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# The Supreme Court decision in *Lacasse*: White Collar Offenders Beware

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On December 17, 2015, in the decision of *R. v. Lacasse*,[1] the Supreme Court of Canada sent a warning to ordinarily law-abiding citizens who commit impaired driving, by upholding a six-and-a-half-year term of imprisonment for the offence of impaired driving causing the death of two people. This warning extends to other law-abiding citizens who might be thinking about committing so-called white collar crimes such as bribery or price fixing, or being willfully blind to the commission of such crimes. Justice Wagner's majority decision specifically targets the impact of deterrence on first offenders:

> While it is true that the objectives of deterrence and denunciation apply in most cases, they are particularly relevant to offences that might be committed by ordinarily law-abiding people. It is such people, more than chronic offenders, who will be sensitive to harsh sentences.[2]

The highly publicized *Muzzo* case, imposing a ten year sentence for impaired driving causing the deaths of three children and their grandparent follows this new way of thinking as Muzzo was an ordinary law-abiding person of otherwise good character.

The decision in *Lacasse* has widespread implications for general sentencing principles on a number of levels. The court recognizes that proportionality is a cardinal sentencing principle which trumps parity as a secondary sentencing principle. This trumping of principles allows for the evolution of sentencing beyond strict ranges as set by prior precedents.

Justice Wagner's judgment provides a very helpful construction of proportionality into two fundamental competing factors: (1) seriousness of the crime's consequences; and (2) moral blameworthiness of the offender:

> In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not

[1] 2015 SCC 64, [2015] S.C.J. No. 64 (S.C.C.). This decision was followed in *R. v. Kazenelson*, 2016 ONSC 25, in imposing a three-and-a-half-year prison term in the *Metron*-related case of death in the workplace, decided January 11, 2016.
[2] *Supra*, at para. 73

> only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender[3] […].

The decision in *Lacasse* is also important with respect to the standard of review of trial level sentencing decisions. The court modifies the classic test that an error in principle, the failure to consider a relevant factor, or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention. The modification is that such errors will only justify intervention where it appears from the trial judge's decision that such an error had an impact on the sentence.

Justice Wagner sets out the stark reality that impaired driving offences still cause more deaths than any other offence in Canada. Yet our legislators for some reason resist the most simple pro-active *ex ante* mechanism to stop impaired driving, which would be the mandatory requirement that every new vehicle be equipped with an interlock breathalyzer machine. The added costs to vehicle cost spread out across society would surely be worth it if lives would be saved, which is a virtual certainty.[4]

***General Sentencing Principles***

The judgment in *Lacasse* recognizes that sentencing remains one of the most delicate stages of the criminal justice process in Canada. Although this task is governed by ss. 718 et seq. of the *Criminal Code*, and although the objectives set out in those sections guide the courts and are clearly defined, sentencing nonetheless involves the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.

The Supreme Court holds on to the objective of rehabilitation as one of the main objectives of Canadian criminal law. Rehabilitation is identified as "one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate".[5] This is a complex area, as it requires insight into why an offence occurred in order to effectively rehabilitate the offender, and there is considerable controversy about the efficacy of a prison term to achieve rehabilitation. There is mixed empirical evidence on the efficacy of prison in relation to specific deterrence.

***Facts***

Mr. Lacasse pleaded guilty to two counts of alcohol-impaired driving causing death. Lacasse lost control of his vehicle while entering a curve on a country road. He was speeding, and his ability to drive was impaired by alcohol. Nadia Pruneau, who was celebrating her 18th

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[3] Lacasse at paragraph 12
[4] Jull and Petersen, "Canada: Judicial Recognition of Risk Assessment, R. v. Michaud" http://globalcompliancenews.com/judicial-recognition-of-risk-assessment-r-v-michaud-published-20150929.
[5] Lacasse at paragraph 4.

birthday that night, and Caroline Fortier, aged 17, were in the back seat of the vehicle. They both died instantly. Neither the vehicle's mechanical condition nor the weather contributed to the accident. Lacasse was entirely responsible for the accident.

Lacasse had been deeply distressed during the weeks and months following the accident and had become suicidal. At the time of the sentencing hearing, he was 20 years old. He did not have a criminal record, although he had been convicted of offences under the *Highway Safety Code*, including three speeding offences.

The sentencing judge attached less weight to the fact that Lacasse had pleaded guilty on the ground that he had done so relatively late, long after he was in a position to make decisions about the conduct of his trial. The sentencing judge also attached less weight to the fact that Lacasse did not have a criminal record, because in his view, the offence was one that was likely to be committed by people who do not have criminal records.

Furthermore, the sentencing judge emphasized the particular situation in the Beauce region of Québec, where approximately one in five cases involves an impaired driving offence. He even posed the question whether driving while impaired is trivialized more there than elsewhere.

For all these reasons, the sentencing judge sentenced Lacasse, on each count of impaired driving causing death, to six years and six months' imprisonment minus the period of one month he had spent in pre-trial detention; the two sentences were to be served concurrently.

***Standard for Intervention on an Appeal from a Sentence***

The Supreme Court has reiterated on many occasions that appellate courts may not intervene lightly in sentence decisions, as trial judges have a broad discretion to impose the sentence they consider appropriate within the limits established by law. The court has narrowly defined the types of error in principle that will generally justify intervention:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.[6]

An issue which split the court in *Lacasse* is the question of whether such errors necessarily require intervention. Justice Gascon wrote a dissenting opinion, joined by Chief Justice MacLachlin, stating the view that where there is a reviewable error in the trial judge's reasoning, for example, where the judge has characterized an element of the offence as an aggravating factor, it is always open to an appellate court to intervene to assess the fitness of the sentence imposed by the trial judge. In other words, such an error opens the door to an

[6] Lacasse at paragraph 44.

appellate court then affirming that sentence if it considers the sentence to be fit, or imposing the sentence it considers appropriate without having to show deference.

Justice Wagner held that every such error of principle will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning. Intervention is only appropriate if the error would have *had an impact on the sentence*:

> In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.[7]

In the *Lacasse* case, both the majority and minority of the court were of the opinion that the sentencing judge erred in identifying the fact that Lacasse was intoxicated as an aggravating factor, as intoxication was a constituent element of the offence itself and accordingly had a higher sentencing range by definition. However, Justice Wagner held that this is a non-determinative error that did not unduly affect the sentence, given that the sentencing judge identified other aggravating factors. It was apparent that the sentencing judge attached no real weight to this factor.

Ultimately it was the opinion of the Supreme Court that the sentence of six years and six months' imprisonment, although severe, fell within the overall range of sentences normally imposed in Quebec and elsewhere in the country and was not demonstrably unfit.

Justice Wagner repeats the reminder given by the Supreme Court about showing deference to a trial judge's exercise of discretion because first, the trial judge has the advantage of having observed the witnesses in the course of the trial and having heard the parties' sentencing submissions. While this is obviously a fact, the witnesses may have testified only on liability issues only and not on issues relevant to sentencing and this should be borne in mind. Moreover, a sentencing judge may consider hearsay evidence where found to be credible and trustworthy.[8]

I have argued previously that a trial judge has little advantage over an appellate court in assessing hearsay evidence for the simple reason that the declarant of the hearsay evidence is not available for the trial judge to see or evaluate under the spotlight of cross-examination. Rather, the decision is made on a principled basis which an appellate court is capable of assessing just as well.[9] To the extent that a sentencing judge relies on hearsay evidence in making sentencing decisions, it is respectfully submitted that the level of deference ought to be adjusted accordingly.

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[7] Lacasse at paragraph 44.
[8] *Criminal Code*, s. 723(5); and see *R. v. Kunicki* (2014), 307 C.C.C. (3d) 233 (Man. C.A.).
[9] Kenneth Jull, "Courts as Gatekeepers: Alternative Hypotheses" in Archibald and Echlin, *Annual Review of Civil Litigation 2009*, p. 471 at pp. 479 to 480.

***Proportionality***

The fundamental principle of proportionality is stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle.

As noted earlier, Justice Wagner's judgment juxtaposes these two fundamental competing factors: The more serious the crime and its consequences, the heavier the sentence will be. The competing and different factor is the moral blameworthiness of the offender. This latter factor included three prior convictions of Lacasse for speeding, which in the court's view showed that he was irresponsible when behind the wheel, and his convictions under the *Highway Safety Code* were all the more relevant given that speeding had played a part in the accident in this case.

A further example of the moral blameworthiness of the offender being weighed in the calculation is demonstrated by the trial judge attaching less weight to the remorse expressed by Lacasse and to his guilty plea because of the lateness of that plea. A plea entered at the last minute before the trial is not deserving of as much consideration as one that was entered promptly.