordered to assist the Court with arriving at the appropriate sentence for the Defendant. The Defendant was then placed on bail pending receipt of the SIR (the Prosecution did not object to the Defendant's request to be placed on bail). The matter was set for the 1st September 2022 to schedule a sentencing date as it is well-known that a SIR takes at least six (6) weeks to be produced by the Department of Court Services ("DCS"). However, on the 30th August 2022, a mere two (2) days before the return date, the Court received a letter from a Mrs. Mia Bean, a Probation Officer within the DCS, stating that the Defendant had been advised by his lawyer (presumably Mr. Marc Daniels who was the trial lawyer) not to participate in the interview process for the SIR because an appeal had been launched in respect of his conviction. The consequence of the Defendant not participating in the SIR process was that the SIR was not prepared and the Court was compelled to delay the sentencing of the Defendant. To exacerbate matters the Defendant did not appear in Court on the mention date of 1st September 2022 and a warrant was issued for his arrest.

5. The Defendant eventually appeared in Court on the 13th September 2022 at which time Mr. Daniels accepted that he advised the Defendant not to participate in the SIR process. Mr. Daniels' reasoning was that whatever the Defendant would have said in the SIR may have had an impact on his eventual appeal and that any factual issues which may be decided on by the Court of Appeal may determine the eventual sentence which the Defendant may receive if the appeal is unsuccessful. Obviously, the Defendant was ill-advised by Mr. Daniels as it is common practice for a trial judge to proceed to sentencing as soon as practicable after a conviction so that any appeal which is filed could be heard in respect of both conviction and sentence (if such sentence is appealed). Indeed, it is the Court of Appeal's desire to have appeals in relation to both conviction and sentence heard at the same time. I therefore confirmed my order for a SIR to be prepared and I set a sentencing date of 26th October 2022. Unfortunately, due to Court commitments which involved pressing jury trials a couple of sentencing dates had to be adjourned and the sentencing could not be set until the 3rd February 2023.

6. It is the responsibility of Counsel to advise their clients that it is imperative that they [the client] must abide by orders of the Court whether or not an appeal has been instituted. It was not for Mr. Daniels to direct his client to not engage in the SIR process because as a result the sentencing of the Defendant was prolonged longer than it should have been. Whether or not the Defendant would say something in the SIR that would have an impact on his appeal, or whether or not any comments by the appellate jurisdiction may affect whatever sentence the Defendant may receive, are not factors that should be taken into consideration when proceeding with the sentencing of the Defendant.

Summary of the Evidence heard at Trial

7. The jury heard that on Saturday, 15th July 2018 at about 3.00am/3.15am a Jen-Naya Simmons was riding a Sym auxiliary motorcycle, registration no. 040AQ, in an easterly direction in the eastbound lane of North Shore Road in Hamilton Parish in Bermuda. At the time she was riding behind her friend Jada Simmons-Trott who was riding on another

motorcycle with Jen-Naya's sister who was the pillion passenger. As Ms. Simmons-Trott cleared a sharp corner and went onto a straight-away she saw a white/greyish van travelling in the opposite direction in the westbound lane. She said that she could clearly see the right wheel of this van either on or slightly over the center yellow line and into the eastbound lane i.e. on her side of the road. She explained that she would have still cleared the van but that she was not comfortable being close to the van and so she went to her left to avoid the van.

8. Ms. Simmons-Trott went on to say that after clearing the van she looked back for Jen-Naya and pulled over to give Jen-Naya time to catch up. Not seeing Jen-Naya she immediately proceeded to go back westerly in the westbound lane. She eventually came upon the motorcycle that Jen-Naya was riding laying on its right side in the eastbound lane and she then saw Jen-Naya in the eastbound lane not moving and unconscious. Other members of the public were near Jen-Naya.

9. An ambulance eventually arrived and Jen-Naya was taken to the hospital without a pulse and without cardiac activity. As a result resuscitative efforts were discontinued and Jen-Naya was pronounced dead. An autopsy report revealed that Jen-Naya sustained multiple skull fractures with underlying brain injury; multiple rib and sternal fractures with underlying aortic and pulmonary lacerations and haemorrhage; vertebral fractures; liver lacerations; left upper extremity open fracture; and multiple abrasions and lacerations. The preliminary cause of death was "Polytrauma Secondary to Road Traffic Collision". A further report from forensic pathologist Dr. Mark Millroy stated that the overall appearance of Jen-Naya was that she had been run over by another vehicle.

10. Answering questions from both the Prosecution and the Defence Ms. Simmons-Trott stated that although Jen-Naya did not have a driver's license that she knew how to operate a motorcycle and had seen Jen-Naya to so on many occasions. The jury also heard that on three occasions Jen-Naya did not pass the Project Ride course which prepares high school students to get motorcycle licenses. She said that Jen-Naya failed but that it was not because Jen-Naya could not handle motorcycles. She also said that earlier in the day on

the 14th July 2018 that Jen-Naya asked to borrow the motorcycle and that after Jen-Naya returned she could see that Jen-Naya had scratches and blood on her. Jen-Naya explained to her that she went down trying to avoid a dog which was in the middle of the road.

11. Ms. Simmons-Trott also said that prior to the accident on the 15th July 2018 that she and Jen-Naya, along with Jen-Naya's sister, attended a party where Jen-Naya drank no more than three shots of Hennessy alcohol. She said that she saw no signs of Jen-Naya being intoxicated including when she was riding the motorcycle.

12. Prosecution witness Quanae Burchall gave evidence that at about 3.15am on the day in question that she was riding slowly in an easterly direction past the Aquarium (which is west of the scene of the collision) when she passed a silver van travelling west in the opposite direction in the westbound lane. The lights on the van were turned off and it was not going fast or slow. She could see that the driver had on a white t-shirt. She thought that the van was going to come after her given the hour of the morning and because she was riding by herself. She kept riding and she came upon the body of Jen-Naya in the eastbound lane of the road. At first she rode off but she then turned around though and went back. She checked Jen-Naya's pulse but could not get any.

13. Ms. Burchall continued to say that no-one else was on the scene for about two to three minutes but then she saw the same silver van come back through the scene travelling easterly in the westbound lane. The van stopped close to her [the distance between the witness box and the jury box] and the four people in the van looked down at Jen-Naya's body. The van then proceeded to drive through the scene and in an easterly direction. She said that she saw two males in the front of the van (one of whom was black) and two others in the back of the van but she could not ascertain their genders. She said that these people in the van did not say anything or offer any assistance.

14. During their investigation the police obtained CCTV footage taken of North Shore Road in Hamilton Parish to the west of the scene of the collision and it revealed that prior to the collision occurring a silver coloured Suzuki APV van, registration no. 49359, travelled in

a westerly direction in the westbound lane near Shelley Bay Beach (which is west of where the collision occurred). The CCTV footage also revealed that after the collision occurred the same van was seen travelling east in the eastbound lane near Shelley Bay Beach at a faster speed than what it was seen earlier travelling westward. Further inquiries made at the Transport Control Department ("TCD") revealed that the registered owner of the van was the Defendant, and, that on the night of the collision a Disc Jockey by the name of "DJ Zedhi" performed at the Bailey's Bay Cricket Club which is located in Hamilton Parish and east of the scene of the collision. The Defendant was a DJ and he used the stage name "DJ Zedhi" (in answers to questions by the police on the 11th September 2018 the Defendant admitted that he DJ'ed "sometimes"). It was the Prosecution's case that the Defendant was driving the van at the time of the collision and that out of a consciousness of guilt for causing the death of Jen-Naya he fled the scene.

15. The Prosecution also called a Rupert Knight who was tendered as an expert in Auto Mechanics. He told the jury that he examined the van on the 11th September 2018 and he concluded that recent repair and paint work had been done to the van, namely, to the: inner and outer part of the front bumper; the bezel; the fog lamp cover and bracket; and, the front offside radiator panel. It was the Prosecution's case that it was out of a consciousness of guilt for colliding with Jen-Naya that the Defendant repaired the damage that was caused to his van.

16. The Prosecution called two expert witnesses, a Mr. Glen Luben who was tendered as a Road Traffic Collision Reconstruction Expert, and, a Sgt. Olasunkanmi Akinmola who was a Traffic Collision Investigation Expert. The Defence also called Mr. Michael Prime who was an expert in Forensic Collision Investigation. It was the divergent evidence of these experts which figured quite prominently in the case. Specifically:

    (i) Sgt. Akinmola's view was that the collision most likely occurred close to the center yellow line but in the westbound lane i.e. the lane in which the van was travelling. Sgt. Akinmola added that there was no evidence that the van encroached into the eastbound lane and that it was not clear why Jen-Naya

encroached into the westbound lane. However, he said, it must have been that Jen-Naya lost control of the motorcycle and this could have been as a result of a combination of factors: her inexperience operating a motorcycle; and, that the wet roads as she negotiated the right hand bend could have been a challenge for her due to inexperience and her being impaired with an alcohol level at 97 milligrams of alcohol in 100 millilitres of blood in her vitreous humour and 108 milligrams of alcohol in 100 millilitres of blood in her urine (the statutory prescribed limit is 80 milligrams of alcohol in 100 millilitres of blood)[1].

Sgt. Akinmola's final conclusion was that the collision could have been avoided if Jen-Naya had been riding at the minimum standard of a competent and alert rider and kept to her lane or the left side of the road as she negotiated the right hand bend. Also, that the collision could have been avoided had Jen-Naya been experienced and was not under the influence of alcohol.

(ii) Mr. Luben did not agree with Sgt. Akinmola. He concluded that Jen-Naya was travelling eastbound in her lane of travel when something made her drop her motorcycle onto its right side. He said that the most likely scenario was that the van encroached into her lane and that she took evasive action or panic braked and locked the front brake and front right handle of the motorcycle. This would have caused the motorcycle to go down. He added that there was clear evidence that the van did not strike the motorcycle at all but that it struck and rolled over Jen-Naya's head/helmet and body thereby causing massive head trauma and bodily injury to Jen-Naya.

He said that there was nothing significant to indicate that Jen-Naya's body was dragged anywhere and this, he said, proved that: (i) Jen-Naya was not on the wrong side of the road and then dragged to her side of the road, and (ii) that based on where her body was located that Jen-Naya was within a few feet of where the impact occurred on her side of the road i.e. in the eastbound road.

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[1] Section 1 of the Road Traffic Act 1947

As to Jen-Naya not having a license Mr. Luben said that this indicated that she was not an experienced rider, however due the fact that the van did run her over there would have been no reason other than the van encroaching into Jena-Naya's lane of travel to cause her to panic brake or lay the motorcycle down and collide with the roadway.

(iii) Mr. Prime, the Defence expert, concluded that Jen-Naya would have fallen to the right of the motorcycle and that it would be no surprise if Jen-Naya fell into the westbound lane whilst the motorcycle was not. It was his opinion that Jen-Naya did fall into the westbound lane, probably to the offside of that lane, and then came in contact with the offside of the van travelling correctly in the westbound lane. So his conclusion was that the collision between Jen-Naya and the van occurred in the westbound lane.

He disagreed with Sgt. Akinmola's opinion that Jen-Naya was in the westbound lane when the motorcycle fell over, and he also disagreed with Mr. Luben that the collision occurred in the eastbound lane or that the van crossed over into the westbound lane.

17. So essentially, the jury had before it the competing versions of where and how the collision between Jen-Naya and the van occurred. Sgt. Akinmola and Mr. Prime saying that the van never went into the eastbound lane (although they differ as to the motorcycle going into the westbound lane), and Mr. Luben saying that the collision happened in the eastbound lane. Of course, it is impossible to know what was in the minds of the jury when arriving at their guilty verdict but in considering their decision they were entitled, in conjunction with all of the other evidence adduced, to accept or reject parts of the respective evidence of Sgt. Akinmola, Mr. Luben, and Mr. Prime. One can reasonably assume however that by their guilty verdict that the jury would have concluded that the Defendant drove carelessly by encroaching into the eastbound lane and then colliding with Jen-Naya who was properly travelling in the eastbound lane.

18. As he was entitled to do the Defendant did not give evidence at trial and the jury were directed that they should draw no adverse inference from this.

Sentencing Guidelines

19. It was stated by Treacy J. in the authority of *R v. Gareth Jones [2013] 1 Cr.App.R. (S.) 20* that:

> *"Sentencing for cases of causing death by careless driving is amongst the most difficult tasks facing a judge. The harm caused is by definition catastrophic for the primary victims, as well as for the most closely affected by the death of a loved one. On the other hand, the crime is not committed by someone who intended any harm, nor by someone who drove dangerously with deliberate disregard for the safety of others. The crime is one of negligence."*

20. Unlike in other jurisdictions where the respective sentencing tariffs draw a clear distinction between the seriousness of the offence of causing death by careless driving and that of the offence of causing death by dangerous driving, by virtue of a higher tariff for the latter offence, the sentencing regime in Bermuda highlights the difficulty of sentencing those who cause death by careless driving which is spoken about by Treacy J in *Jones*.

21. In Bermuda, for a first time offence of causing death by careless driving (under section 37A of the RTA) Schedule 1 of the Traffic Offences (Penalties) Act 1976 ("TOPA") provides that the maximum period of imprisonment is eight (8) years, that the obligatory period of disqualification from driving all vehicles is five (5) years, and that the application of demerit points is fixed at twelve (12). The problem is that the exactly same maximum sentences are ascribed to a first time offence of causing death by dangerous driving under section 34 of the RTA.

22. In his oral and written sentencing submissions Mr. Daniels, through the citation of several authorities[2], spent considerable time seeking to persuade the Court that the Defendant

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[2] Mr. Daniels cited the authorities of: *Laurin Davies v Fiona Miller (Police Sergeant) 2020 Bda LR 59* and *Luke Armstrong v The Queen, Criminal Appeal No. 17 of 2009* (including the authorities referred to therein).

should be sentenced on the lesser serious offence of causing death by careless driving rather than the more serious offence of causing death by dangerous driving. He need not have done so as it is trite that although pursuant to TOPA the two offences carry the same maximum sentences the level of culpability for careless driving is less than for dangerous driving. Therefore, any sentence should reflect that. Careless driving being that which falls below what would be expected of a competent and careful driver[3], and dangerous driving being that which falls far below what would be expected of a competent and careful driver[4]. For the avoidance of doubt, I will sentence the Defendant on the basis that he was driving in a manner which was careless and not dangerous.

23. Counsel also referred the Court to several authorities which have varying degrees of applicability to the case at bar and therefore there is no need for me to cover all of them in any great detail. One case which Mr. Carrington Mahoney (for the Prosecution) and Mr. Daniels both relied on was the Bermudian authority of *The Queen v. Bryan Daniel, Criminal Appeal No. 22 of 2015* which although involving the offence of dangerous driving provides useful guidance as to how the Court should treat cases where death results from the driving of an individual (whether carelessly or dangerously).

24. The brief facts of *Daniel* was that the respondent was driving his motorcar with the deceased in the front passenger seat when he lost control of the vehicle on a slight left hand bend. The deceased was able to extricate himself from vehicle but because of severe injuries he unfortunately met his death in the ambulance on the way to the hospital. The respondent also sustained serious injury which left him in a coma and he could not remember the details of the accident. However, a road traffic investigator estimated the vehicle to have been travelling at almost 100kph at the time of the collision. At trial the respondent was found guilty by a jury for the offence of causing death by dangerous driving and the trial judge sentenced him to six (6) months imprisonment, disqualified him from driving all vehicles for five (5) years, and she imposed twelve (12) demerit points. The Prosecution appealed the sentence on the ground that the term of imprisonment was

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3 Section 37B of the Road Traffic Act 1947 (the "RTA").
4 Section 36A of the RTA.

manifestly inadequate (there was no appeal as to the disqualification period or the demerit points).

25. Acknowledging that there was no clear guidance on the appropriate level of sentence in Bermuda for causing death by dangerous driving Baker P. (President of the Court of Appeal in Bermuda) turned to the English Court of Appeal authority of *R v. Cooksley [2003] EWCA Crim 996* for assistance. The facts in *Cooksley* were that the appellant pleaded guilty to causing death by careless driving when he ran into a cyclist when under the influence of alcohol. He was uncooperative immediately following the offence and he was sentenced to six (6) years imprisonment and disqualified from driving for six (6) years. This sentence was appealed.

26. In considering the appeal the Court in *Cooksley* adopted the advice of the Sentencing Advisory Panel of February 2003 (the "SAP") which formulated the following series of aggravating and mitigating factors which should be considered when sentencing for the offences of causing death by dangerous driving and careless driving when under the influence of drink or drugs:

> *"Aggravating Factors*
>
> *"Highly culpable standard of driving at time of offence*
>
> *(a) the consumption of drugs (including legal medication known to cause drowsiness) or of alcohol, ranging from a couple of drinks to a 'motorised pub crawl'*
> *(b) greatly excessive speed; racing; competitive driving against another vehicle; 'showing off'*
> *(c) disregard of warnings from fellow passengers*
> *(d) a prolonged, persistent and deliberate course of very bad driving*
> *(e) aggressive driving (such as driving much too close to the vehicle in front, persistent inappropriate attempts to overtake, or cutting in after overtaking)*
> *(f) driving while the driver's attention is avoidably distracted, e.g. by reading or by use of a mobile phone (especially if hand-held)*
> *(g) driving when knowingly suffering from a medical condition which significantly impairs the offender's driving skills*
> *(h) driving when knowingly deprived of adequate sleep or rest*
> *(i) driving a poorly maintained or dangerously loaded vehicle, especially where this has been motivated by commercial concerns*

Driving habitually below acceptable standard

(j) other offences committed at the same time, such as driving without ever having held a licence; driving while disqualified; driving without insurance; driving while a learner without supervision; taking a vehicle without consent; driving a stolen vehicle

(k) previous convictions for motoring offences, particularly offences which involve bad driving or the consumption of excessive alcohol before driving

Outcome of offence

(l) more than one person killed as a result of the offence (especially if the offender knowingly put more than one person at risk or the occurrence of multiple deaths was foreseeable)

(m) serious injury to one or more victims, in addition to the death(s)

Irresponsible behaviour at time of offence

(n) behaviour at the time of the offence, such as failing to stop, falsely claiming that one of the victims was responsible for the crash, or trying to throw the victim off the bonnet of the car by swerving in order to escape

(o) causing death in the course of dangerous driving in an attempt to avoid detection or apprehension

(p) offence committed while the offender was on bail.

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Mitigating Factors

(a) a good driving record;

(b) the absence of previous convictions;

(c) a timely plea of guilty;

(d) genuine shock or remorse (which may be greater if the victim is either a close relation or a friend);

(e) the offender's age (but only in cases where lack of driving experience has contributed to the commission of the offence), and

(f) the fact that the offender has also been seriously injured as a result of the accident caused by the dangerous driving."[5]

27. With this in mind, and being guided by the ranges suggested by the SAP, *Cooksley* put together four (4) starting points for sentencing offenders convicted of causing death by dangerous driving offences after a contested trial. They are:

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[5] The Court of Appeal in *Cooksley* and the Court of Appeal in *Daniel* commented that the aggravating and mitigating factors should not be seen as exhaustive and that the significance of the factors may differ.

No Aggravating Circumstances:	12 – 18 months
Intermediate Culpability:	2 – 3 years
Higher Culpability:	4 – 5 years
Most Serious Culpability:	6 years or over[6]

28. Taking all of this into consideration the Justices in *Cooksley* were of the view that since it was a bad case of causing death by careless driving that the case properly fell within the third category of seriousness or higher culpability. It went on to conclude that the six (6) year sentence of imprisonment was not excessive.

29. Baker J. in *Daniel* commented that the maximum penalty for the offence of causing death by dangerous driving in Bermuda is eight (8) years' imprisonment which at the time was two years less than the maximum of ten (10) years' imprisonment for such offence in England (I will say more about this later). Therefore, Baker P. opined, the above starting points of *Cooksley* are "slightly on the high side for Bermuda"[7]. Against that backdrop, and taking into consideration the aggravating factor of speed as well as the mitigating factors (good character, the fact that the deceased was a close friend of the appellant, and the appellant's own injuries) Baker P. took the position that the starting point of five years' imprisonment taken by the trial judge was "rather too high and 3 – 4 years would have been more appropriate"[8]. This 3 – 4 year sentencing range would be somewhere between the Intermediate Culpability and Higher Culpability starting points of *Cooksley*. Accordingly, the Court of Appeal in *Daniel* held that the sentence of six (6) months' imprisonment imposed by the trial judge was manifestly inadequate and they substituted it with two (2) years' imprisonment.

30. For the purposes of sentencing the Defendant in the case at bar the guidance set down in *Cooksley* and *Daniel* is instructive. However, I would be remiss if I did not mention that in relation to the offence of causing death by dangerous driving the sentencing landscape

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6 Paragraph 23 of *Daniel*.
7 Paragraph 24 of *Daniel*.
8 Paragraph 26 of *Daniel*.

in England has significantly changed since the decision of *Cooksley* in 2003 when the maximum penalty for the offence of causing death by dangerous driving was ten (10) years' imprisonment i.e. when it was two years more than the maximum penalty in Bermuda. As outlined in the recent authority of *R v. Luis Soto and Malcolm Waite [2023] EWCA Crim 55* (decided on the 26th January 2023) with effect from the 4th August 2008 (i.e. after the decision of *Cooksley*), the Sentencing Council for England and Wales (the "Sentencing Council") formulated and issued new sentencing guidelines on the basis that the maximum sentence for causing death by dangerous driving was increased to fourteen (14) years imprisonment. It is unclear exactly when the maximum sentence was increased from ten (10) years to fourteen (14) years but with the increase came a concomitant increase in the starting points for sentencing offenders convicted of causing death by dangerous driving. Moreover, rather than utilizing the culpability categories of "No Aggravating Circumstances", "Intermediate", "High" and "Most Serious" which were identified by *Cooksley* the Sentencing Council prefers using the labels "Level 1" for the most serious offences; "Level 2" which involves driving that created a 'substantial' risk of danger; and "Level 3" which involves driving that created a 'significant' risk of danger. It should be said that the Sentencing Council takes into consideration the same aggravating and mitigating features referred to in *Cooksley*. With this, the Sentencing Council set the following starting points for sentencing offenders who plead not guilty to causing death by dangerous driving:

Level 1	8 years' custody (with a range of 7 – 14 years' custody)
Level 2	5 years' custody (with a range of 4 – 7 years' custody)
Level 3	3 years' custody (with a range of 2 – 5 years custody)

31. This obviously represents an uplift in the sentencing guidelines suggested by *Cooksley*. However, this upward trajectory in the strict manner in which offenders in England are treated for the offence of causing death by dangerous driving does not end with the 2008 guidance of the Sentencing Council. The English Parliament registered its and presumably the English community's abhorrence for offences of this nature by the enactment of section 86(2) of the Police, Crime Sentencing and Courts Act 2022 (the "PCSCA") which

increased the maximum penalty for causing death by dangerous driving from 14 years' imprisonment to life imprisonment for any offence committed after 28th June 2022 (see *Soto*). The Sentencing Council have not as yet formulated guidelines to reflect this maximum period of life imprisonment but I do not think that it would be unreasonable to assume that the starting points of their 2008 guidelines would be further increased[9].

32. Moreover, and I confess that this is pure speculation, but given the 2008 guidance of the Sentencing Council and the maximum life imprisonment penalty imposed by the PCSCA it would not be unreasonable to assume that a Court presented today with the same facts of *Cooksley*, and maybe even *Daniel*, may be justified in having a starting point which is higher than those which were referred to in those cases.

33. More specific to the offence of causing death by careless driving (which of course is the offence in the case at bar), it does not appear that the English Parliament has taken the same dim view for this type of offence that it has for the offence of causing death by dangerous driving. Currently, in England the maximum sentence for causing death by careless driving is five (5) years imprisonment and there is little indication that there is any parliamentary movement to increase it. Possibly because the lower level of culpability which characterizes causing death by careless driving cases does not stir up society's ire in the same way that it does for causing death by dangerous driving offences (which often involves drink or drugs, excessive speed, or extremely bad driving).

34. It should be said though that the Sentencing Council is now in the process of revising its guidelines to reflect higher starting points for causing death by careless driving than what their current guidelines suggest. As it currently stands, the Sentencing Council's starting points are as follows: community service orders where there is momentary inattention with no aggravating factors; 36 weeks' custody for other cases of careless driving (ranging up to 2 years' custody); and, 15 months' custody for careless driving which falls not far short of dangerous driving (ranging up to 3 years' custody). The suggested new guidelines are

[9] On its website the Sentencing Council does provide a draft guideline but stresses that it is for consultation only and should not be taken into account when sentencing.

yet to be finalized (it is unclear when this would occur), and therefore they should not be used as a basis for sentencing (whether in the UK or in Bermuda). Interestingly though, the following starting points which are being considered are: 26 weeks' custody for lesser culpability offences (ranging from a community service order to 1 year's custody); 1 year's custody for medium culpability offences (ranging from 26 weeks to 3 years' custody); and, 2 years' custody for high culpability offences (ranging from 1 to 4 years' custody). So while the English legislature may appear to be slow in increasing the maximum penalty for causing death by careless driving, the Sentencing Council seems to have taken the initiative, within the confines of the existing maximum penalties, to increase their starting points to presumably reflect the increased perceptions of the seriousness of the offence.

35. So where does that leave us in Bermuda? We are just under twenty (20) years on from *Cooksley* and about seven (7) years on from the decision in *Daniel*. Therefore, the application of any starting points for sentencing offenders who have caused death by careless driving should reasonably reflect this, particularly in light of the prevalence of fatal road traffic collisions for the period 2016 to 2020 (the Bermuda Police Service's Official Statistics Report 2020 was provided by the Prosecution). Moreover, considering that the maximum penalty of 8 years' imprisonment in Bermuda for causing death by careless driving is three (3) years more than the maximum in England for the same offence then any starting points for Bermuda should justifiably be higher than the current starting points set by the Sentencing Council. Therefore, relying on the guidance provided by *Cooksley* and *Daniel* (including the aggravating and mitigating features which are to be factored in) I would suggest the following starting points for imprisonment for the offence of causing death by careless driving where there is a not guilty plea i.e. after trial:

Lesser Culpability (with no aggravating circumstances)	9 – 12 months
Intermediate Culpability	18 months - 3 years
Higher Culpability	4 – 5 years
Most Serious Culpability	6 years or over

36. In setting those starting points I am mindful of the words of Baker P in *Daniel* when he said that the Court in *Cooksley* emphasized that *"the sentencer had to avoid the trap of double accounting by taking aggravating circumstances to place the sentence in a higher category and then adding to it because of the very same aggravating features"*[10], and, that the Court made *"allowances for the fact that those who commit offences of dangerous driving resulting in death are less likely, having served their sentence, to commit the same offence again"*[11].

37. Of course, it would be impossible to list all the possible careless driving scenarios which may fall within each culpability category. It would be reasonable however to accept that in many cases the manner of careless driving which has resulted in death may have been as a result of momentary inattention or a minor lack of judgment by someone who otherwise would not have driven carelessly or dangerously. As the Court stated in the Canadian authority of *R v. Ranko Stupar [2015 ONCJ 350* which was cited by Mr. Daniels *"...Even simple carelessness may result in tragic consequences...."* (which is consistent with the thought patterns of Treacy J. in *Jones*). Indeed, it can even be said that most road users may potentially find themselves in such a predicament during an otherwise normal course of competent and careful driving. These types of circumstances could be assigned culpability which ranges from the lesser end of the spectrum (particularly if there are no aggravating aspects) to the intermediate end (where there may be some aggravating features).

38. However, there are also those categories of cases where the driver's careless driving is more deliberate and may even fall just short of the offence of dangerous driving. Such as: prematurely exiting from a minor road and onto a major road when there is oncoming traffic (in common Bermudian parlance: where the person is "trying to make the nip"), overtaking when it is not safe to do, or the "cutting of corners" as one negotiates a bend. These categories of cases could range from high to the most serious end of culpability. Of

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[10] Paragraph 22 of *Daniel*.
[11] Paragraph 24 of *Daniel*.

course, my examples are not exhaustive as there are a multitude of other permutations of careless driving which I have not listed.

39. I will therefore now turn to the crux of why I sentenced the Defendant in the manner which I did.

Sentencing Decision

40. Buttressed by the statistics set out in the aforementioned 2020 Bermuda Police Service Report on the prevalence of road traffic accidents for the period 2016 to 2020 it would be entirely reasonable for me to take Judicial Notice of the fact that the overall standard of driving on Bermuda roads is horrendous and has plummeted for many years. There has been told and untold carnage on the roads which have not only led to the untimely and unnecessary deaths of unsuspecting road users but it has psychologically, emotionally and financially devastated the loved ones, friends, and co-workers of the victims. The contents of the several Victim Impact Statements from Jen-Naya's father, grandmother, sister, and close friends are indicative of the extent to which Jena-Naya's death has taken its toll on them.

41. I appreciate that in most, if not all, causing death by careless driving cases that the offender does not intend to cause death, however it is still imperative that those who cause the death of another by careless driving, especially if the level of their culpability is intermediate or higher, clearly understand that they will be treated harshly by the Court. Such aberrant driving must be denounced and whether or not the end result will be an immediate term of imprisonment will of course be determined by the facts of the case, the presence of any mitigation or aggravating features, and the applicability of sections 53 to 55 of the Criminal Code Act 1907 (the "Criminal Code").

Mitigating Circumstances

42. Obviously, by electing to have a trial, which is his constitutional right to do, the Defendant cannot benefit from any discounts in sentence which he would have been entitled to had he pleaded guilty. However, I am obliged to, and I will, take into consideration that prior to committing this offence the Defendant was of previous good character in that he had no previous criminal convictions, was a hard worker, was family orientated, and was trustworthy (as noted in the SIR). I further take into consideration that the Defendant did not intend to cause the death of Jen-Naya and that the contents of the SIR dated 21st October 2022 states that the Defendant *"is of very low risk of reoffending and of very low need for rehabilitative services, with no areas of risk identified"*. This is not surprising since as Baker P. noted in *Daniel* persons who cause death by careless driving are less likely to commit the offence again.

43. Mr. Daniels, by way of mitigation (and in seeking to persuade me that any term of imprisonment which may be imposed should be suspended) asks me to consider that: the Defendant continued to drive for 4½ years after the incident without committing any traffic offences; the Defendant's daughter is presently in counselling due to stress levels surrounding this matter; the Defendant's family depends on his income to meet their financial needs; the Defendant's father is suffering with cancer and the Defendant covers his medical expenses; the Defendant's mother suffers from high blood pressure; the Defendant owns a business which employs two part-time employees; and, that the Defendant has business contracts that he must meet.[12] I will later address whether these factors, and others, amount to "good reasons" for me to suspend any period of imprisonment but the only one which sustainably amounts to a proper mitigating circumstance would be that the Defendant's family depends on him for financial support. Even then, I find that this is only a minor consideration given that those who commit criminal offences should expect that any conviction may lead to a term of imprisonment being imposed and that this may have a knock-on impact on their loved ones.

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[12] See paragraph 69 of the Defence's written submissions.

The Defendant's lack of regret or remorse

44. As to any genuine regret or remorse, the Defendant did not express any that would assist him by way of mitigation. In the SIR, when asked by the report writer about his attitude towards the offence, the Defendant said *"An accident took place, anyone that loses life in a tragic way hurts. She was young, I feel sorry for her family's loss"*. The report writer then recorded that the Defendant maintained that he did not believe that he was responsible for the victim's death. I suppose that what the Defendant said to the report writer, or did not say, is consistent with the advice which he may have received from his lawyer that he should not say anything in the SIR which may affect the merits of his appeal. It was a matter for the Defendant whether he actually followed the advice of his lawyer but by not unequivocally apologizing or expressing genuine regret or remorse for causing the death of Jen-Naya the Defendant did not assist himself in convincing me that any sentence that he receives should be adjusted downwards from the aforementioned starting points. In fact, what the Defendant did eventually say to the SIR report writer comes across as being scripted and was vacuous as an apology.

45. However, it was what the Defendant said in his allocutus at the sentencing hearing that is most telling on many different levels. Reading from a written statement the Defendant said in open court:

> *"As a parent there are no words that I can say that can ease the pain of Ms. Kimberley's and Mr. Kingsley's pain* [Jen-Naya's mother and father]. *I also believe that no parent should have to endure the loss of a child. I also appreciate and anticipate that any family that suffers a tragedy wants closure and I respect that Ms. Kimberely and Mr. Kingsley waited a long time to hear evidence about what happened and to seek justice. The evidence provided stated there were two people in the front seat of the car. I did not give evidence and I did not confirm who was present in the car or who was driving. I think that this lack of evidence may also contribute to some of the pain that Ms. Kimberley and Mr. Kinglsey feels. However, this is a burden that I carry with me for the rest of my life to protect the other individual present in the vehicle.*
>
> *To Ms. Kimberely and Mr. Kingsley, all I can say is that this is a burden that I shall carry for the rest of my natural life. Ever since that fateful night I have replayed the scene of what truly happened over and over in my mind. To whatever degree*

of peace please know that this tragedy has affected me deeply. While I have tried to face the world and be strong for my partner and my children I have carried this pain inside with me from the moment I knew who was killed and the extent of what may have happened. I can only offer my most sincere and genuine sorrow for your loss.

To you your Honour, I wish to thank you for your professionalism throughout my trial. I also wish to give respect to the prosecutor for his professionalism despite hearing some difficult argument about me and my character. It is very difficult to try to convince the Court to see good in me on a day like this, like today. But I hope that to some extent you can believe that I am not a callous monster. I can honestly say that I am truly remorseful that I did not get out of my vehicle and stay with Jen-Naya as Quanae Burchall did. Just like her there was the confusion and then panic set, started to take over.

However, I must make it clear that I did not take steps to conceal my vehicle or otherwise get away with something. I know that I did not come forward and confirm the identity of the driver but I did not change my plate or try to get rid of my car. I honestly had repaired rust damage to the undercarriage as I said to the police. I only highlight this point to try to make it clear to Jen-Naya's family that I was not acting with a consciousness of guilt as the Crown argued.

This would no doubt cause me great financial and family stress as my business depends on my ability to drive. However, I am conscious that whatever punishment is given would never serve justice to a family that is grieving.

This case has been a huge weight on me and I accept that by receiving punishment I will also embark on my own journey of healing.

To my partner, and my family and my friends, my children, I love you and I promise to move forward from this experience and demonstrate the best version of me."

46. Hearing the Defendant's allocutus, and seeing him shed a tear on a couple of occasions whilst delivering it, I am satisfied that the Defendant conveyed heartfelt sympathy for the pain suffered by the parents of Jen-Naya for having lost their child. But I am not satisfied that any of what the Defendant said constituted an unequivocal apology for causing the death of Jen-Naya. To the contrary, he accepted no responsibility whatsoever for what occurred and he maintained that he was not the driver of the van. I therefore find that on this basis alone that the Defendant is not regretful or remorseful for what the jury concluded that he did. I am fortified in this finding by the words of Kay JA in the Bermuda Court of Appeal decision of *John Wardman v. R [2015] CA (Bda) 15 Crim (28th April 2015)*. The

appellant in *Wardman* was found guilty after trial for the offence of driving with excess alcohol and causing grievous bodily harm and Kay JA commented that:

> *"To treat 'expression of remorse' as a mitigating factor was simply wrong. Through his counsel and in his own words, the offender expressed sorrow and regret about the plight of Alex Doyle* [the victim], *but to equate that with "remorse" is unsustainable. At the time of sentence and to this day the offender has maintained that he was not the driver. Remorse is incompatible with that stance."*

47. To exacerbate matters, the Defendant then casted blame on another person for causing the death of Jen-Naya. This revelation came only after a jury was called upon to determine what actually occurred in the early morning hours of the collision and it flies in the face of any attempt by the Defendant to convince me that he is apologetic, regretful or remorseful. Especially since it was for the first time at this sentencing hearing that the Court was made aware of any possibility that someone else was behind the steering wheel of the van when the collision occurred. To be clear, the Defendant was entitled to exercise his legal right not to give evidence at trial and to put the Prosecution to proof that he was the driver of his van at the time of the collision with Jen-Naya. No adverse inference should be drawn from that. However, it is disingenuous for him to now, as a means to mitigate any sentence that he may receive, to introduce pertinent information which would have assisted the police in carrying out their investigation into the death of Jen-Naya. As I said in my extemporaneous sentence on the sentencing date, if what the Defendant says about another person causing the collision is true, which I do not accept that it was, then it is obvious that the Defendant is more willing to protect someone who needlessly took the life of a promising young person than to do justice for Jen-Naya and her family. Further, that if the Defendant was truly remorseful then he would now come forward and inform the authorities of who caused the death of Jen-Naya. If he does not do so then what he said in his allocutus is a "callous" attempt by him, in addition to modifying his van, to avoid responsibility for causing the death of Jen-Naya and to ultimately escape punishment for what he did. What is certain, is that by putting the blame onto an unknown and faceless individual adds no comfort to the loved ones of Jen-Naya and it does not help them in achieving any closure. If fact, what the Defendant said may have even deepened their pain and suffering.

48. I therefore find that the Defendant did not expresses any degree of apology, regret or remorse for causing the death of Jen-Naya.

Aggravating Circumstances

49. The above summary of the evidence at trial demonstrates that the manner of the Defendant's careless driving did not reach the high levels of culpability stated in *Cooksley*. In particular, there was no evidence of: consumption of drugs or alcohol, excessive speed (It was Ms. Simmons-Trott's opinion that when she saw the van just prior to the collision that it was speeding but I give little regard to this as none of the experts speak to excessive speed at the time of the collision), aggressive driving, or the use of a hand device. I therefore agree with Mr. Daniels that in this regard the Defendant's manner of driving does not place him in the higher culpability realm.

50. However, I have regard to the CCTV footage of the van driving westward prior to the accident and the evidence of Ms. Simmons-Trott indicated that at times the Defendant drove his van on or slightly over the center line. As well as the evidence of Mr. Luben that the van collided with Jen-Naya when it was just over the center yellow line and into eastbound lane in which Jen-Naya was traveling (I do not agree with Mr. Daniels' assessment of the evidence that the height of the Prosecution's case was that of Ms. Simmons-Trott). The collective import of this evidence is that there was a prolonged, persistent and deliberate course of careless driving by the Defendant. However, I would not deem the Defendant's driving in this manner to be "very bad driving" or that it was such that it would put the Defendant in the high culpability category of *Cooksley*. Indeed, the Defendant's manner of driving was not even as serious as the driving in *Daniel*.

51. However, an aggravating circumstance which did not feature in both *Cooksley* and *Daniel*, but which is of vital importance in this matter, is the Defendant's irresponsible behavior at the time of and after the offence. I have already commented on the Defendant seeking to belatedly cast blame on another for causing the death of Jen-Naya but when one includes the evidence that (i) within a short couple of minutes after the collision the Defendant drove

his van back through the scene of the collision, looked at Jen-Naya's body on the road, and then left the scene, and (ii) that he repaired and modified his van soon after the collision, then this makes the totality of the Defendant's commission of the offence even more egregious than the facts of *Cooksley* and *Daniel* (I accept that the Defendant was not separately charged with the offence of failing to stop after an accident contrary to section 42 of the RTA). Clearly, the Defendant's conduct was to thwart any investigation into the death of Jen-Naya, to avoid detection by the police, and to ultimately not face any responsibility for Jen-Naya's death (even if he did not change the license plate on the van). So while the Defendant's manner of driving may not have been as serious as those which may denote higher culpability his failure to stop after the collision, coming back through the scene and looking at Jen-Naya's body on the road, and his deliberate attempt to conceal his commission of the offence is extremely serious (the jury obviously did not accept the Defendant's comments in his police statement that he had ran over a tree stump or that he carried out legitimate repairs on the van). I therefore see no compelling reason why this should not be significantly taken into consideration in my sentencing of the Defendant.

52. I should add that this case is distinguishable from and more serious than the authority of *R v. Richards [2021] EWCA Crim 1753* which was cited by Mr. Daniels. Whilst both the Defendant and the appellant in *Richards* left the scene of the collision the Defendant took his evasive conduct to the next level by repairing the damage caused to his van as a result of the collision with Jen-Naya, and, modifying the appearance of his by installing the roof rack.

Level of Culpability of the Defendant and Starting Point of Sentence

53. In consideration of the above, and taking into consideration all of the circumstances in this case, the Defendant's level of culpability is "Intermediate". I come to this conclusion based on the Defendant's prolonged and deliberate driving on or over the center yellow line prior to the accident occurring and at the time of the collision. This is an aggravating aspect of this case. I therefore conclude that the starting point for sentencing the Defendant in

accordance with my suggested ranges set out in earlier paragraphs is one of 18 months to 3 years' imprisonment.

54. The only question for me to now determine is where along that range should the term of imprisonment fall. While I have placed the Defendant in the intermediate culpability category the Defendant's behavior at the time of and after the offence is a heinous aggravating feature, and when coupled with his lack of regret or remorse and his casting of blame onto another unknown person there is justification to sentence him at the higher end of the starting point range i.e. 3 years' imprisonment.

55. By placing the Defendant in the intermediate culpability category and deciding that the appropriate sentence is one of 3 years' imprisonment I obviously disagree with Mr. Mahoney's submitted sentence of at least 5 years' imprisonment. To have acceded to Mr. Mahoney's submission would have put the Defendant in the higher culpability classes of *Cooksley*, *Daniel*, and *R v. Edward Arthur Sheppard [2010] 2 Cr. App. R. (S.) 54* (which is another authority cited by Mr. Mahoney). Given the circumstances of this case, the gravity of the offence, and the degree of responsibility of the Defendant (even with the above aggravating features) a 5 year imprisonment sentence would have been disproportionately too high and would therefore have been inconsistent with the fundamental principle of proportionality set out in section 54 of the Criminal Code.

56. I am also obviously of the view that the sentence of 12 months' imprisonment proffered by Mr. Daniels is woefully too low given the facts of the case at bar. Both Mr. Mahoney and Mr. Daniels, for different reasons, referred to the Bermuda authority of *Clinton Kevin Eugene Smith Case No. 47 of 2017* in which the defendant was found guilty by a jury for the offence of causing death by careless driving and received a sentence of 18 months' imprisonment. It is correct that the Defendant and the defendant in *Smith* both were found guilty of the same offence after trial but the fact that the Defendant left the scene of the collision as well as repaired and altered the appearance of his van after the collision (whereas the defendant in *Smith* did not) makes the case at bar more serious. Therefore, to sentence the Defendant to 12 months' imprisonment as suggested by Mr. Daniels would

essentially be treating the Defendant as if there were no aggravating circumstance and it would be disproportionately placing him into the lowest categories of *Cooksley*, *Daniels*, and my suggested categories.

Whether the term of imprisonment should be suspended

57. Mr. Daniels also urged upon me that there are good reasons to suspend any term of imprisonment that I may impose and in paragraph 69 of his written submissions he sets out his rationale for making the proposition. I am not so persuaded and I disagree that the community would not be abhorred if I were to give the Defendant a suspended sentence, especially in consideration of all of the circumstances of the offence stated above. I appreciate that pursuant to section 70K of the Criminal Code, and by reference to the case of *R v. Crockwell* (citation not provided), that there is statutory scope for any sentence of 5 years' imprisonment or less to be suspended in whole or in part if the Court is satisfied that it is appropriate to do so in the circumstances. However, factors such as the date of the collision, when the Defendant was charged, that he has not been convicted of any traffic infraction since the date of the collision, the physical, psychological, and financial impact on his family, the effects on his business, and the Defendant's growth as a person since the collision, are not circumstances or good reasons that would give rise for me to invoke a suspended sentence.

58. Further, I have reviewed the other authorities cited by Mr. Daniels in support of his submission that any term of imprisonment may be suspended, specifically: *R v. Kelly-Ann Damasio (reported in the Royal Gazette on the 16th July 2019)*, *R v. Muthoka (2011) MBCA 40*, *R v. Manty (2006) MBCA 25* (which also references *Hundal v The Queen [1993] 1 SCR 867*), *R v. Austin [2020] EWCA Crim 1269*), *R v. Abukhrais (Nezar) [2020] EWCA 1305*. However, each of them can be distinguished from the circumstances of the case at bar and/or are of limited assistance. In particular: there were guilty pleas (*Damasio*, *Muthoka*, *Austin*, and *Abukrais*) or the victim was related to the offender (*Damasio*). In respect of *Manty* the appeal against the suspended sentence of was abandoned by the appellant and

so it is unclear as to what was the reasoning behind the trial judge sentencing the appellant as they did.

Disqualification from driving all vehicles

59. As per Schedule 1 of TOPA the offence of causing death by careless driving carries with it an "obligatory" five (5) year disqualification from driving all vehicles for a first time offender. Section 4(1)(a) of TOPA provides that the Court, for "special reasons", may order an offender to be disqualified for a shorter period or not to order him to be disqualified. As is seen in *Dean Allen Grant v. The Queen [2021] Bda LR 17* (cited by Mr. Daniels), which also referenced the authorities of *Whittall v. Kirby [1946] 2 All ER 552* and *R v. Crossan [1939] 1 NI 1-6*, a "special reason" is:

> *"……one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished form the offence is not a "special reason" within the exception."*

60. Mr. Daniels submits that there are sufficient "special circumstances" for me to exercise my statutory discretion to only disqualify the Defendant for a period of one to two years. Specifically, Mr. Daniels asserts that the following amounts to special reasons for me to see fit to invoke section 4(1)(a) of TOPA: the nature of Bermuda's roads; the layout and condition of the accident scene; the evidence of Ms. Simmons-Trott that the van was driving on, but not over, the yellow line; the evidence from the experts as to the positioning of the van at the time of collision; and the inexperience and impairment of Jen-Naya. I am not satisfied that any of the matters listed by Mr. Daniels amount to special reasons and nor are they matters which I find that I ought to take into consideration.

61. Firstly, there was no evidence from any of the expert witnesses that the nature of Bermuda's roads, including the nature of the bend where the collision occurred, are designed in such

a way that they are prone to accidents occurring. So I cannot see how this is connected to the commission of the offence. It should be said that Sgt. Akinmola and Mr. Luben did make reference to the roads being wet at the time of the collision but this was just one of several factors which Sgt. Akinmola and Mr. Luben said collectively caused Jen-Naya to go down.

62. Secondly, whether the van was over the yellow line prior to the accident or into Jen-Naya's eastbound lane at the time of the collision, and whether Jen-Naya's inexperience or intoxication caused the collision, were all disputed issues at trial and formed part of the Prosecution's case and that of the Defence's case. They were all up for determination by the jury and in reaching their guilty verdict the jury must have accepted beyond a reasonable doubt the Prosecution's version of what occurred (including what the Prosecution' expert witnesses). I therefore do not characterize them as special reasons for me to see fit to reduce any the obligatory period of disqualification.

Conclusion

63. In the premises, I confirm the sentence which I handed down on the 3rd February 2023, that is:

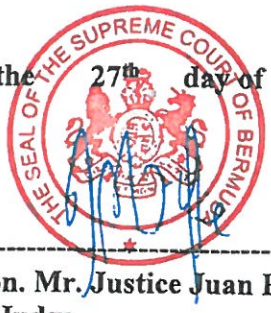
(i) Three (3) years imprisonment
(ii) Disqualified from driving all vehicles for five (5) years
(iii) Twelve (12) demerit points

Guidance:

Strong consideration should be given by the Legislature to (i) increasing the sentencing tariffs for both the offences of causing death by careless driving and causing death by dangerous driving, and in doing so (ii) make the sentencing tariff for causing death by dangerous driving higher than for causing death by careless driving. Both of these legislative acts would register Parliament's and the society's obvious deep concern for the prevalence of such offences on Bermuda's roads

and simultaneously deter persons who may even contemplate driving in a manner which is likely to cause the death of another from doing so.

Dated the 27th day of February 2023



The Hon. Mr. Justice Juan P. Wolffe
Puisne Judge