SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2022 0125

DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

v

CHRISTOPHER BROWNE — Respondent

JUDGES:	KYROU, T FORREST and KENNEDY JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	24 January 2023
DATE OF JUDGMENT:	10 February 2023
MEDIUM NEUTRAL CITATION:	[2023] VSCA 13
JUDGMENT APPEALED FROM:	[2022] VCC 1210 (Judge Cahill)

CRIMINAL LAW – Sentence – Crown appeal – Dangerous driving causing death – Reckless conduct placing a person in danger of serious injury – Respondent sentenced to 3 year community correction order with 250 hours of unpaid community work – Whether sentence manifestly inadequate – Appeal allowed.

CRIMINAL LAW – Sentence – Crown appeal – Sentence indication given by sentencing judge – Whether sentence indication relevant to Court of Appeal's residual discretion to dismiss Crown appeal notwithstanding sentence manifestly inadequate – Whether plea of guilty in reliance upon sentence indication involves element of double jeopardy which Court of Appeal is prohibited from taking into account – Whether other factors sufficient to warrant exercise of residual discretion – Residual discretion not exercised.

CRIMINAL LAW – Sentence – Respondent complied with community correction order for 6 months and completed 64 per cent of unpaid community work – Early plea of guilty during COVID-19 pandemic, impaired mental functioning, profound remorse, excellent prospects of rehabilitation, family support and community involvement – Concession by appellant that very powerful mitigating circumstances warrant considerable leniency in resentence – Respondent resentenced to 15 months' imprisonment with a non-parole period of 6 months.

Sentencing Act 1991 ss 5(2H)(c)(ii); *Criminal Procedure Act 2009* ss 207–209, 289, 290, considered.

Stephens v The Queen (2016) 50 VR 740; *Peers v The Queen* (2021) 97 MVR 379; *Green v The Queen* (2011) 244 CLR 462; *Director of Public Prosecutions v Karazisis* (2010) 31 VR 634; *Director of Public Prosecutions v Lombardo* (2022) 102 MVR 19.

Counsel

Appellant:	Mr BF Kissane KC with Mr T Bourbon
Respondent:	Mr J Gullaci SC with Mr PJ Smallwood

Solicitors

Appellant:	Ms A Hogan, Solicitor for Public Prosecutions
Respondent:	Timothy Hemsley & Associates

TABLE OF CONTENTS

KYROU JA
T FORREST JA
KENNEDY JA:

Introduction and summary

1 Tragically, on Christmas Day 2020, the respondent's two year old son Lincoln, who was an unrestrained passenger in a buggy the respondent was driving on a rural paddock, was thrown and killed when the buggy rolled over. The respondent's sister, who was also a passenger, received minor injuries.

2 Initially, the respondent was charged with culpable driving causing death.[1] He applied for a sentence indication pursuant to s 208 of the *Criminal Procedure Act 2009* ('CPA') in the event that he pleaded guilty to a charge of dangerous driving causing death and a charge of reckless conduct placing a person in danger of serious injury. On 22 June 2022, a judge of the County Court gave a sentence indication that, if the respondent were to plead guilty to the two proposed charges, a custodial sentence would not be imposed. On the same day, a new indictment was filed over and the respondent pleaded guilty to a charge of dangerous driving causing death (charge 1)[2] and a charge of reckless conduct placing a person in danger of serious injury (charge 2).[3]

3 On 11 August 2022, the judge sentenced the respondent to an aggregate sentence of a 3 year community correction order ('CCO') with a condition that he complete 250 hours of unpaid community work.[4] The judge also cancelled the respondent's driver's licence and disqualified him from obtaining a further licence for 18 months. Pursuant to s 6AAA of the *Sentencing Act 1991* ('SA'), the judge declared that, had the respondent not pleaded guilty, he would have been sentenced to 2 years, 6 months' imprisonment with a non-parole period of 1 year, 3 months.

4 On 7 September 2022, the Director of Public Prosecutions filed a notice of appeal against the respondent's sentence on the ground that the aggregate sentence for both charges and the total effective sentence are manifestly inadequate. We have been informed that this is the first time that the Director has appealed against a sentence which was imposed following the acceptance of a sentence indication.

5 For the reasons that follow, the appeal will be allowed, the sentence imposed by the judge will be set aside and the respondent will be resentenced as set out at [102] below.

Circumstances of the offending

6 In June 2020, the respondent purchased a new Polaris General Deluxe 1000 buggy. The salesperson explained the rollover risks and the buggy's safety features. She recommended that helmets be worn even though there was then no legal requirement for them to be worn.

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1 Contrary to *Crimes Act 1958*, s 318(1). The maximum penalty is 20 years' imprisonment.
2 Contrary to *Crimes Act*, s 319(1). The maximum penalty is 10 years' imprisonment.
3 Contrary to *Crimes Act*, s 23. The maximum penalty is 5 years' imprisonment.
4 *DPP v Browne* [2022] VCC 1210 ('Sentencing remarks').

7 The buggy was a left-hand drive, two-seater vehicle designed for off-road use. It was fitted with half doors on both sides and a solid plastic roof. It had rollbars and seatbelts. The driver's seat was fitted with a seatbelt interlock. If the seatbelt was not clipped in, a red warning light would flash and the speed would be limited to 24 kilometres per hour. Inside the buggy, there was a notice warning of the risk of death or serious injury from a rollover and another notice warning that the two-occupant seating capacity must not be exceeded.

8 On 25 December 2020, the respondent, his sister, his wife, their two children and other family members, gathered at the respondent's home at Barnawartha North for a Christmas brunch. The weather was clear and fine, and the ground was dry and mostly flat, although uneven.

9 At around 11:50 am, the respondent got into the driver's seat of his buggy. He saw that the seatbelt was already clipped in. Instead of unclipping it and securing it over him, he sat on top of it. This had the effect of overriding the seatbelt interlock. The respondent placed Lincoln on his left knee, closest to the left door of the buggy. The respondent held Lincoln in place with his left hand and used his right hand to steer. The respondent's sister got into the passenger seat and put on her seatbelt. None of the occupants were wearing helmets.

10 The respondent drove into a paddock and performed several 'doughnuts'. He then drove along the gravel driveway to the property entrance and turned around. When he got back to the paddock, he tried to perform another 'doughnut' and the buggy overturned on the driver's side. A report by a collision reconstructionist estimated that the buggy's speed at the time of the accident was about 25 kilometres per hour.

11 When the buggy overturned, Lincoln was partially ejected and effectively crushed by the rollbars of the buggy. He suffered head and neck injuries and died at the scene (charge 1, dangerous driving causing death).

12 The respondent's sister sustained minor injuries (charge 2, reckless conduct placing a person in danger of serious injury).

13 Police attended the respondent's property. He told police: '[Lincoln] always sat in my lap and I always put the seat belt over the two of us but this one time I didn't [be]cause it was already plugged in.' He said that he was sitting on top of the seatbelt.

14 The respondent was arrested and interviewed on the same day. During his interview, he said the following: He was taking his sister for a ride in the buggy and wanted to scare her. He jumped in, on top of the seatbelt which was already clipped in, with Lincoln on his leg. He held Lincoln with his left hand and steered with his right. He made his sister put her seatbelt on. He was doing 'burnouts', which he had done many times before and, when he went to do one last burnout, the buggy flipped. He saw Lincoln go under the buggy and it crushed his neck. He had probably driven the buggy up to 20 hours previously. He said that it was too easy to get 'a little complacent' with the safety warnings.

Respondent's personal circumstances

15 The respondent was aged 31 at the time of the offending and 33 at the time of sentencing.

16 The respondent has two older sisters. His parents separated when he was a child. He married his wife in 2016. They had Lincoln and a younger son, as well as stillborn twin daughters. His wife remains staunchly loyal to him.

17 The respondent owns and operates a home building business and is a partner in a kitchen cabinetry business. He also helps his wife with her event hire and wedding business and his brother-in-law with his plumbing business.

18 The respondent plays and coaches community soccer. His business sponsors local soccer and basketball teams.

19 The respondent's general practitioner, Dr Ferencz Baranyay, diagnosed him with post-traumatic stress disorder ('PTSD') with anxious mood, as a consequence of the accident. Dr Baranyay reported that the respondent has significant symptoms of anxiety, panic, hypervigilance, insomnia, tearfulness and despair. Dr Baranyay prescribed antidepressants for the respondent's anxiety and sedatives to help him sleep. Dr Baranyay opined that the respondent would most likely continue to be affected by PTSD for some years to come, if not for the rest of his life. Dr Baranyay stated that the respondent 'has been genuine in persevering with his mental health recovery for the sake of others who rely on him'.

20 With one exception, the respondent and his wife have seen a psychologist, Richard Brown, at least monthly since 4 January 2021. Mr Brown diagnosed the respondent with PTSD with anxiety and depression, as a consequence of the accident. Mr Brown stated that he was asked to see the respondent and his wife very soon after the death of Lincoln as there were serious concerns for both of them, including concern for the respondent's safety. Mr Brown said that the respondent 'expressed profound feelings of guilt and sadness' and 'blamed himself completely for what had happened'. Mr Brown said that the respondent told him more than once that 'the only thing keeping him going was a sense of responsibility to look after his wife and their younger child'.

21 Mr Brown reported that, in addition to the respondent's emotional devastation, his day-to-day functioning was also profoundly affected. Mr Brown stated that the respondent often has trouble staying on task and getting things done, remembering what he was supposed to be doing and learning new things, and sometimes feels overwhelmed and has to stop what he is doing altogether. Mr Brown said that the respondent has difficulty continuing to run his small business due to his problems with concentration, memory and energy. Mr Brown opined that the effects of what happened on Christmas Day 2020 had been catastrophic on the respondent's mental health, and would continue to be into the future.

22 The respondent does not have a criminal record.

Relevant legislative provisions

Prohibition on imposition of CCO

23 Section 5(2H)(c)(ii) of the SA provides as follows:

> In sentencing an offender for a category 2 offence, a court must make an order under Division 2 of Part 3 (other than a sentence of imprisonment imposed in addition to making a [CCO] in accordance with section 44) unless—
>
> …
>
> (c) the offender proves on the balance of probabilities that—
>
> …
>
> (ii) the offender has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment; …

24 The charge of dangerous driving causing death is a category 2 offence within the meaning of s 5(2H) of the SA.

Sentence indication

25 Under pt 5.6 of the CPA, an accused may apply to the court for a sentence indication. Part 5.6 relevantly states as follows:

> **207 Court may give sentence indication**
>
> (1) At any time after the indictment is filed but before the trial commences, the court may indicate that, if the accused pleads guilty to any charge on the indictment at that time or another charge, the court would be likely to impose on the accused—
>
> (a) a sentence of a specified type; or
>
> (b) a specified maximum total effective sentence.
>
> …
>
> **208 Application for sentence indication**
>
> (1) A sentence indication under section 207—
>
> (a) may be given only on the application of the accused; and
>
> …
>
> …
>
> **209 Effect of sentence indication**
>
> (1) If—

(a) the court gives a sentence indication under section 207; and

(b) the accused pleads guilty to any charge to which the sentence indication relates at the first available opportunity—

the court, when sentencing the accused for the offence, must not impose a more severe sentence than the sentence type or maximum total effective sentence indicated.

…

(6) This section does not affect any right to appeal against sentence.

Crown appeals against sentence and double jeopardy

26 Subsections 289(1) and (3) of the CPA provide that this Court can only allow a Crown appeal against sentence if the Director satisfies the Court that 'there is an error in the sentence first imposed' (s 289(1)(a)) and that 'a different sentence should be imposed' (s 289(1)(b)). Section 289(2) provides that, in considering whether a Crown appeal should be allowed, this Court 'must not take into account any element of double jeopardy involved in the respondent being sentenced again, if the appeal is allowed'.

27 Section 290(1) of the CPA provides that, if this Court allows a Crown appeal, it must set aside the sentence under appeal and 'impose the sentence, whether more or less severe, that it considers appropriate'. Section 290(3) provides that, in imposing a sentence under s 290(1), this Court 'must not take into account the element of double jeopardy involved in the respondent being sentenced again, in order to impose a less severe sentence than the court would otherwise consider appropriate'.

Sentence indication and plea hearing

28 As we have already stated, the respondent was initially charged with one charge of culpable driving causing death. Prior to the hearing of that charge, he applied for a sentence indication in the event that he pleaded guilty to a charge of dangerous driving causing death and a charge of reckless conduct placing a person in danger of serious injury.

29 On 22 June 2022, the judge heard the application for a sentence indication. At that hearing, the prosecutor conceded: that the respondent suffered from PTSD as a result of the accident; that the PTSD would result in the respondent being subject to substantially and materially greater than the ordinary burden of imprisonment; and that, accordingly, the exception in s 5(2H)(c)(ii) of the SA was satisfied. However, the prosecution submitted that, due to the seriousness of the offending and the respondent's high moral culpability, only an immediate term of imprisonment was appropriate. Defence counsel contended that a non-custodial sentence was appropriate.

30 On the same day, the judge gave the following sentence indication:

> Any offence which involves the loss of a human life is serious, and because dangerous driving causing death is a category 2 offence, a prison sentence is mandated unless a statutory exception is established. I am satisfied [the

> respondent] has suffered severe symptoms of [PTSD] caused by the grief of the loss of his son. And because of it, the burden of prison would be substantially and materially … greater for him.
>
> That is not the end of the matter. I have to decide whether imprisonment is the only available sentence, taking into account the objective gravity of the offender's conduct and the circumstances of the specific case.
>
> …
>
> I accept the prosecution submission [that] this a serious example of the offence [of dangerous driving causing death], and moral culpability is high for the reasons advanced, in particular, ignoring the safety warnings, exceeding the passenger capacity of the vehicle, overriding the seatbelt speed interlock, and having his son unrestrained.
>
> While I find it difficult to categorise, I do find [the respondent's] driving involved a serious degree of irresponsible behaviour, so as to place it in the mid category of seriousness of the offence.
>
> Ordinarily, because of the primacy of general deterrence, a prison term would be warranted. However, in this case there are powerful mitigating factors, [including the respondent's] profound remorse, the high utilitarian value of a guilty plea, particularly during the times of the health pandemic, and also the severe psychological effects of the sight of the accident and the awareness of its consequences.
>
> Having carefully considered all the material provided by prosecution and defence, and the oral submissions of [the prosecutor] and [defence counsel], I am in a position to give a sentence indication.
>
> This would be a difficult sentencing task. In all the circumstances, I am satisfied all sentencing objectives could be met by a [CCO]. And I indicate in the event [the respondent] pleaded guilty to a charge of dangerous driving causing death and a charge of reckless conduct endangering serious injury, I would not impose a custodial sentence.

31 As we have already stated:

(a) on 22 June 2022, a new indictment was filed over and the respondent pleaded guilty to a charge of dangerous driving causing death and a charge of reckless conduct placing a person in danger of serious injury;

(b) on 11 August 2022, the judge sentenced the respondent to a 3 year CCO with a condition that he perform 250 hours of unpaid community work; and

(c) on 7 September 2022, the Director filed a notice of appeal against the sentence on the ground that it is manifestly inadequate.

32 The plea hearing was of limited scope and duration because, having regard to the sentence indication, s 209(1) of the CPA constrained the sentencing disposition that was open to the judge.

Sentencing remarks

33 The judge described the respondent's offending as 'objectively serious' and assessed it as falling within the 'mid-range of seriousness of the offence of dangerous driving causing death'.[5] He found that the respondent's moral culpability was 'high' because he ignored a number of safety warnings.[6]

34 The judge stated that the respondent's guilty plea had 'high utilitarian value', particularly in the context of the backlog of trials due to the COVID-19 pandemic.[7] He found that the respondent would suffer additional hardship in prison and his mental health was likely to deteriorate there. He also found that the respondent was unlikely to reoffend and that his prospects of rehabilitation were 'excellent'.[8] He additionally found that the respondent was 'devastated by the accident and deeply remorseful for it'.[9]

35 The judge stated that he was satisfied that, as a consequence of causing Lincoln's death, the respondent has 'suffered PTSD, with severe symptoms, that would result in [him] being subject to substantially and materially greater than the ordinary burden or risks of imprisonment' and that, accordingly, the exception in s 5(2H)(c)(ii) of the SA was satisfied.[10] The judge acknowledged that the fact that the exception was satisfied was 'not the end of the matter' and that he had to decide the appropriate sentence taking into account the circumstances of the respondent's offending and his personal circumstances.[11]

36 The judge cited *Stephens v The Queen*[12] and *Peers v The Queen*[13] for the proposition that, ordinarily, a prison sentence will be imposed for the offence of dangerous driving causing death. He also acknowledged that general deterrence must be given considerable weight for such an offence. He then relied upon *Boulton v The Queen*[14] for the proposition that a CCO can meet the punitive and rehabilitative purposes of sentencing, even in relatively serious cases.

37 The judge stated that he was satisfied that a CCO could achieve all the sentencing purposes in the respondent's case having regard to the judge's findings to which we have already referred and the following further findings:

> Understandably, [the respondent has] suffered deep guilt and sadness which has manifested itself in severe symptoms of PTSD.
>
> [The respondent has] said to [his] counsellor, more than once, the only thing keeping [him] going is a sense of responsibility to look after [his] wife and [his] younger child.

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5 Sentencing remarks [66], [68].
6 Sentencing remarks [69].
7 Sentencing remarks [76].
8 Sentencing remarks [77].
9 Sentencing remarks [36].
10 Sentencing remarks [62], [63].
11 Sentencing remarks [64], [65].
12 (2016) 50 VR 740 ('*Stephens*').
13 (2021) 97 MVR 379; [2021] VSCA 264 ('*Peers*').
14 (2014) 46 VR 308, 377 [25].

> The suffering and loss, [he has] brought upon [himself], involves a punishment more than any court could impose.
>
> Accordingly, in my view, the sentencing objectives of just punishment and specific deterrence are to be given less weight.
>
> And, in the circumstances of [the respondent's] case, the weight to be given to general deterrence should be moderated.[15]

38 The judge concluded that, as the respondent's offending arose out of a single episode, it was appropriate to impose an aggregate sentence of a single CCO of 3 years, with a condition that the respondent complete 250 hours of unpaid community work, for both offences.

Issues raised on the appeal

39 The Director's appeal has given rise to the following questions for determination by this Court:

(a) Is the sentence manifestly inadequate?

(b) If the sentence is manifestly inadequate, should the Court nevertheless dismiss the Director's appeal in the exercise of its residual discretion? This question gives rise to a subsidiary issue of whether the sentence indication is relevant to the exercise of the residual discretion.

(c) If the sentence is manifestly inadequate and the residual discretion is not exercised, how should the respondent be resentenced?

Is the sentence manifestly inadequate?

Principles relevant to the offence of dangerous driving causing death

40 In *Stephens*, this Court stated that, although the offence of dangerous driving causing death encompasses a very wide range of conduct, it 'is likely to receive a significant term of imprisonment'.[16] The Court went on to say that, where an offender's level of moral culpability is low, it may be appropriate for the sentencing court to depart from the usual disposition of a custodial sentence.[17]

41 In *Stephens*, the offender was driving an off-road buggy, similar to the buggy in the present case and with similar warnings, on a rural property. The offender's 11 year old stepson was sitting in the passenger seat and his 9 year old daughter was sitting between his stepson's legs. The offender and his stepson engaged their seatbelts but his daughter was unrestrained. When the offender attempted a 'burnout', the buggy rolled and his daughter was killed. His stepson was not seriously injured. The offender had not driven

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15 Sentencing remarks [71]–[75] (citations omitted).
16 (2016) 50 VR 740, 745 [21].
17 (2016) 50 VR 740, 746 [21].

the buggy previously. A collision reconstructionist estimated that the buggy's speed at the time it rolled over was 34 kilometres per hour.

42 The sentencing judge in *Stephens* assessed the gravity of the offending as 'serious examples of serious offences' and found that the offender's moral culpability was 'at … a very high' level and his prospects of rehabilitation were 'excellent'.[18] The offender did not have a criminal history, conducted two businesses, was involved in community pursuits, and was deeply remorseful. He was 'grief-stricken' as a result of the accident and had symptoms consistent with PTSD but they were not sufficient to meet the diagnostic criteria for PTSD.[19] The sentencing judge found that the principles in *R v Verdins*[20] were not strictly engaged.

43 The offender in *Stephens* pleaded guilty and was sentenced to 3 years, 3 months' imprisonment for the offence of dangerous driving causing death and to 18 months' imprisonment for the offence of reckless conduct endangering life, with cumulation of 6 months for the latter sentence. A non-parole period of 2 years, 3 months' imprisonment was fixed in respect of the total effective sentence of 3 years, 9 months. This Court dismissed the offender's appeal against sentence, in which he sought to impugn the sentencing judge's finding about his moral culpability. The Court rejected the offender's contention that a CCO would have been an appropriate disposition in the circumstances of that case.[21]

44 The inappropriateness of a CCO as a sentencing disposition for the offence of dangerous driving causing death in the vast majority of cases was emphasised by this Court more recently in *Peers*.[22] That case involved a relatively youthful female offender who attempted to overtake a truck on a two-lane road which narrowed to a single lane road. The speed of the vehicle was estimated at 128.7 kilometres per hour, well above the speed limit of 100 kilometres per hour. When the offender realised that she did not have sufficient time to overtake the truck, she applied the brakes suddenly and lost control of her car, resulting in it going off the road, impacting a large tree and rolling over. Her front seat passenger died as a result of the collision. She pleaded guilty to a single charge of dangerous driving causing death. The offender suffered from a number of mental conditions, including PTSD.

45 The sentencing judge in *Peers* assessed the gravity of the offending as neither at the high nor at the low end and sentenced the offender to 30 months' imprisonment with a non-parole period of 12 months. This Court allowed the offender's appeal against sentence on the basis that the sentencing judge erred in finding that the requirements of s 5(2H)(c)(ii) of the SA were not satisfied. The Court resentenced the offender to 20 months' imprisonment with a non-parole period of 8 months.

46 This Court in *Peers* made the following pertinent observations:

> This Court has previously noted that the offence of dangerous driving causing death is a serious one, and 'it is difficult to see how any sentence other than one

18 *DPP v Stephens* [2015] VCC 1847, [55], [57], [71].
19 *DPP v Stephens* [2015] VCC 1847, [48], [58].
20 (2007) 16 VR 269.
21 *Stephens* (2016) 50 VR 740, 748 [31].
22 (2021) 97 MVR 379; [2021] VSCA 264.

> of immediate imprisonment could possibly meet the needs of general deterrence, adequate punishment, and denunciation'. This Court has previously upheld sentences of imprisonment comparable to that received by the applicant, and found in the case of *Borg*, that the imposition of a five-year CCO without any period of incarceration was a wholly inadequate sentence.
>
> [E]ach case must be considered having regard to its own facts. In our view, a term of imprisonment is required. The speed at which the applicant drove and the overtaking manoeuvre plainly rendered the driving dangerous and general deterrence is important … It is the necessary reality for offending of this kind that people with unblemished records, undoubted remorse, and with little or no prospect of re-offending, will receive an immediate term of imprisonment. [23]

47 These observations are consistent with the earlier authority of *Director of Public Prosecutions v Neethling*.[24] In that case, this Court stated that a non-custodial sentence for the offence of dangerous driving causing death should be seen as exceptional and that the degree of the offender's moral culpability will be 'a key factor' in determining whether such a sentence is available as a sentencing option.[25] That statement was endorsed in the more recent case of *Director of Public Prosecutions v Lombardo*, where this Court stated that, whilst non-custodial sentences are exceptional for the offence of dangerous driving causing death, the exception applies where the offender's moral culpability is low, such as where there has been momentary inattention or misjudgement.[26]

Parties' submissions on manifest inadequacy

48 The Director submitted that, in accordance with the principles summarised at [40] to [47] above, the judge's findings that the respondent's offending was 'objectively serious' and 'falls into the mid-range of seriousness of the offence', and his moral culpability was 'high', meant that a non-custodial sentence was not open. Accordingly, so it was said, in imposing a CCO instead of an immediate term of imprisonment, the judge imposed the wrong type of sentence and therefore the sentence is manifestly inadequate.

49 The Director contended that, in accordance with the principles to which we have already referred, a sentence of imprisonment was necessary in order to give proper effect to the important sentencing purposes of general deterrence, denunciation and just punishment. The Director argued that the sentence imposed by the judge does not reflect either the objective gravity of the offending or the respondent's moral culpability, and indicates that undue weight was given to factors said to be mitigating.

50 The Director submitted that the judge did not adequately explain how a CCO could achieve the relevant sentencing purposes in the present case, beyond merely reciting that a CCO could meet the punitive and rehabilitative purposes of sentencing, even in relatively serious cases. In particular, the Director contended that there was no basis for

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23 *Peers* (2021) 97 MVR 379, 293–4 [72]-[73]; [2021] VSCA 264 (citations omitted).
24 (2009) 22 VR 466 (*'Neethling*').
25 *Neethling* (2009) 22 VR 466, 474 [38].
26 (2022) 102 MVR 19, 43 [100]; [2022] VSCA 204 ('*Lombardo*').

significantly reducing the weight to be given to general deterrence in the present case, and that the judge did not provide reasons for why he did so.

51 The Director argued that the satisfaction of the exception in s 5(2H)(c)(ii) of the SA did not foreclose the issue of what was the appropriate sentencing disposition in all the circumstances of the case. According to the Director, in all the circumstances of the case — including the respondent's PTSD — a sentence of imprisonment was the only disposition reasonably open.

52 The Director submitted that the circumstances in the present case and in *Stephens* were strikingly similar. The Director acknowledged that sentences in other cases are not precedents to be applied or distinguished. Nonetheless, the Director contended that significant disparity between the outcome in *Stephens* and that in the respondent's case is illustrative that something has gone obviously and significantly wrong in the sentencing synthesis.

53 In oral submissions, senior counsel for the respondent conceded that the sentence imposed by the judge 'was objectively a very lenient sentence' and that it was 'an outlier of the permissible range'. He also accepted that, ordinarily, for offending of the type committed by the respondent, it is unusual for an offender not to be sentenced to a term of imprisonment. However, he submitted that a CCO was not necessarily precluded for such offending and that the CCO imposed in the present case was within range and not manifestly inadequate because of a combination of substantial mitigating factors which warranted the exercise of mercy. Those factors were said to be:

(a) The respondent's guilty plea and its utilitarian value, particularly in the context of the COVID-19 pandemic.

(b) The respondent's impaired mental functioning — particularly his PTSD — which resulted in the burden of imprisonment for him being substantially and materially greater than would ordinarily be the case, and his willingness to engage in psychological therapy for his mental condition.

(c) The respondent's overwhelming remorse, his immediate admissions to police and his acceptance of direct and full responsibility for the offending.

(d) The judge's finding that the weight to be given to general deterrence should be moderated in the present case.

(e) The respondent's relative youth, good character and community involvement.

54 Senior counsel for the respondent acknowledged that the similarities between the present case and *Stephens* are 'stark'. However, he submitted that the sentence in *Stephens* did not set a precedent and that, for the reasons he articulated, it was open to the judge in the present case to impose a 3 year CCO with a condition that the respondent complete 250 hours of unpaid community work.

Decision on manifest inadequacy

55 In our opinion, consistent with the principles summarised at [40] to [47] above, the offending in the present case required an immediate term of imprisonment and therefore it was not open to the judge to impose a CCO. As the judge imposed the wrong form of sentence, the Director has established that the sentence is manifestly inadequate.[27]

56 As is apparent from the principles to which we have already referred, there is strong authority to the effect that, unless an offender's moral culpability is low, the offence of dangerous driving causing death should ordinarily result in an immediate term of imprisonment. Having regard to the maximum penalty of 10 years' imprisonment, it is not surprising that terms of imprisonment such as 3 years, 3 months (the sentence in *Stephens*), 20 months (the sentence in *Peers*) and 2 years (the sentence in *Neethling*, which was to be served in a Youth Justice Centre) have been imposed in previous cases.

57 In the present case, there is no challenge to the judge's findings that the respondent's offending was in the mid-range of seriousness and that his moral culpability was high. We accept that the respondent was able to call in aid the very powerful mitigating factors to which his counsel referred. However, whilst those factors were highly relevant to the question of the moderation to the term of imprisonment to be imposed on the respondent,[28] they were not sufficient, either individually or in combination, to warrant a non-custodial sentence.

58 We agree with the Director's submission that the similarities between the present case and *Stephens* are 'striking'. The respondent did not cavil with that description. Although the judge referred to *Stephens* in a footnote in support of the proposition that a prison sentence is ordinarily imposed for the offence of dangerous driving causing death, he did not address the similarities between that case and the present case in his sentencing remarks. At the hearing of the application for a sentence indication, there was a brief and inconclusive discussion about possible differences between the two cases, including the fact that the offender in *Stephens* had not driven his buggy previously, whereas the respondent in the present case had done so.

59 It is well established that the sentences in prior cases are not precedents and that care must be applied in relying upon so-called comparable cases in determining whether the sentence in a particular case is manifestly excessive or inadequate. Nevertheless, comparable cases provide yardsticks for determining the range of sentences reasonably open to a sentencing judge in a particular case. Further, where at the plea hearing, one of the parties places particular reliance upon a specific prior decision of this Court, which on its face is strikingly similar, it is ordinarily incumbent on the sentencing judge to explain the extent to which that decision informed the exercise of that judge's sentencing discretion.

60 In the present case, the judge's failure to discuss this Court's decision in *Stephens* is surprising because that decision not only dealt with strikingly similar facts but also referred to important sentencing principles for the offence of dangerous driving causing death.

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27 *Dinsdale v The Queen* (2000) 202 CLR 321, 325–6 [6].

28 The factors are discussed further below, under the heading 'Resentence'.

61 There are two main differences between *Stephens* and the present case. Firstly, unlike the respondent, the offender in *Stephens* was not diagnosed with the array of mental illnesses — including PTSD — that the respondent suffers. Secondly, the respondent pleaded guilty during the COVID-19 pandemic whereas the offender in *Stephens* pleaded guilty and was sentenced prior to the pandemic. Even though these differences are significant, they cannot provide a basis for the stark dissimilarity between the sentence of a 3 year CCO with a condition of 250 hours of unpaid community work in the present case and the sentence of 3 years, 3 months' imprisonment in *Stephens*. That is particularly so having regard to the fact that the sentence in *Stephens* is consistent with the principles summarised at [40] to [47] above — which emphasise that, other than cases involving low moral culpability, an immediate term of imprisonment is ordinarily required — whereas the sentence in the present case is inconsistent with those principles.

62 We do not regard the fact that the respondent had driven his buggy previously, whereas the offender in *Stephens* had not done so, as material. That is because they were both aware of the dangers involved in embarking on their inherently dangerous conduct. We emphasise that we are not treating the sentence in *Stephens* as a precedent. However, it is a closely comparable case and is of assistance in determining the appropriate range of sentences available to the judge in the present case.

63 It follows from our conclusion that the sentence imposed by the judge is manifestly inadequate and that, for the purposes of s 289(1) of the CPA, we are satisfied that there is an error in that sentence. In accordance with that section, we are obliged to allow the Director's appeal if we are also satisfied that a different sentence should be imposed. In determining that question, we have a residual discretion to dismiss the appeal notwithstanding our finding of error, but we are not permitted to take into account any element of double jeopardy.[29]

Should the Court exercise its residual discretion to dismiss the Director's appeal?

Principles relevant to the residual discretion[30]

64 In *Green v The Queen*,[31] a majority of the High Court stated that the primary purpose of Crown appeals was 'to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons'.[32] The majority accepted that this purpose could be 'achieved to a very significant extent' by a statement of an appellate court that the sentences imposed upon the respondent 'were wrong and why they were wrong'.[33]

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29 See [26] above.

30 Paragraphs [64] to [72] are based upon *DPP v Oksuz* (2015) 47 VR 731, 771-4 [165]–[171], [173], [176].

31 (2011) 244 CLR 462 ('*Green*').

32 *Green* (2011) 244 CLR 462, 465 [1], 477 [36], quoting *Griffiths v The Queen* (1977) 137 CLR 293, 310.

33 *Green* (2011) 244 CLR 462, 478 [37], quoting *R v Borkowski* (2009) 195 A Crim R 1, 18 [70]; [2009] NSWCCA 102.

65 In *Director of Public Prosecutions v Karazisis*, a majority of this Court set out the three conceptual stages of inquiry that traditionally arose from a Crown appeal as follows:

> First, the court considered the nature of the sentencing error in order to determine whether it satisfied the common law requirements … and did not unduly circumscribe the sentencing discretion. Secondly, even if the error met those requirements, the court would consider whether, for reasons of principle or because of discretionary considerations, it should decline to intervene because it did not consider that a different sentence should be imposed. For example, the court would exercise what it regarded as an overriding, or residual, discretion not to intervene where it did not consider that there was a sufficient difference between the sentence imposed at first instance, and any sentence it regarded as appropriate. Thirdly, if the court did intervene, because it was a Crown appeal the court would impose a lesser sentence than it would otherwise have imposed, which was generally toward the lower end of the appropriate range.[34]

66 This Court's residual discretion to refuse to intervene even if sentencing error has been demonstrated is exercisable at the second stage of its inquiry on a Crown appeal, that is, under s 289(1)(b) of the CPA. This Court also has a residual discretion in fixing a different sentence in accordance with the third stage of its inquiry on a Crown appeal.[35] This Court's residual discretion to dismiss a Crown appeal has survived the abolition of double jeopardy as a sentencing consideration, but that abolition means that the discretion can only be exercised on the basis of considerations other than double jeopardy.[36] The burden lies upon the Crown to show that the residual discretion should not be exercised.[37]

67 It has been said that the residual discretion is 'perhaps of uncertain width' and that '[i]t is impossible to lay down any exhaustive statement of its scope, or to be unduly prescriptive as to how it should be exercised in any given case'.[38]

68 In *Green*, the majority stated that the purpose of Crown appeals — namely, to lay down principles for the governance and guidance of sentencing courts — is a primary consideration relevant to the exercise of the residual discretion. They described it as a 'limiting purpose' which does not extend to the general correction of errors made by sentencing judges. They also stated that it supplies a framework within which to assess the significance of factors relevant to the exercise of the residual discretion.[39]

69 A number of cases have considered the factors that are relevant to the exercise of the residual discretion. In *Green*, the majority stated that the creation of unjustifiable disparity between a proposed new sentence to be imposed on the respondent to a Crown appeal and the unchallenged sentence previously imposed on a co-offender was a powerful consideration in favour of exercising the residual discretion to dismiss the

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34 (2010) 31 VR 634, 648 [50] (citations omitted) ('*Karazisis*').

35 In *Karazisis* (2010) 31 VR 634, 652, in the heading above [73], the majority refer to '[t]he continued existence of the residual discretion in determining whether to intervene (stage 2) and in fixing a different sentence (stage 3)'.

36 *Karazisis* (2010) 31 VR 634, 648–9 [52]–[53], 657–8 [100], 658 [103], 661 [119].

37 *Cumberland v The Queen* (2020) 379 ALR 503, 511 [33]; [2020] HCA 21 ('*Cumberland*').

38 *Karazisis* (2010) 31 VR 634, 657 [100].

39 *Green* (2011) 244 CLR 462, 477 [36].

appeal.[40] The majority also stated that other circumstances may combine to produce injustice if a Crown appeal was allowed and were therefore relevant to the exercise of the residual discretion. Those circumstances were said to include delay in the hearing and determination of the appeal, the imminent or past occurrence of the respondent's release on parole or unconditionally, and disruption to the respondent's progress towards rehabilitation if he or she is resentenced.[41]

70 In *Karazisis*, the majority articulated the following non-exhaustive list of factors that may be relevant to the exercise of this Court's residual discretion: delay, parity, the totality principle, rehabilitation, and fault on the part of the Crown.[42] The majority said the following in relation to the relevance of a partially or fully completed non-custodial sentence to the exercise of the residual discretion:

> When an offender is given a non-custodial sentence and has complied with its terms for a significant period, there may be powerful reasons why that sentence should not be disturbed. A similar point can be made in situations where an offender, who received a short custodial sentence, has served the entirety of that sentence and been released by the time the Crown appeal is heard.
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> …
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> Rehabilitation has always been regarded by this court as an important factor in determining whether to interfere with a sentence that was designed to enhance its prospects. This applies as well to custodial sentences which are ordered to be served in less punitive ways than actual imprisonment. For example, an offender who has been sentenced to a term of imprisonment, to be served by way of an intensive correction order, may already have completed a good part of that sentence by the time the Crown appeal is heard. That is plainly a matter to be accorded considerable weight in determining whether the court should, in the exercise of its residual discretion, dismiss such an appeal. Rehabilitation will also play its part in the sentencing discretion in the event that the court resolves to intervene and impose a different sentence.[43]

71 In respect of rehabilitation, the majority in *Karazisis* approved of the following statement:

> [W]hen an offender appeals against an allegedly excessive sentence the court concerns itself almost exclusively with circumstances presented to the trial judge whereas when the Crown appeals the court also shows great interest in what has happened since imposition of sentence. To this extent the review of a lenient sentence is in some ways analogous to choice of a sentence following breach of a bond or of a probation order.[44]

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40 *Green* (2011) 244 CLR 462, 466 [2], 477 [37], 480 [44].

41 *Green* (2011) 244 CLR 462, 466 [2], 479 [43]. See also *Munda v Western Australia* (2013) 249 CLR 600, 624 [72]; *Cumberland* (2020) 379 ALR 503, 505 [6]; [2020] HCA 21.

42 *Karazisis* (2010) 31 VR 634, 658 [104].

43 *Karazisis* (2020) 31 VR 634, 658–60 [107], [112].

44 Fiori Rinaldi, 'Dismissal of Crown Appeals Despite Inadequacy of Sentence' (1983) 7 *Criminal Law Journal* 306, 308, quoted in *Karazisis* (2010) 31 VR 634, 660 [113].

72 In *Director of Public Prosecutions v Hardy*, Buchanan JA, with whom Mandie JA agreed, stated:

> Matters such as damage to reputation, legal costs, *hardship to third parties*, the completion by the respondent of the sentence, the imminent release of the respondent from custody, delay by the Crown, the adoption of a position by the prosecutor at the plea that may have led the sentencing judge into error and an appropriate exercise of mercy by the sentencing judge can lead to an appeal being dismissed.[45]

73 In *Lombardo*, this Court stated that the factors that inform the exercise of the residual discretion include whether:

> (a) the offender given a non-custodial sentence has complied with its terms for a significant period;
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> (b) the offender given a 'lenient disposition' has made productive use of that disposition, including by finding 'employment and stability in their personal life';
>
> (c) the offending falls short of 'criminality of the highest order';
>
> (d) there has been a delay between the imposition of sentence and the Crown appeal; and
>
> (e) the sentence first imposed is of a type which enhances the prospects of the offender's rehabilitation, particularly where the offender is young.[46]

Additional evidence adduced in connection with residual discretion and resentence

74 The respondent affirmed an affidavit on 19 January 2023 setting out events since he was sentenced on 11 August 2022. He deposed that: he had completed about 107 hours of the 250 hours of unpaid community work he was required to complete under the CCO; he has been compliant with the CCO; he had not been convicted of any other criminal offence; he had completed two houses prior to the end of 2022, he is currently working on three houses and he is due to commence work on two other houses in March 2023; four employees work in his building business; he had continued to attend appointments with Mr Brown and to take his medication; and he had continued his involvement in local sporting clubs. The respondent also deposed that his wife is about 8 weeks pregnant.

75 In a supplementary affidavit affirmed on 3 February 2023, the respondent stated:

> (a) The three houses upon which he is currently working are due to be completed by the end of May, June and July 2023, respectively, and he is also working on another property which is due to be completed in the next six weeks.
>
> (b) He is due to commence work on: a property in about April 2023, with an estimated completion time of 10 to 12 months; a property in about May 2023,

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45 [2011] VSCA 86, [18] (emphasis added).

46 (2022) 102 MVR 19; 44 [108]; [2022] VSCA 204 (citations omitted).

with an estimated completion time of 18 to 24 months; and a property in about August 2023, with an estimated completion time of 12 to 18 months.

(c) Local builders to whom he has spoken have told him that, if he is not able to continue with any property, they could not take over any of the work because they are at capacity.

(d) If he is incarcerated, his four employees, six regular contractors, clients and creditors would be adversely affected. There is a real risk that his home building business would go into liquidation if he is not able to keep working.

(e) He is worried about the financial and emotional stress that his wife would experience if his business were to go into liquidation.

(f) Since he affirmed his first affidavit, he has continued with his unpaid community work and has now completed 160 hours.

Parties' submissions on the residual discretion

76 The parties made extensive written and oral submissions on whether the judge's sentence indication is relevant to the exercise of the residual discretion.

77 The Director submitted that the sentence indication could not be taken into account in the exercise of the residual discretion. That was said to be so for two reasons. First, the sentence indication could only be relevant due to the element of double jeopardy that would be involved in this Court allowing the appeal and resentencing the respondent, in circumstances where s 289(2) of the CPA prohibits this Court from taking that element into account. Secondly, the fact that s 209(6) preserves Crown appeals notwithstanding that an offender is sentenced in accordance with a sentence indication points to an intention by Parliament that the effect of the sentence indication procedure should be confined to the sentence imposed in the trial court.[47]

78 The respondent submitted that the sentence indication can be taken into account in the exercise of the residual discretion because it can be relevant for reasons other than the element of double jeopardy that it involved. Relying upon *R v Warfield*,[48] the respondent contended that, where an appellate court upholds a Crown appeal following a sentence imposed in accordance with a sentence indication, an offender may be placed in a position not only of double jeopardy but also of 'triple jeopardy'. The triple jeopardy was said to arise because the offender will be put in the position of having to decide whether to seek leave to withdraw the plea of guilty and face the possibility of a substantially longer sentence because of the unavailability of moderation in sentence resulting from a guilty plea.

79 It is not necessary for us to make a decision on these submissions in the present case. That is because, at the hearing of the appeal, senior counsel for the respondent informed

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47 As appears from [25] above, s 209(1) of the CPA provides that the sentencing court must not impose a more severe sentence than the sentence type or maximum total effective sentence set out in the sentence indication provided to an accused prior to a plea of guilty.

48 (1994) 34 NSWLR 200, 210 ('*Warfield*').

us that, if the Director's appeal is allowed, the respondent will not seek leave to withdraw his plea of guilty. Accordingly, no issue of 'triple jeopardy' arises in the present case. Further, when pressed to identify any prejudice to the respondent from the Director's appeal being allowed and the respondent being resentenced, other than the element of double jeopardy which the Court cannot take into account, counsel was not able to refer to any. It follows that the sentence indication in the present case is not relevant to the exercise of the residual discretion and, even if it were, it could not affect the result of its exercise. It is not necessary for us to consider whether, in other cases, a sentence indication might be relevant to the exercise of the residual discretion and, if it were, what its impact might be.

80 The parties also made extensive written and oral submissions on the guidance that this Court was able to provide for cases where a sentence indication is given and there is a prospect of a Crown appeal if the accused pleads guilty in reliance upon that indication. One option that was raised was for prosecutors to be encouraged to obtain instructions and state in open court whether the Crown proposes to appeal if the accused pleads guilty following a sentence indication and is sentenced in accordance with that indication. Another option that was raised was the procedure discussed in *R v Glass*[49] and endorsed in *Warfield*.[50] That procedure involves an appellate court announcing that it intends to allow a Crown appeal and indicating the proposed substituted sentence, but delaying the making of formal orders so as to give the offender an opportunity to seek leave to appeal against conviction, in which case the appellate court could grant him or her leave to withdraw his or her plea of guilty and order a trial of the charges.

81 Once again, it is not necessary for us to make a decision on these submissions. The first option that the parties raised may involve practical issues which should be fully explored in a case where that option arises for consideration. As senior counsel for the respondent made it clear that the respondent will not seek leave to withdraw his plea of guilty in the event that the appeal is allowed, we need not address the second option and the observations made in *Glass* and *Warfield* in relation to it.

82 It now remains for us to summarise the parties' other submissions on whether the residual discretion should be exercised in the present case.

83 The Director accepted that two factors in the present case were relevant to the exercise of the residual discretion. First, the fact that the respondent had complied with the terms of the CCO and had partly completed the hours of unpaid community work he was required to perform. Secondly, the fact that the respondent and his wife are expecting another child. The Director submitted that the above factors were not sufficient, either individually or collectively, to justify this Court exercising the residual discretion. That was said to be particularly so having regard to the judge's unchallenged findings that the gravity of the offending was 'mid-range' and the respondent's moral culpability was high.

84 The Director submitted that the respondent's poor mental health is not relevant to whether the residual discretion should be exercised because it was known at the time of the plea hearing and the judge took it into account in arriving at his sentence. The

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49 (1994) 73 A Crim R 299, 304 ('*Glass*').
50 (1994) 34 NSWLR 200, 210–11, 214.

Director observed that there was no evidence that the respondent's mental health had deteriorated since the sentence was imposed.

85 The Director relied upon *Markovic v The Queen*[51] and *R v Edwards*[52] for the proposition that hardship to family and third parties resulting from an offender's incarceration can only be taken into account, in sentencing him or her, in exceptional circumstances. The Director submitted that this threshold was not met in the present case. The Director also contended that the hardship to third parties, such as the respondent's building clients and employees, resulting from his incarceration was not relevant to the exercise of the residual discretion. That was said to be because, when he sentenced the respondent, the judge took into account the fact that the respondent owns and operates a home building business and is a partner in a kitchen cabinetry business.

86 The respondent submitted that the following factors in combination justified this Court exercising the residual discretion:

(a) He had complied with the CCO and has demonstrated a real attempt to complete its requirements, having performed a substantial proportion of the required hours of unpaid community work.

(b) Even if this Court finds that the CCO is manifestly inadequate, he has taken advantage of it by continuing with his family life, work and community service, and making progress with his rehabilitation.

(c) He and his wife are expecting another child, which again indicates that he wishes to get on with his life.

(d) His mental health issues, his willingness to accept treatment for them, and the additional concern he will have if he is in prison while his wife is pregnant.

87 The respondent did not rely upon hardship to his family or third parties, resulting from any period of incarceration this Court may order, as a matter that was relevant to the exercise of the residual discretion in the present case. That was because he accepted that the hardship would not be exceptional.

88 The respondent submitted that the residual discretion should be exercised in his favour because a sentence of imprisonment by this Court 'would be a severe outcome for a man who has been so profoundly traumatised, who would find imprisonment so burdensome, who has completed so much of his [CCO] and who was told that if he pleaded guilty he would not be imprisoned'.

89 The respondent contended that allowing the Director's appeal in the present case would have a 'chilling' effect on the sentence indication scheme and undermine the benefits to the criminal justice system that Parliament sought to achieve by introducing it.

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51 (2010) 30 VR 589, 591 [5], 594 [15].
52 (1996) 90 A Crim R 510, 515–16.

Decision on residual discretion

90 We are persuaded by the Director's submissions that the residual discretion should not be exercised in the present case.

91 We agree with the Director that the respondent's mental health issues are not relevant to the exercise of the residual discretion, in the absence of evidence of any material change since he was sentenced, and that the other matters upon which the respondent relies are insufficient to justify the exercise of the residual discretion. Other factors which have been held to be relevant to the residual discretion — such as delay, fault on the part of the Crown, low level offending, and youth — are absent in the present case.

92 Furthermore, we are of the opinion that it would not be appropriate in the present case to provide guidance to sentencing courts by identifying and explaining the sentencing error made by the judge and dismissing the Director's appeal. The sentence imposed by the judge is so out of line with current sentencing practices for the offence of dangerous driving causing death that it cannot be allowed to stand.

93 Neither party referred to the observations of Buchannan JA in *Hardy* set out at [72] above in relation to the relevance of third party hardship on the exercise of the residual discretion. As the respondent did not seek to rely upon third party hardship, we need not say anything further about it in the context of the residual discretion.

94 We reject the respondent's submission that allowing the Director's appeal in the present case will have a 'chilling' effect on the sentence indication scheme. That is because an accused who pleads guilty in reliance upon a sentence indication would, properly advised,[53] be aware that the Crown has a statutory right of appeal against sentence and there is a risk that such an appeal may result in this Court imposing a more severe sentence.

Resentence

95 On the basis of the evidence before the judge and the new evidence referred to at [74] to [75] above, the respondent submitted that he should not be sentenced to a term of imprisonment. In support of that submission, the respondent relied upon the matters summarised at [86] to [88] above that he called in aid in support of the exercise of the residual discretion.

96 Although the respondent did not rely upon family or third party hardship as a relevant sentencing consideration in the present case, he submitted that the impact that his inability to work would have on others if he is incarcerated will weigh on him in custody, particularly in the context of his impaired mental functioning.

97 The Director submitted that, having regard to the gravity of the respondent's offending, his high moral culpability and the need for general deterrence in the present case, only a sentence of a term of imprisonment with a non-parole period is open. However, senior counsel for the Director conceded that the respondent is able to call in aid very powerful

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53 By his or her lawyers, or, in the case of a self-represented accused, by the judge who provides the sentence indication.

mitigating circumstances which warrant considerable leniency both in the head sentence and in the non-parole period.

98 The Director contended that hardship for the respondent's family or to third parties, such as the respondent's clients and employees, was not relevant to resentence because the test of exceptional circumstances was not met in the present case.[54]

99 We agree with the Director's submission that only a sentence of a term of imprisonment with a non-parole period is open in the present case. The respondent's offending was objectively serious and his moral culpability was high because, being aware of the warnings about the dangers involved and the safety measures that were available to address them, he deliberately did not heed the warnings, disregarded the safety measures and embarked on inherently dangerous conduct. The respondent: exceeded the passenger limit; placed Lincoln in an unrestrained position in the buggy; overrode the seatbelt safety interlock system; drove in a manner deliberately calculated to cause the buggy to lose traction; and deliberately set out to drive in a manner designed to scare his sister, who was a passenger in the buggy.

100 Of course, the determination of an appropriate sentence by this Court requires consideration of not only the gravity of the respondent's offending and his moral culpability, but also all relevant sentencing considerations as illuminated by the evidence before this Court. As conceded by senior counsel for the Director, the respondent is able to call in aid very powerful mitigating circumstances which warrant considerable leniency in both the head sentence and non-parole period. The mitigating circumstances include:

(a) The respondent's plea of guilty and its additional utilitarian value due to its timing during the COVID-19 pandemic.

(b) The respondent's immediate cooperation with police, his overwhelming remorse and his excellent prospects of rehabilitation.

(c) The respondent's PTSD, which would result in the burden of imprisonment being substantially and materially greater for him than other prisoners who did not suffer from this condition, and his willingness to seek treatment for his mental health problems.

(d) The fact that the respondent not only does not have a criminal record but he is a person of good character who has an impressive work history and makes valuable contributions to his local community.

(e) The family support enjoyed by the respondent.

(f) The additional anxiety that the respondent will experience having regard to the fact that his wife is expecting another child.

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54 See [85] above.

(g) The absence of any risk that the respondent will reoffend, resulting in protection of the community and specific deterrence requiring little, if any, weight as part of the intuitive synthesis.

(h) Importantly, the fact that six months have elapsed since the respondent was sentenced to a CCO and that, during that period, he has complied with the CCO and completed 64 per cent of the unpaid community work component of the CCO.

101 When the above mitigating circumstances are considered in combination and in the context of the gravity of the respondent's offending, his moral culpability and the important consideration of general deterrence, they warrant a sentence that is merciful.

102 In all the circumstances, we will resentence the respondent to an aggregate sentence of 15 months' imprisonment for both charges and will fix a non-parole period of 6 months. Had the respondent not pleaded guilty, we would have sentenced him to an aggregate sentence of 4 years' imprisonment with a non-parole period of 2 years, 6 months.

103 We wish to stress that the present case has unique features which limit the extent, if any, to which the sentence we will impose is capable of providing assistance in future cases.
