IN THE HIGH COURT OF THE COOK ISLANDS CR NO: 477/2016
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CROWN

v

TAINA NGAMETUA TIMOTI

Date: 1 June 2016

Counsel: Mesdames A Mills & T Koteka for the Crown
Mr N George for Defendant

SENTENCING NOTES OF HUGH WILLIAMS, J

Background Facts

[1] Taina Ngametua Timoti, you appear here this morning for two reasons.

[2] The first is that following trial last week the jury convicted you on a substituted charge namely driving a motor vehicle under the influence of drink to such an extent as to be incapable of having proper control of it and causing bodily injury to Mr Metuariki.

[3] Secondly, you are here on appeal following your conviction on a charge of driving with excess blood alcohol on the same occasion as gave rise to the trial charge. You appealed the sentence of the Justice of the Peace imposing one months imprisonment on you, 12 months probation and disqualification for 12 months plus reparation of $320.00 for the blood analysis and $30.00 Court costs.

[4] On the excess blood alcohol charge the maximum sentence which could have been imposed on you was 12 months' imprisonment, $1000.00 fine or both and 12 months disqualification from driving. On the charge on which you went to trial under the Transport Act s.25(2), initially the maximum sentence was one of five years' imprisonment or a fine of $1000.00. But in 2007 Parliament doubled the maximum sentence to ten years' imprisonment and increased the possible fine by ten times to $10,000.00.

[5] The facts are that in the early morning of 17 October 2014 you had been at a social function. When it finished, you had been there for the whole of the evening during which time, on your own admission you had drunk two bottles of wine. You had a meal, and then were the usual social activities including dancing. The function wound up about midnight or a little later. You drove a friend home and it was when you were driving back to pick up your cousin and drive her home, by that stage about 1:00am, that the accident occurred which gave rise both to the excess blood alcohol charge and to the charge of driving under the influence of drink and not having proper control of your vehicle.

[6] At that stage, you had been up on, your own evidence, for about 18 hours and were tired. A moment's thought would have shown you that you should never have got behind the wheel of a vehicle even if you had taken no drink. But having regard to the fact that you had drunk two bottles of wine and were later measured to have had 222mgs of alcohol per 100ml of blood, it should have been very clear to you that you should have gone nowhere near the wheel of a vehicle.

[7] Returning to pick up your cousin, on your own admission you were driving at between 50 to 55, maybe 65 kph. In evidence you said that did not amount to speeding in your view, even though the speed limit is 50kph. You failed to take a modest bend and, after driving along possibly with your headlights on full beam, you ran across double yellow lines and ran into Mr Metuariki on his motorbike.

[8] He was on his way home from work at the time. There was no alcohol in his system. He was driving along at the legal speed of about 40kph. He saw your vehicle coming but was unable to save himself when you car crossed the double yellow lines, smashed into him and threw him and his bike several metres into plants at the side of the road. Your speed was such that after the impact with Mr Metuariki, your car careered on and smashed into a power pole

damaging it beyond repair, a circumstance which suggests you may have been travelling at well over your admitted speed of 50 to 55 or 65 kph.

[9] Mr Metuariki suffered serious injuries as a result of your running into him. He nearly lost the tip of the little finger on his right hand and he had very serious injuries to his right leg. His right leg suffered a compound fracture. He had weeks in hospital here in Rarotonga and a longer period again in hospital in New Zealand. He had to have several operations and suffered the insertion of pins and plates in his bones and is not yet fully recovered from the events of that night. His bike was written off in the impact and was irreparable, an issue to which I shall return.

[10] You were relatively uninjured although you were taken to hospital as a precaution. It is significant also, that in your evidence you said that you do not recall nearly hitting another motor cyclist, Mr Maropai, a little before your impact with Mr Metuariki and you barely recall running into Mr Metuariki.

[11] As far as the excess blood alcohol appeal is concerned, initially, the charge led to a defended hearing in the Justices' Court on 17 February 2015. Nearly three months later in a reserved decision on 8th May 2015, the charge was dismissed for technical reasons associated with the taking of the blood sample which underlay the EBA reading.

[12] The Crown appealed against the dismissal of the information and on 16 July 2015, Doherty J upheld the appeal and reinstated the conviction which would otherwise have followed in the Justices' Court. Undeterred by that, you appealed to the Court of Appeal which on 20 November 2015, dismissed your appeal and upheld Doherty J's decision. Reading the Court of Appeal's judgment makes clear that they were of the view that your appeal had little, if any, merit. Effectively, the Court merely adopted what Doherty J had said in reinstating the conviction. The matter was then remitted to the Justice of the Peace, who on 15 December 2015 sentenced you to the penalties earlier mentioned. She mentioned that you were almost three times over the blood alcohol limit on this night, discussed the maximum penalty that could be imposed, noted that this was your first appearance and you had no previous convictions, but, on the other side of the ledger, that serious injuries had followed the accident and she said that you "took a huge risk in driving that night as you did". She reduced the sentence for what she said was an early guilty plea, although that is a doubtful

proposition given the history of the matter but said that she needed to send a strong message to the community. One issue she was obliged to take into account was that at that stage, you had a baby some four months old.

Submissions

[13] In relation to the trial conviction, Ms Mills for the Crown drew attention to the facts of the matter earlier summarised and to the 2007 Amendment to the Transport Act 1996 doubling the penalties for offences under ss. 25 and 26 of the Transport Act. She drew attention to a number of previous decisions where jail sentences have been imposed on these sorts of charges and to the victim impact report and submitted that the circumstances of the matter meant that community work was not an appropriate sentence, a fine would insufficiently denounce your driving on that occasion and that the starting point for sentencing you should be a jail term of three months with an end point of approximately one month in jail or 12 months community work. But she pointed out that this was a very high alcohol reading, you chose to drive when you had consumed two bottles of wine, and she drew attention to your speed and the effect on the victim.

[14] Ms Mills also handed up materials showing that Mr Metuariki's motorbike prior to the accident was worth $1300.00 and that he had incurred significant medical expenses in New Zealand and in Rarotonga and had suffered other losses such as Mr Metuariki's contact lenses. She also pointed to the fact that he has been unable to work since the accident, nor had his wife; and asked for some allowance for compensation for lost wages in that regard.

[15] Mr George on your behalf, dealing with the appeal, suggested that the imposition of imprisonment on the first conviction for EBA was harsh and without precedent and was disproportionate to your actions on the night. He submitted that were you to be imprisoned, you may lose your job and be unable to pay reparation. He stressed that your baby is now 8 months old and that you breast feed the baby. All those factors, he submitted indicated that a sentence of imprisonment should not have been imposed. But he accepted that the balance of the Justice of the Peace's remarks were not under challenge; i.e. the probation disqualification, and the imposition of the Court costs and blood analysis fees.

[16] In mitigation in relation to the trial conviction, Mr George stressed similar matters and in particular that you have attained a senior post with the ANZ Bank. He pointed out that you visited the victim and offered support and had been to see him or contacted him on a number of occasions. He drew attention to cases which he submitted were similar but where no imprisonment was involved.

[17] Mr George also read out a number of references testifying to your good character and your involvement with institutions in the community. They were from not just your employer, but also from charitable organisations in Rarotonga. At that point, on Friday last, he said that you had been able to obtain access up to $10,000.00, half for reparation and half for medical and personal losses for Mr Metuariki and were prepared to offer that to him as compensation. Because those were new issues, and, at that stage, Mr Metuariki's response to the offer of reparation was unknown, the sentencing was adjourned until today.

Starting Point

[18] Your conviction by the jury on a charge under s.25(2) of the Transport Act 1966 raises, once again, the question as to what should be the starting point for the imposition of the appropriate sentence on persons who are convicted of or have pleaded guilty to, offences under s.25 and 26 of that Act. Generally speaking, those are reckless or dangerous driving causing injury or death, especially when the commission of the offence is associated with the drinking of alcohol. As mentioned, in 2007, Parliament massively increased the maximum penalties for those serious driving offences, especially when alcohol related, doubling the maximum term of imprisonment increasing the maximum fine by ten times, and also providing for a minimum disqualification of 12 months on conviction with no maximum.

[19] Parliament's response was a principled reaction to mark its disquiet at the prevalence of cases coming before the Courts of serious injury or death caused by the most serious driving offences especially those involving alcohol coupled with injury or death. That was a plain indication of Parliament's wish to deter and denounce such conduct.

[20] In part, it was also perhaps in response to cases such as *Police v. Teokotai*[1] where in an usually detailed set of sentencing notes the then Chief Justice called for Parliament to increase the maximum sentences for serious driving offences to combat the appalling road toll in the Cook Islands, especially when the incident gives rise both to injury and follows the taking of alcohol.

[21] In the nine years since the maximum penalties were so massively increased, a number of consequences have followed.

[22] The first is that, unfortunately, there has been no discernible diminution in the frequency of serious injury or death from driving cases nor in the frequency of such driving being alcohol related. Indeed, the Cook Islands has, notoriously, one of the highest road tolls in the world calculated on a per capita basis. It is an appalling statistic which shows no signs of decreasing.

[23] Secondly, what has just been said remains the case despite repeated and frequent public calls from the police for motorists to modify their driving behaviour generally, especially when they have drunk alcohol. Those calls have been insistent over the years, including as recently as last week, but the call seems to have been of little avail.

[24] Thirdly, the situation I have described continues despite frequent urging by prosecutors for sentencing Courts to heed Parliament's lead, increase the sentences for those serious offences and so address the ongoing problems arising from death or serious injury incurred by serious bad driving where alcohol is involved.

[25] It must be said that, although Courts have increased their sentences in response, the increases have been modest when set against the doubling of the possible term of imprisonment nine years ago and the tenfold increase in fines. The sentence increases must be seen as minimal, tentative and, where imprisonment has been imposed for convictions for such offences, the increases have been in terms of a few weeks or months rather than years. Even now, the sentences imposed to which counsel referred me, tend only to be around two

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[1] HCCI CR 10, 339 & 340/2005 19.5.2006 David Williams CJ

and a half percent of the maximum or even less. Non-custodial sentences are often still the result following conviction for such offences.

[26] As this case illustrates, the time has come – and is arguably well overdue, – to increase the starting point for sentencing those who have been convicted of or pleaded guilty to offences under ss. 25 and 26. While this Court is unable to bind this or a higher Courts it is of the view that, on conviction for a serious driving offence, particularly those under ss. 25 and 26, where excess blood alcohol well in excess of the allowable maximum of 80mg of alcohol per 100ml of blood is involved and where those offences result in serious injury or death to persons other than the driver, in the search for the appropriate penalty to impose on the driver, the Court should, as a first step, adopt a starting point of at least one year's imprisonment. This of course, is still only 10% of the maximum. It has been described it as a "first step" because if there is no slackening in the commission of such offences having those consequences, the Courts may well be justified in the future in adopting a higher starting point.

[27] Of course, despite adoption of that starting point the search for the appropriate level of penalty of impose on a particular driver in his or her particular circumstances will necessarily involve increases or reductions from the starting point resulting from the myriad of aggravating and mitigating circumstances that can apply. Jail for more than one year may well be the sentence imposed ultimately.

[28] Similarly, a reduction from the starting point may well follow but still involve an ultimate sentence of imprisonment. Realistically, the pressure from offenders and their counsel will be to persuade the Court that sufficient mitigating circumstances exist to justify an end sentence not resulting in jail. Perhaps longer disqualification or Probation may be urged and there will be cases where, exceptionally, that will be the result. But, if others follow this Court's lead, a term of imprisonment will normally follow conviction for offences under ss. 245 and 26 where alcohol and injury are also present.

Reparation

[29] Before moving on to apply that starting point and under the principles of sentencing, I also need to say something about reparation and in this, I am speaking both generally and to Mr and Mrs Metuariki who are present.

[30] Orders for reparation, that is to say payment of money by an offender to victims as part of their sentence are not infrequently made by Courts. The frequency with which requests are made for Courts, as part of the sentence to impose orders for reparation prompts inquiry as to the statutory power for the Court to make such orders.

[31] Ordering persons or offenders to pay their money to third parties, whether the Government (for paying their own or the victim's hospital medical costs), or to private persons, (payment of lost wages or vehicle repair or replacement costs as examples) is a serious infraction of the offender's property rights.

[32] Further, ordering payment by an offender of say, the full amount of the victim's lost wages or their full vehicle repair or replacement costs, is tantamount to using the criminal process as the equivalent of the civil recovery process, without the balancing for other factors such as contributory negligence which might be relevant to the assessment of civil damages.

[33] Whether Courts should be given the express power to order reparation can be a difficult legal and moral conundrum for Parliaments contemplating enacting such legislation and for Courts contemplating making reparation orders against those being sentenced.

[34] Arguments for and against the power to order reparation are numerous and contentious. Generally, at one end of the spectrum, is the proposition that, fundamentally, all citizens are entitled to equal protection of, and equal treatment by the law irrespective of their personal affluence or other circumstances. So offenders who have access to resources should not be able to "buy" more lenient outcomes from Courts than those not so favourably situated.

[35] At the other end of the spectrum can be the proposition that reparation, voluntarily offered, and if accepted, paid, well before sentencing, can be cogent evidence of those

desirable aims in sentencing, namely remorse, acceptance of responsibility for the incident giving rise to the charges before the Court and meeting the interests of those harmed by those circumstances, perhaps in some cases even reconciliation and forgiveness.

[36] However, when one looks at the statutory basis for reparation orders, the answer is that there is only a limited statutory basis.

[37] Under s.414 of the Crimes Act 1969, there is express power for the Court to order an offender to pay such sum as it thinks just and reasonable towards the costs of *the* prosecution. That would certainly justify the order for costs imposed by the Justice of the Peace on you, Ms Timoti, and probably justifies the orders commonly made for the payment of the costs of obtaining blood tests and undergoing medical treatment and the like. But those orders must be related to the costs of the prosecution.

[38] Secondly, under s.415 of the Crimes Act on conviction of any person for any offence, - so both under ss.414 and 415, the orders are not limited to offences under the Crimes Act and can include offences under the Transport Act as here – the section gives the Court power to order the offender to pay to any person "such sum as it thinks fit by way of compensation for any loss of or damage to property suffered by that person through or by means of the offence." That gives the Court only a limited power to order *compensation* to be paid by the offender: the *compensation* must be related to loss of, or damage to, property.

[39] I say to Mr and Mrs Metuariki that, unfortunately, I can see no legal power to make orders compensating you for the loss of wages each of you have suffered over the last 18 months or so since the date of this accident. I can certainly impose orders to compensate you for the pre-accident value of your vehicle and for such things as the loss of your contact lenses, but there just is no power in the Court for the imposition of an order requiring Ms Timoti to pay you to compensate you for the loss of your wages.

[40] Next The Criminal Justice Act 1967 gives the Court power to place offenders on probation and section 8(1)(c) of that Act *gives the Court power to make conditions* of probation including that an offender pay "by way of damages for injury or compensation for loss suffered by any person through or by means of any such offence as aforesaid such sum as the Court may direct or as may be fixed by the probation officer."

[41] That is a broader empowerment by comparison with s. 415 of the Crimes Act because whereas s.415 is limited to compensation for loss of property, under the Criminal Justice Act the Court can impose, as a condition of probation, orders for damages for injury or compensation for loss suffered. So it is not limited to property loss and it is broadened to allow the Court to impose as a condition of probation that the offender *pay damages for injury*.

[42] The difficulty as far as that is concerned, however, is that probation can only be imposed if the Court sentences a person to "imprisonment for less than one year" so if the Court's view is that the appropriate sentence is imprisonment for one year or more, there is no power to admit that person to probation and accordingly, no power to impose as a condition of probation that they pay *damages for injury or compensation for loss suffered*.

[43] If the Court's view is that the appropriate sentence is imprisonment for 364 days or fewer – because s. 6(3) of the Criminal Justice Act 1961 speaks of the Court sentencing a person to imprisonment for "less than one year" – then it would be possible as a condition of admitting a person to probation that they should be ordered to *pay damages for injury or compensation for loss suffered.*

[44] For completeness, it should be noted that under the Criminal Procedure Act 1980-81 ss. 117 and following, there are provisions concerning the enforcement of penalties. Section 117 (1) says:

> *(1) ...references to the sum adjudged to be paid by the defendant on a conviction shall be deemed to include any sum of money adjudged or ordered be paid on any conviction entered or by any order made in any criminal proceedings a fine or for costs, damages, compensation, restitution or otherwise.*

[45] So on the face of it s.117 is broader than the provision in the Criminal Justice Act because it includes not merely fines costs, damages and compensation but also includes restitution. That would give the Court broader powers still, but the problem is that the Criminal Procedure Act regime applies only to the enforcement of penalties and you cannot enforce a penalty that has not been validly made in the first case. So s.117 and the following sections are not very helpful in this area.

[46] It is unfortunate that Parliament in the Cook Islands has not seen fit, as the New Zealand Parliament did when reparation became a major issue in that country, to amend the statute to give the Courts express power to make orders covering damages, compensation, restitution or the like, but, to sum that up, the position in this country concerning reparation is that under s.415 orders for compensation are limited to property loss and any orders for payment of damages for injury or compensation for loss suffered can only be made if the appropriate sentence is imprisonment for less than a year and the offender is admitted to probation with that condition being imposed.

[47] So although this might well be an appropriate case, if the power existed, for the Court to order you, Ms Timoti to pay Mr and Mrs Metuariki compensation or restitution or damages, however you describe it, for their lost wages over the past 18 months, regrettably there is no statutory power to do that and that possibility must therefore be put to one side.

[48] That said, some amount of recompense, genuinely offered at a time when the offender is not under the spur of imminent sentencing, may properly be taken into account as tending to demonstrate those desirable aims of sentencing that have been mentioned particularly, addressing the victim's interests. Full payment is not a prerequisite, - the "widow's mite" principle might apply- nor is acceptance – and here Mr and Mrs Metuariki in a dignified way have rejected the offers of compensation so lately made – but, if money is offered or paid in those circumstances, then it can properly be taken into account in reaching the appropriate sentence in the case with which the Court is concerned.

[49] It would be helpful I suggest, for the Crown Law Office to draw to the attention of Parliament the gaps that currently exist in the compensation, restitution or reparation regime in the Cook Islands, with the recommendation that Parliament consider enacting legislation to give Courts broader powers than those which now exist.

[50] I need then to turn to an associated topic which is the question of reparation or compensation in this case and the impact of your driving on Mr and Mrs Metuariki. As earlier mentioned, an offer of up to $10,000 was made following your conviction for the offence under s.25(2). There had been earlier contact in which undefined offers were made for assistance, but as far as the Court is aware this is the first time a specified sum of money had

been mentioned and it was principally for that reason that the sentencing was adjourned to give Mr and Mrs Metuariki a chance to consider the offer.

[51] In an appropriate way, they have considered the offer and have decided not to accept it. Mr Metuariki says in his victim impact statement, "to me it seems like she's made the offer to avoid taking the consequences of what she did" He goes on to say, the offer makes him feel like "she was trying to buy herself an easier sentence and that she still doesn't want to take full responsibility for what she did". Underlying that statement of his position, is the reference to the loss that he has suffered coupled with the suggestion from Ms Mills that the Court impose orders requiring that payment to be made. That prompted the inquiry earlier referred to and the conclusion that beyond damage to property, there is no power to order damages for injury unless probation for less than one year is imposed.

[52] I have carefully read Mr and Mrs Metuariki's victim impact statement dated 28 May 2016. It graphically demonstrates the serious consequences of the crash for them. Of course it details the property loss, but, more than that, it shows that Mr Metuariki suffered greatly, first in Rarotonga where he was hospitalised for a number of weeks and was subject to a number of operations, and then when he went to New Zealand on 31 January 2015 and unfortunately, had to be admitted to hospital on an urgent basis in that country because the wound became infected. He then had to endure more operations and more weeks in hospital. It is most unfortunate that that happened although, of course, the latter cannot be laid entirely at Ms Timoti's door.

[53] The victim impact report also makes clear that Mr and Mrs Metuaarik's rejection of the offer made in the last few days was a restrained and dignified one after having regard to what they saw as the motivation for the offer to which I have already referred.

Testimonials and References

[54] There are two other general matters that need to be considered before turning to the appropriate sentence to be imposed.

[55] The first is the question of character witnesses and testimonials. In this case, Ms Timoti, you called a number of character witnesses and, following your conviction by the

jury, put before the Court a number of testimonials from friends and organisations with which you are associated.

[56] It must be said that, unless an offender's personal circumstances are exceptional, or, occasionally, the offender's credibility is decisive, there is no or very little empirical evidence that character witnesses are influential with juries in reaching their verdicts.

[57] Similarly,those being sentenced relying on testimonials from friends and organisations with which they are involved, are relying on something to which a Court is not likely to accord a great deal of weight in deciding on the appropriate sentence to be imposed. Everybody has a few friends who will be prepared to say laudatory things about one and involvement in various organisations is unlikely to play much part in the search for the appropriate ultimate sentence. So the provision of testimonials on sentence is to be taken into account, but it is not an exercise likely to result in much, if any reduction in the severity of the sentence imposed.

Pregnancy or Recent Birth

[58] Finally, of the more general matters, Mr George, on your behalf, has stressed that you are the mother of a baby, now 8 months old, which you are breastfeeding. As mentioned to Mr George when that topic was raised, it would appear that you, Ms Timoti must have embarked on parenthood after being charged with the offences with which the Court is now dealing.

[59] Putting that to one side, in New Zealand at least[2], and this should also be the position in the Cook Islands, there is ample authority that pregnancy or recent birth does not confer any immunity against a custodial sentence. Pregnancy or recent birth can affect the nature or duration of the sentence and obviously it can bring about a reduction in what otherwise might be the appropriate sentence but it is not proof against a custodial sentence being imposed. Otherwise, of course, women pregnant or with young children would be subject to a completely different sentencing regime from every other member of the community. So

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[2] R v Marey NZCA CA 12/88 18.4.88; R v Tahu ZNCA CA 493/95 11.12.94; R v Curd (1992) 10 CRNZ 78; Quarter v R CACI CA 3/11 9.36.11

although Ms Timoti's motherhood is to be taken into account, it does not mean that she cannot be sentenced to a term of imprisonment.

This Case

[60] Coming then to the determination of the appropriate sentence to be imposed on you, Ms Timoti, the guiding principles include the gravity of the offence, the seriousness of the offence, the effect on the victim, and the search for accountability on the part of the offender; promotion of a sense of responsibility, and denunciation of the offence and deterring, a major factor in the Cook Islands, others from engaging in similar activity. There is also a need to protect the community from the offender. The law also requires that the least restrictive outcome be imposed and requires Judges to have regard to the totality of the sentencing as regards the offending.

[61] There are cases to some of which Mr George has referred to like *Police v. Vaiana Georg*[3]*e* where exceptionally lenient sentences have been imposed but for the reasons I have discussed at some length, cases such as *Police v. Raeina*[4] and *R v. Teokotai* and the cases that have followed *Teokotai*, are to be given more weight in the criminal sphere.

[62] The remarks I have made concerning selection of the appropriate starting point for finding the appropriate sentence are not without precedent. Ms Mills draws my attention to a 2012 case called *Police v. Maunga*[5] where there was no serious injury but the Judge noted that the penalty will be imprisonment unless there are exceptional circumstances to justify departing from that..

[63] Here, adopting a starting point of at least one year's imprisonment for you, Ms Timoti, one first needs to look at the aggravating features, those which make your offending worse than the run of offenders convicted of an offence under s.25(2).

[64] There is first the very high reading shown by the certificate of analysis 220 mgs per 100ml of blood or approximately two and a half times the allowed able maximum.

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[3] HCCI CR 70/15 25.9.15 Weston, CJ.

[4] HCCI CR 33/13 15.3.13 Hugh Williams, J.

[5] HCCI CR 110&111/13 3.5.15 Potter, J.

[65] To an extent, the conviction for excess blood alcohol is part of the s.25(2) offence but it would be also possible for somebody to be convicted under s.25(2) without there being a blood alcohol analysis. So the high reading in this case is an aggravating feature, but not an especially potent one.

[66] The second aggravating feature is the lack of thought you, Ms Timoti gave before you got behind the wheel of the car and drove as you did. If you had been a responsible driver, a moment's reflection would have demonstrated that after having two bottles of wine, you should never have gone near the wheel of a car.

[67] There is the aggravating feature that you were not, as the Justice of the Peace thought, a person without previous convictions. A dangerous driving conviction was proved against you some years ago, but against that, you were discharged without conviction and apparently ordered to pay an unspecified amount of damages.

[68] It is also a seriously aggravating feature that your driving caused serious and ongoing injury and cost to Mr and Mrs Metuariki.

[69] The mitigating features reducing the seriousness of the offence are that you say you have not drunk alcohol since the night of the offence. You said that on oath in evidence. You are not, of course, entitled to any reduction in the sentence for a plea. You fought the possibility of conviction on the excess blood alcohol, was your right, as far as the Court of the Appeal but even when the charge under s.25(2) was substituted prior to the trial, you did not plead guilty at that point. You call in aid your visits to Mr Metuariki and of course the offer of the reparation but for the reasons already discussed, while that is a factor to be taken into account, in the overall circumstances as they currently stand, again it is not a factor of great weight.

[70] There is certainly the possibility that you will lose your job as a result of the conviction on the s.25 (2) charge. That is most unfortunate but is an almost inevitable consequence of a person's conviction on a serious offence. There is also the question of your young child and the fact that you are breast feeding, but I have discussed the extent to which those circumstances can be taken into account.

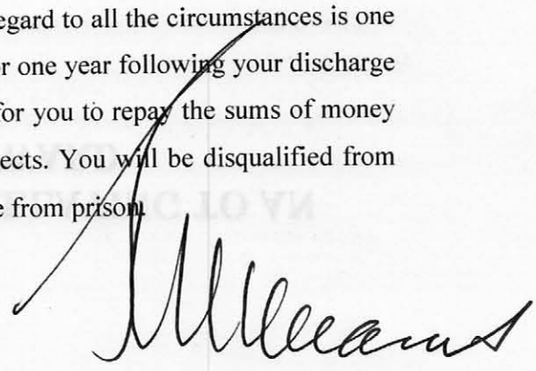
[71] In the event, having regard to everything that has been said, in my view the appropriate penalty to be imposed on you, Ms Timoti starts at at least 12 months' imprisonment. Here there needs to be a modest increase for the aggravating circumstances I have discussed. As I have said, it is only modest and there needs to be a reduction for the mitigating circumstances admittedly in this case, more potent but at the end of the day, I still conclude that a sentence of imprisonment is the correct sentence to be imposed.

[72] In those circumstances, there will be orders that you, Ms Timoti continue to meet the Court costs imposed in the Justices' Court and that you meet the hospital expenses and blood report costs in the schedule handed up by Ms Mills which would appear to be $6165.00.

[73] You are ordered to pay Mr Metuariki the sum of $1300.00 being the pre-accident value of his motorcycle. You are also to pay $99.00 in compensation for the damage to his contact lenses and the pharmacy and other costs incurred by Mr Metuariki in New Zealand as per the schedule that Ms Mills handed up.

[74] The appeal against the Justice's of the Peace decision is allowed principally because the orders made would obviously not have been made if the two offences had been dealt with together.

[75] The term of imprisonment to be imposed having regard to all the circumstances is one of six months in jail. You will be admitted to probation for one year following your discharge and orders will be made under the Criminal Justice Act for you to repay the sums of money imposed by such instalments as the probation officer directs. You will be disqualified from driving for the period of 24 months following your release from prison.



Hugh Williams, J