

TASMANIA
LAW REFORM
INSTITUTE

**Criminal liability of drivers who fall asleep
causing motor vehicle crashes resulting in death
or other serious injury: *Jiminez***

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CONTENTS

About this Issues Paper	v
How to respond	v
Acknowledgments	v
Information on the Tasmanian Law Reform Institute.....	vi
List of questions	vii
Part 1: Introduction	1
Background.....	1
Outline of paper.....	3
Part 2: Fatigue and motor vehicle crashes	4
The relationship between fatigue and motor vehicle crashes.....	4
Fatigue as a cause of motor vehicle crashes.....	4
What causes fatigue?	6
Sleep disorders	6
Characteristics of fatigue-related crashes.....	7
Sleep research and driving	8
Relevance of sleep studies to the legal issues associated with falling asleep while driving.....	10
Part 3: Current legislative and procedural framework in Tasmania	12
Criminal liability for driving causing death	12
Manslaughter.....	12
Elements of the offence.....	13
Procedure and sentencing.....	13
Causing death by dangerous driving.....	14
Elements of the offence.....	14
Procedure and sentencing.....	16
Negligent driving causing death	16
Elements of the offence.....	16
Procedure and sentencing.....	17
Criminal liability for driving causing serious injury.....	17
Dangerous driving causing grievous bodily harm	18
Elements of the offence.....	19
Procedure and sentencing.....	19
Negligent driving causing grievous bodily harm.....	19
Elements of the offence.....	19
Procedure and sentencing.....	20
Wanton or furious driving	20
Elements of the offence.....	20
Procedure and sentencing.....	21

Part 4: The voluntary act of driving as it applies to fatigue-related crashes	22
A voluntary act of driving.....	22
Decisions pre-Jiminez.....	24
Decisions where the issue of voluntariness was glossed over.....	24
Decisions where court held there was not sufficient evidence to displace the presumption of voluntariness.....	26
Decisions where issue of voluntariness considered in light of falling asleep.....	26
Jiminez’s case.....	29
High Court appeal.....	30
Commentary about the decision in Jiminez.....	32
Decisions post-Jiminez.....	32
Other cases of involuntary driving.....	35
Part 5: The need for reform: Tasmanian case studies	37
Dr Jerry Courvisanos.....	37
Decision of the Magistrate.....	39
Commentary.....	40
William Robert Piggott.....	41
Decision of the Magistrate.....	43
Commentary.....	44
Other cases.....	44
Jill Louise Bailey.....	44
Deborah May Lynch.....	45
Prosecution of cases involving motor vehicle crashes.....	45
Part 6: Reforms in other jurisdictions	48
New South Wales.....	48
Joint Standing Committee Upon Road Safety (STAYS SAFE).....	48
Amendments to driver licensing regulations.....	48
Victoria.....	49
Department of Justice Discussion Paper on Culpable and Dangerous Driving Laws.....	49
Queensland.....	52
New Jersey, USA.....	52
Part 7: Options for reform	54
Option 1 - No change to the law.....	54
Option 2 - No change to substantive law but with the introduction of a power to suspend driving licence.....	55
Option 3 - Introduction of provisions specifying that if there is an appreciable risk of falling asleep, driving when sleepy may constitute negligence or dangerousness.....	58
Option 4 - Introduction of deeming provisions to establish a rebuttable presumption that a person who fell asleep at the wheel did in fact have prior awareness that they were at risk of falling asleep...	60
Option 5 - Amend current legislation to specifically exclude falling asleep at the wheel from being relied on in relation to driving offences under the <i>Criminal Code</i> and the <i>Traffic Act</i>	62

Part 8: Related issues	63
Alternative verdicts	63
Young offenders	64
Appendix.....	65

About this Issues Paper

This Issues Paper discusses the need for legislative and procedural change to address the criminal liability of drivers who fall asleep and are then involved in motor vehicle crashes. The topic for this Issues Paper was suggested by the Attorney-General in September 2003. The Board of the Tasmania Law Reform Institute approved the project on 14 October 2003.

How to respond

The Tasmania Law Reform Institute invites responses to the issues discussed in this Issues Paper. Questions are contained within the paper. The questions are intended as a guide only – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all responses, it is intended that a final report, containing recommendations, will be published.

Responses should be made in writing by **17 November 2007**.

If possible, responses should be sent by email to: **law.reform@utas.edu.au**

Alternately, responses may be sent to the Institute by mail or fax:

Address: Tasmania Law Reform Institute
Private Bag 89,
Hobart, TAS 7001
fax: (03) 62267623

If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquires should be directed to Rebecca Bradfield, on the above contacts, or by telephoning (03) 62262069.

This Issues Paper is also available on the Institute's web page at: www.law.utas.edu.au/reform or can be sent to you by mail or email.

Acknowledgments

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Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), and Mr Mathew Wilkins (nominated by the Tasmanian Bar Association).

List of questions

1. Do you think it is appropriate that police prosecutors are responsible for prosecuting drivers charged with negligent driving causing death or grievous bodily harm? (See Pt 5, particularly 5.5).
2. Do you think that there needs to be a change in the way fall-asleep cases are charged, for example, should it be specified in relation to charging that driving when too tired to stay awake is an example of circumstances that may support an allegation of dangerous driving? (See Pt 5, particularly 5.5).
3. Are there any deficiencies in the way evidence is collected in cases of motor vehicle crashes causing death or serious injury? (See Pt 5, particularly 5.5).
4. Do you think that greater use of expert evidence would assist in the prosecution of fall-asleep cases? (See Pt 5, particularly 5.5).
5. Do you think there are any other ways in which the prosecution of these offences could be improved? (See Pt 5, particularly 5.5).
6. Do you agree with Option 1, that there should be no change to the law? Please give reasons for your views. (See 7.1).
7. Do you agree with Option 2, that there should be no change to the substantive law with power given to Registrar of Motor Vehicle to suspend a person's driving licence where they have fallen asleep and caused death or grievous bodily harm? Please give reasons for your views. (See 7.2).
8. Should limits be placed on the power of the Registrar of Motor Vehicles? For example: (a) Should the power be exercised only where a person is prosecuted and/or convicted of an offence? (b) Should the Registrar have to inquire into the likelihood of the person becoming incapable of controlling a motor vehicle in similar circumstances? (c) Should the Registrar be required to obtain additional medical evidence before exercising the power to suspend a driving licence? (See 7.2).
9. Should medical practitioners be compelled to notify the Registrar of Motor Vehicles that a person is suffering from a medical condition that is likely to affect their ability to drive safely? (See 7.2).
10. Do you agree with Option 3, that provisions should be adopted that specify that dangerous driving or negligent driving can be established by proving that the driver drove whilst sleepy to such an extent that they knew or ought to have known that there was an appreciable risk of falling asleep, and that the driver did in fact fall asleep at the wheel? Please give reasons for your views. (See 7.3).

11. Do you agree with Option 4, that deeming provisions should be introduced to establish a rebuttable presumption that a person who fell asleep at the wheel did in fact have prior awareness that they were at risk of falling asleep? Please give reasons for your views. (See 7.4).
12. Do you agree with Option 5, that current legislation should be amended to specifically exclude falling asleep at the wheel from being relied upon in relation to driving offences under the *Criminal Code* and the *Traffic Act*? (See 7.5).
13. Do you have any other suggestions/comments concerning the criminal liability of a driver who falls asleep and causes death or serious injury?
14. Should the alternative verdicts provisions be changed to reflect the full range of offences applicable where motor vehicle crashes result in either death or serious injury? (See 8.2).
15. Do you think it is appropriate that a 17 year old charged with dangerous driving causing death or grievous bodily harm is dealt with by the courts as a youth when they would be dealt with by the courts as an adult if they are charged with the lesser offences of negligent driving causing death or grievous bodily harm? (See 8.3).

Part 1

Introduction

1.1 Background

1.1.1 This Issues Paper discusses the need for legislative and procedural change to address the criminal liability of drivers who fall asleep and are then involved in motor vehicle crashes. Courts, both in Australia and in other jurisdictions, have had cause to consider the criminal responsibility of drivers who fall asleep at the wheel and are involved in crashes on a number of occasions. Most notably, the High Court considered the issue in *Jiminez v The Queen*¹ where it approved an earlier decision of the South Australian Court of Criminal Appeal in *Kroon*.²

1.1.2 In order for an accused to be found guilty of causing death or injury by driving, it is necessary for the prosecution to establish that the accused's act of driving was voluntary. In traffic offences it may be claimed by an accused that he or she was asleep at the time of the crash. In essence, the accused is arguing that his or her act of driving was not voluntary due to the onset of sleep. The accused would then argue the Crown could not prove the act of driving was voluntary. Until the High Court decision in *Jiminez*, there was confusion about the relevance of the claim.

1.1.3 In *Jiminez*, the High Court held that the actions of a driver whilst asleep 'are not conscious or voluntary (an act committed while unconscious is necessarily involuntary) and he could not be criminally responsible for driving the car in a manner dangerous to the public'.³ In other words, there must be a voluntary act of driving and the period of driving while asleep does not constitute that voluntary act. In cases where the driver has fallen asleep, the focus of the court is upon the driving 'which immediately precedes his falling asleep'. It is necessary for the prosecution to prove that the driver was 'affected by tiredness to an extent that, in the circumstances, his driving was objectively dangerous'.⁴ The court also held that the liability for dangerous driving causing death was strict rather than absolute. Accordingly, the defence of honest and reasonable mistaken belief is available. The court held that '[if] in a case based on tiredness, there is material suggesting that the driver honestly believed on reasonable grounds that it was safe for him to drive, the jury must be instructed with respect to that issue'.⁵ This Issues Paper will examine the application of the principles articulated in these cases to the legislative framework currently in place in Tasmania.

1.1.4 The issue has become the focus of debate in Tasmania in the light of two cases heard in the Magistrates Court. In 2000, Dr Jerry Courvisanos and Mr William Robert Piggott were both charged with offences arising out of their involvement in fatal motor vehicle crashes. The prosecution of both cases relied on the allegation that they had fallen asleep at the wheel. The crashes that resulted caused the death of another road user. Both drivers were prosecuted for causing death by negligent driving and were found not guilty following hearings in the Magistrates Court. The outcome of both cases

¹ (1992) 173 CLR 572.

² (1991) 52 A Crim R 15.

³ (1992) 173 CLR 572, 577.

⁴ (1992) 173 CLR 572, 583.

⁵ (1992) 173 CLR 572, 584.

turned on whether the relevant acts of driving were voluntary and intentional. Both of these cases will be examined in this Issues Paper to identify what problems, if any, exist with the current legislative and procedural framework in place to deal with motor vehicle crashes resulting in the death or serious injury of other road users.

1.1.5 The outcomes of both of these cases have been the subject of considerable public comment. Following the acquittal of Dr Jerry Courvisanos in April 2002 of the offence of causing death by negligent driving, members of the family of the person killed in the crash spoke out publicly about the decision. The deceased's niece, Fiona Ferguson stated that 'I felt that a very wrong message was being imparted to the public. It appeared to me that the verdict was basically saying that it is okay to drive when you're sleepy and not take responsibility for your decision to drive'.⁶

1.1.6 The currency of this issue was highlighted in the recent coroner's investigation into the death of Kiyoko Yamada.⁷ The collision that resulted in the death of Mrs Yamada was caused by the loss of control of the vehicle by Mr Nakagawa who had fallen asleep just before the crash. Mr Nakagawa had also experienced a brief period of falling asleep 5 – 10 minutes before the crash but elected to keep driving. He instead turned on the air conditioning to help keep him alert. He subsequently fell asleep and it was not until the front seat passenger (Mr Yamada) yelled at him that he realised he had crossed the centre line and was heading towards a tree on the other side of the road. The coroner observed that:

drivers can experience 'micro sleeps'. These occur when a fatigued person is trying to stay awake at the steering wheel. The driver's eyes can remain open but, for a period of few seconds to a few minutes, the driver fails to respond to outside information. A vehicle can travel significant distance during this time without a fully conscious driver at the wheel. Thus the potential for an accident is high.

1.1.7 Such issues are not solely relevant to the criminal liability of drivers who fall asleep. Commonly, motor vehicle crashes give rise to civil actions. Such actions may include seeking compensation for damage to property or loss of income resulting from injury and pain and suffering. Most motor vehicle crashes which occur in this jurisdiction and result in physical injury and death are covered by the 'no-fault' Motor Accidents Insurance Board (MAIB) scheme. Where the scheme does not apply or the prescribed benefits do not sufficiently compensate an injured party, recourse may be had to civil actions. While the discussion in this paper may be relevant to the issues that arise in respect of 'involuntary' acts of driving in the context of a driver's civil liability, civil liability is beyond the scope of this paper.

1.1.8 As has been noted in a Road Safety Research Report from the Australian Transport Safety Bureau, '[f]atigue represents a significant social and economic cost to the community in relation to road crashes, especially fatal road crashes. Fatigue-related crashes are often more severe than other crashes as drivers' reaction times are often delayed or drivers have not employed any crash avoidance manoeuvres'.⁸ While there have been attempts by government to take preventative action, for example by introducing greater controls on drivers of heavy vehicles, placing audible edgelines on the sides of highways and the development of driver awareness campaigns that have emphasized the dangers of fatigue and driving, the issue of the criminal liability of a driver who falls asleep arises where there is a crash involving serious injury or death.⁹ An examination of the legal consequences of falling asleep at the wheel highlights the tension between two competing views. On one hand, there is a reluctance to apportion criminal liability to acts over which a person has no conscious control. On the other hand,

⁶ ABC 7.30 Report, 'Family outraged at law regarding falling asleep at the wheel', 6/5/2002, <http://www.abc.net.au/7.30/s5498084.htm>, (21 October 2003).

⁷ Yamakda, Kiyoko [2007] TASCDC 063.

⁸ K Dobbie, *Fatigue-related crashes: An analysis of fatigue-related crashes on Australian roads using an operational definition of fatigue*, Australian Transport Safety Bureau, Report No. OR 23 2002, 1.

⁹ C Jones et al, 'Fatigue and the Criminal Law' 43 (2005) *Industrial Health* 63, 63.

the community is becoming increasingly aware of the dangers posed by drivers affected by tiredness or some other medical condition which may result in diminishment of concentration or a loss of consciousness. The community has an interest in seeing that drivers are deterred from driving in circumstances where they pose a danger to themselves and other road-users, and punished if they do so and cause harm or death to others.

1.1.9 This Issues Paper will examine whether these opposing considerations are being adequately dealt with under the current legislative and procedural framework.

1.2 Outline of paper

1.2.1 Part 2 of this paper looks at the relationship between driver fatigue and motor vehicle crashes. It provides background to the paper by examining literature concerning the cause of fatigue, the impact of fatigue on driving and a driver's awareness of fatigue.

1.2.2 Part 3 examines the current legislative framework in Tasmania.

1.2.3 Part 4 looks at the need for a voluntary act of driving in the context of fatigue related crashes.

1.2.4 Part 5 considers the need for reform through an examination of Tasmanian case studies where fatigue has been relevant to a criminal prosecution for death or injury caused in motor vehicle crash.

1.2.5 Part 6 examines reforms to the law in other jurisdictions.

1.2.6 Part 7 outlines possible options for reform. These include:

- No change to the law;
- No change to substantive law with power to suspend driving licence;
- Introduction of provisions specifying that if there is an appreciable risk of falling asleep, driving when fatigued at the wheel may constitute negligence or dangerousness;
- Introduction of deeming provisions to establish a rebuttable presumption that a person who fell asleep at the wheel did in fact have prior awareness that they were at risk of falling asleep;
- Amendment of current legislation to specifically exclude falling asleep at the wheel from being relied upon as a defence in relation to driving offences under the *Criminal Code* and the *Traffic Act*.

Part 2

Fatigue and motor vehicle crashes

2.1.1 This Part examines the relationship between driver fatigue and motor vehicle crashes. It provides background to the paper by examining literature concerning the cause of fatigue, the impact of fatigue on driving and a driver's awareness of fatigue. These issues are relevant to the legal issues that arise when a driver falls asleep at the wheel, causing a motor vehicle crash that results in death or serious injury.

2.2 The relationship between fatigue and motor vehicle crashes

Fatigue as a cause of motor vehicle crashes

2.2.1 The Mercury newspaper recently reported that a survey of 2000 Tasmanian drivers revealed that more than 30% of those interviewed admitted to nearly falling asleep at the wheel and 10% admitted having actually fallen asleep while driving.¹⁰ These statistics were referred to as disturbing by the chairman of the Tasmanian Road Safety Taskforce, who also noted that fatigue or driving when tired was a major cause of injuries and fatalities in Tasmania. The Department of Infrastructure, Energy and Resources figures show that 'asleep-fatigue' was a crash factor in 20 crashes involving fatal (4) or serious injury (16)¹¹ in 2006. This means 'asleep-fatigue' was a crash factor for 5.4% of crashes involving fatal or serious injury. This statistic is based on assessments made by police officers in the initial reporting of motor vehicle crashes. Traffic Accident Reports are prepared by attending police officers at all motor vehicle crashes. The reports include a section where police are asked their opinion as to the cause of the crash. Police can record as many factors as they deem relevant to a particular crash.¹²

2.2.2 Higher estimates of driver fatigue as a cause of motor vehicle crashes are found in Australian studies. An Australian Transport Safety Bureau report into fatigue-related crashes noted that:

[t]he estimation of the proportion of crashes attributable to driver fatigue varies from five per cent to 50 per cent. The difficulty in measuring fatigue contributes to this variation. However, most experts estimate that 20 per cent to 30 per cent of fatal road crashes could result from driver fatigue. A proportion of these crashes involves drivers falling asleep at the wheel. Additionally, an even higher proportion of crashes involves inattention due to fatigue.¹³

¹⁰ 'Sleepy heads risking lives' The Mercury, 27 January 2004.

¹¹ Department of Infrastructure, Energy and Resources, *2006 Tasmanian Serious Casualties*.

¹² It is noted that the Tasmanian statistics appear low in comparison to the road safety statistics in other jurisdictions. For example, in NSW, 18.4% of fatal crashed involved fatigue in 2006. The 2003 - 2004 average was 16.6%. The higher statistics recorded for NSW may be attributable to the broad definition adopted, under which fatigue is taken to be factor where the driver appears to police to have been drowsy, asleep or fatigued; or where the vehicle performs a manoeuvre which suggested loss of concentration due to fatigue (such as running off the road whilst taking a corner where speed is not a factor). Tasmania does not use a set definition of fatigue for reporting under the Crash Data Manager. This means that in some instances the police may report a crash as being caused by 'inattention' where on a broader definition 'fatigue' would be more appropriate.

¹³ K Dobbie, above n 8, 8.

2.2.3 Fatigue is also recognized in other countries as a major cause of motor vehicle crashes. For example, in 1996, a US Senate Appropriations Committee report noted that:

[National Highway Traffic Safety Administration] data indicate that in recent years there have been about 56,000 crashes annually in which driver drowsiness/fatigue was cited by police. Annual averages of roughly 40,000 non-fatal injuries and 1,550 fatalities result from these crashes. It is widely recognized that these statistics underreport the extent of these types of crashes.¹⁴

In a United Kingdom study, it was estimated that driver fatigue accounts for approximately 20% of motor vehicle crashes.¹⁵

2.2.4 The underreporting of the incidence of fatigue-related crashes is frequently cited in any discussion about the extent of the problem of sleepy drivers. This underreporting has been attributed to a number of factors. These include:

- The lack of training of police in identifying the incidence of fatigue-related crashes and lack of time and resources to examine crashes to the extent required;¹⁶
- The lack of universally accepted definitions of fatigue;¹⁷
- The absence of methods to objectively assess sleepiness at a crash site;¹⁸
- The failure of drivers to report that they have fallen asleep, either out of embarrassment, fear of incrimination, or genuine absence of recollection of a fall-asleep incident;¹⁹
- The death of the witnesses, and in particular, the driver responsible for the motor vehicle crash;
- The effect of the crash itself may lead to an alteration in arousal levels thereby eliminating evidence of impairment due to fatigue;²⁰
- The failure of crash investigators to routinely collect information about time spent driving, details of rest breaks and previous sleep and work patterns of the drivers involved.²¹

¹⁴ National Center on Sleep Disorders Research/National Highway Traffic Safety Administration Expert Panel on Driver Fatigue and Sleepiness (NCSDR/NHTSA), *Drowsy Driving and Automobile Crashes*, US Department of Transport, 1998, 1.

¹⁵ J Horne and L Reyner, 'Sleep related vehicle accidents' (1995) 310 *British Medical Journal* 565.

¹⁶ K Dobbie, above n 8, 8.

¹⁷ Ibid, 5. See also NCSDR/NHTSA, above n 14, 2.

¹⁸ NCSDR/NHTSA, above n 14, 2.

¹⁹ L Reyner and J Horne, 'Falling asleep whilst driving: are drivers aware of prior sleepiness' (1998) *International Journal of Legal Medicine* 111, 120.

²⁰ K Dobbie, above n 8, 6.

²¹ Ibid.

What causes fatigue?

2.2.5 There has been considerable research into the incidence of fatigue. The Australian Transport Safety Bureau report on fatigue-related crashes identifies three main causes of fatigue as:

- *Lack of sleep*: Failure to get enough sleep leads to the accumulation of ‘sleep debt’ which is defined as the difference between the minimum amount of sleep needed to maintain appropriate levels of alertness and performance, and the actual amount of sleep obtained. Even relatively small amounts of sleep loss can negatively affect reaction times, cognitive functioning, memory, mood, alertness and performance on attention based tasks.²²
- *Time of day*: Humans are subject to a sleep-wake cycle known as the circadian rhythm. Research has shown that there are two periods in any 24 hour circadian cycle where a person’s level of sleepiness is high. The first of these periods occurs during the night and early morning and the second is in the afternoon. Functions are degraded during these periods. Research has also shown that fatigue-related crashes peak during these two periods of the day.²³
- *Time spent performing a task*: As time spent on a task is increased, the level of fatigue is increased, leading to a corresponding reduction in alertness and performance and an increased risk of falling asleep. Thus the longer one drives, the greater the risk of impaired performance and indeed falling asleep.²⁴

2.2.6 Other factors such as alcohol consumption, use of sedating medication and the existence of sleep disorders, can also increase the incidence of fatigue.²⁵

Sleep disorders

2.2.7 There are a number of sleep disorders which result in increased sleepiness, the most serious of which are sleep apnoea syndrome and narcolepsy. Other conditions such as insomnia and periodic leg movements can lead to sleep fragmentation and loss of sleep, thereby increasing the ‘sleep-debt’ and the risk of falling asleep.

2.2.8 Sleep apnoea is a condition which causes a person to suffer brief episodes of interrupted breathing while asleep, resulting in loss of oxygen and disrupted sleep. Sleep apnoea syndrome refers to the combination of excessive sleepiness and sleep apnoea. In patients with obstructive sleep apnoea, the interruption to breathing is caused by repeated obstructions to the upper airway during sleep. These obstructions are caused by the collapse of the muscle and soft tissue in the back of the throat. Central sleep apnoea, on the other hand, involves an interruption to breathing caused by the instability of the neural drive rather than an obstruction to the upper airway.²⁶ In effect, the brain fails to tell the respiratory muscles to work. This condition is rarer than obstructive sleep apnoea and is more difficult to treat.²⁷

²² Ibid, 5.

²³ Ibid.

²⁴ Ibid, 6.

²⁵ Ibid, 5; NCSDR/NHTSA, above n 14, vii.

²⁶ Austroads, *Assessing Fitness to Drive for Commercial and Private Vehicle Drivers: Guidelines and Standards for Health Professionals in Australia*, 2003, 87.

²⁷ Newcastle Sleep Disorders Centre website, <http://www.newcastle.edu.au/centre/nsdc/centralslpap.htm> (accessed 17 July 2007).

2.2.9 Studies have shown that around 9% of adult women and 24% of adult men experience sleep apnoea during overnight monitoring of their sleep. Sleep apnoea syndrome is present in 2% of women and 4% of men.²⁸ The cessation of breathing causes a person's oxygen levels to fall, triggering a warning mechanism which wakes the person. Most often, the person will go from deep sleep to light sleep, allowing the person to breath again and fall back into a deep sleep. This cycle may be repeated up to 40 times in an hour, preventing a person from having a deep sleep. This disruption to sleep causes the sleepiness associated with the condition.²⁹

2.2.10 Narcolepsy is a disorder of the sleep-wake mechanism. Sufferers can experience excessive daytime sleepiness and may also fall asleep with little or no warning. Some may also experience cataplexy which is a sudden loss of muscle tone ranging from a slight weakness to a complete collapse.³⁰ Around .05% of the population suffers from Narcolepsy.³¹

2.2.11 Studies have shown that those suffering from sleep apnoea are between 2 and 4 times more likely to be involved in motor vehicle crashes.³² Unfortunately, many may suffer from sleep apnoea syndrome and narcolepsy without having been diagnosed or treated. The US National Heart, Lung, and Blood Institute and National Center on Sleep Disorders Research Expert Panel on Driver Fatigue and Sleepiness found that the 'time from onset of symptoms to diagnosis of narcolepsy averages 10 years', and that '[m]edical systems have been successful in identifying only a fraction of the population with symptomatic sleep apnoea'.³³

Characteristics of fatigue-related crashes

2.2.12 The Australian Transport Safety Bureau report on fatigue-related crashes refers to analyses of crashes known to have been caused by fatigue which reveal that:

- They generally include single vehicle crashes in which the vehicle drifted off the road, or head-on crashes in which the vehicle drifted onto the wrong side of the road but was not overtaking at the time of the crash.
- They peak at the times associated with increased sleepiness due to the influence of circadian rhythms, specifically between midnight - 6 am and 2 pm - 4 pm.
- They are more likely to occur on rural highways than on urban and rural roads. This is likely to be due to trip length being longer and the increase in drowsiness caused by constant speed and monotony involved in driving on such roads.³⁴

2.2.13 Knowledge of the types of factors common to fatigue-related crashes has allowed researchers and crash investigators to develop 'surrogate measures' to attempt to determine which motor-vehicle crashes are caused by fatigue. By analysing motor vehicle crashes in light of the above

²⁸ Austroads, above n 26, 87.

²⁹ *Newcastle Sleep Disorders Centre website*, <http://www.newcastle.edu.au/centre/nsdc/aboutsleep/sleepapnoea.html> (accessed 17 July 2007).

³⁰ Austroads, above n 26, 88; NCSDR/NHTSA, above n 14, 13.

³¹ Austroads, above n 26, 88.

³² J Horne and L Reyner, 'Vehicle accidents related to sleep: a review' (1999) 56 *Occupational and Environmental Medicine* 289; F Barbé et al, 'Automobile Accidents in Patients with Sleep Apnoea Syndrome: An Epidemiological and Mechanistic Study' (1998) 158 *American Journal of Respiratory and Critical Care Medicine* 18. Horne and Reyner also cite a study where no increased risk was found.

³³ NCSDR/NHTSA, above n 14, 18.

³⁴ K Dobbie, above n 8, 7.

factors, researchers and investigators hope to better identify fatigue-related crashes.³⁵ Forms of surrogate measures are used in New South Wales, Queensland and Western Australia to analyse motor vehicle crashes.³⁶ In its report into fatigue-related crashes, the Australian Transport Safety Bureau formulated an operational definition of fatigue and analysed data gathered from fatal motor-vehicle crashes in all states and territories during 1998. By applying the operational definition of fatigue, the report found that 16.6 per cent of fatal crashes and 19.6 per cent of fatalities in Australia were identified as fatigue related.³⁷

Sleep research and driving

2.2.14 A number of studies have been conducted by sleep researchers to examine the extent to which drivers may be aware of sleepiness prior to a fall-asleep incident. This research potentially has a critical role to play in the assessment of the legal issues concerning drivers who fall asleep, as a key question in any trial is likely to be whether the accused had prior warning of the onset of sleep.³⁸ This is relevant both to the question of the dangerousness/negligence of the driving, but also to the defence of honest and reasonable mistake (that is, the belief of the accused that it was safe to drive).

2.2.15 In a survey of vehicle crashes related to sleep, Horne and Reyner noted the following:

- Sleep-related motor vehicle crashes are more likely to occur during periods of ‘[l]ong, undemanding and monotonous driving’, conditions usually found on highways. Such crashes are less likely to occur in urban situations as the driving environment is more stimulating.³⁹
- Prescribed drugs and alcohol are more likely to produce sleepy effects if taken at times when the circadian rhythm of sleepiness is greater. Thus, alcohol consumed in the early afternoon is twice as likely to produce sleepiness as the same amount of alcohol taken in the early evening.⁴⁰
- Many drivers who fall asleep at the wheel will not report having fallen asleep. Although in some cases this may be due to fear of incrimination and other like factors, studies have shown that if a person is woken within a minute or two of having fallen asleep, they may not be aware that they had fallen asleep. Given that most drivers cannot be asleep for longer than a few seconds before causing a crash and that the crash may then cause the driver to wake up, this may well explain why many drivers involved in sleep related motor vehicle crashes do not recall having fallen asleep.⁴¹
- While drivers may not recall having fallen asleep ‘it is very likely that they were aware of the precursory feeling of sleepiness’.⁴² They referred to a Swedish study where 12 people were made to drive on a five km track until they fell asleep behind the wheel or stopped driving for other reasons. The Swedish research found that all 12 subjects ‘had felt very drowsy on occasions during the closed track driving. Difficulties with vision were reported by all subjects’. Only seven of the subjects completed the experiment, the other five having stopped for other reasons. The remaining seven dropped off to sleep, with all reporting having spent periods of

³⁵ Ibid, 1, 6.

³⁶ Ibid, 7.

³⁷ Ibid, 11.

³⁸ See discussion in Part 4.

³⁹ Horne and Reyner, above n 32, 290.

⁴⁰ Ibid, 290.

⁴¹ Ibid, 291.

⁴² Ibid, 291.

driving fighting sleep. They estimated fighting sleep for periods ranging from a couple of minutes to half an hour. Importantly, ‘none of the 12 subjects believed it was possible to fall asleep while driving without any pre-warning whatsoever’.⁴³ In their article the researchers stated that their findings supported the conclusion that ‘it is virtually impossible to fall asleep whilst driving without any warning whatsoever’.⁴⁴ Horne and Reyner also conducted a study in 1998 of 28 healthy drivers to assess the association between their perceptions of sleepiness and their driving impairment in a car simulator in situations where they had been limited to five hours sleep the night before. During the experiment each subject was asked about their level of sleepiness and asked to assess the likelihood of falling asleep. Horne and Reyner found that their drivers were aware of the precursory feelings of sleepiness and generally had insight into the likelihood of falling asleep. The number of incidents (where the simulator recorded wheels crossing a line marking or leaving the lane entirely) increased as the feelings of sleepiness worsened. Major incidents were recorded when the subjects fell asleep and all fall-asleep incidents were preceded by self-reported sleepiness and after a lengthy period of fighting sleep.⁴⁵ They also found, however, that ‘some subjects failed to appreciate that extreme sleepiness is accompanied by a high likelihood of falling asleep.’⁴⁶

- The best remedy for sleepy drivers is to stop driving as soon as possible. Methods such as allowing cold air on the face or turning up the radio provide only temporary benefits. The best available counter-measure to combat sleepiness is to sleep. Studies show that 15 minute naps every six hours during a 35 hour period of no sleep are effective in maintaining performance. Naps longer than 20 minutes result in grogginess and can therefore be counterproductive.⁴⁷ Caffeine in combination with a 15 minute nap is even more effective.

In light of the above, Horne and Reyner conclude that ‘[v]ehicular accidents related to sleep can be reduced through a greater awareness by drivers and employers of the danger of driving while sleepy.’⁴⁸ They advocate campaigns to better educate drivers that sleepiness portends sleep, and that sleep can come on more rapidly than a driver may realise.⁴⁹

2.2.16 In a later study, Horne and Baulk compared their subjects’ subjective level of sleepiness with EEG activity indicative of sleepiness and found that participants were aware of their physiological sleepiness.⁵⁰ They write that ‘with the possible exception of rare clinical conditions ..., sleep is not known to occur spontaneously from an alert state, that is, healthy individuals do not experience unforwarned “sleep attacks”’.⁵¹ This finding appears to be consistent with other research.⁵²

⁴³ H Lisper et al, ‘Relation between time to falling asleep behind the wheel on a closed track and changes in subsidiary reaction time during prolonged driving on a motorway’ (1986) 29 *Ergonomics* 445, 448.

⁴⁴ Ibid, 450.

⁴⁵ L Reyner and J Horne, above n 19, 122.

⁴⁶ Ibid, 120.

⁴⁷ J Horne and L Reyner, above n 32, 292-293.

⁴⁸ Ibid, 293.

⁴⁹ Ibid.

⁵⁰ J Horne and S Baulk, ‘Awareness of sleepiness when driving’ (2004) 41 *Psychophysiology* 161, 164.

⁵¹ Ibid, 161.

⁵² See H Lisper et al, above n 43; M Atzram et al, ‘Can sleep attacks occur without feeling sleepy?’ (2001) 24 *Sleep* 428; H Nabi et al, ‘Awareness of driving while sleepy and road traffic accidents: prospective study in GAZEL cohort’ *BMJ*, doi:10.1136/bmj.38863.638194.AE (published 23 June 2006).

2.2.17 A recent Australian study examined the capacity of individuals to predict their driving ability after extended wakefulness. In Jones et al's study, it was found that 'participants had a reasonably accurate perception of when their driving ability had meaningfully declined'.⁵³

2.2.18 In a recent French study, 13 299 participants were asked questions about sleepiness and other driving behaviour using a self administered driving behaviour and road safety questionnaire. This study found a 'robust association between self assessed driving while sleepy and the risk of serious road traffic accidents in the next three years'.⁵⁴ The results suggested that while drivers were aware that they are sleepy while driving, they did not act accordingly. In other words drivers did not stop even though they were aware that they were sleepy. Nabi et al suggest that 'drivers may either underestimate the impact of sleepiness on their driving performance or overestimate their capacity to fight sleepiness'.⁵⁵

Relevance of sleep studies to the legal issues associated with falling asleep while driving

2.2.19 As stated above, studies that examine awareness of sleepiness have significance to the legal issues surrounding falling asleep at the wheel given that they suggest that 'sleep does not occur spontaneously without warning'.⁵⁶ Given the legal significance of such a finding, it is necessary to consider the extent to which the research findings ought to be applied in criminal trials involving fall-asleep incidents resulting in crashes. There have been suggestions that caution ought to be exercised in accepting a conclusion that sleep does not occur without warning. Rajaratnam and Jones suggest that 'current research into the question of awareness of sleepiness while driving is limited, as is research into the question of whether an individual's capacity to self-assess driving competence is significantly impaired by sleepiness'.⁵⁷ There has been further research in this area by Jones et al, who concluded that 'it is reasonable to focus on a person's perception of the situation, as it does have some insight into objective reality'.⁵⁸ In other words, their 'findings suggest that the participants had a reasonably accurate perception of when their driving ability had meaningfully declined'.⁵⁹

2.2.20 In an article dealing with the legal issues arising in crashes caused by sleepiness, Rajaratnam refers to the use of expert testimony in the prosecution of a truck driver in *R v Franks*.⁶⁰ Rajaratnam noted that testimony relied on 'laboratory-based "simulator" driving studies'. It was suggested that the difference between the laboratory environment and that actually experienced by drivers may provide a basis for criticism of the evidence of such experts.⁶¹ Jones et al write that:

There is a question about whether the results obtained in the laboratory are generalisable to the fatigued driver, as most of the studies involve single periods of sleep deprivation, whereas a typical fatigued driver would have either have had some sleep or experienced a series of less than optimal sleep opportunities over the prior few days.⁶²

⁵³ C Jones et al, 'Self-awareness of impairment and the decision to drive after an extended period of wakefulness' (2006) 23 *Chronobiology International* 1253, 1260.

⁵⁴ H Nabi et al, above n 52, 3.

⁵⁵ Ibid, 4.

⁵⁶ Horne and Reyner, above n 32, 289.

⁵⁷ S Rajaratnam and C Jones, 'Lessons about sleepiness and driving from the Selby Rail Disaster Case: *R v Neil Hart*' (2004) 21 *Chronobiology International* 1073, 1076.

⁵⁸ C Jones et al, above n 53, 1261.

⁵⁹ Ibid, 1260. See also S Baulk et al, *Managing Driver Fatigue: Quantifying real work performance impairment*, (2006) Centre for Sleep Research, University of South Australia.

⁶⁰ (1999) VSCA 39.

⁶¹ S Rajaratnam 'Legal Issues in Accidents Caused by Sleepiness', (2001) 30 *Journal of Human Ergology* 107, 108.

⁶² C Jones et al, above n 9, 66.

2.2.21 The reported studies all involve situations where the subject is asked specific questions about their level of sleepiness, which could conceivably impact on the level of each subject's perception of sleepiness. In Horne and Baulk's later study, they address this issue and write:

To return to our more important finding relating to the awareness of sleepiness, would our drivers have known they were sleepy had we not asked them? If not, then one would have to accept that it is common for healthy drivers to have unforwarned and spontaneous 'sleep attacks' eventuating in accidents. However, this seems unlikely, because as we have previously shown drivers who run off the road (rather than have a more minor lane 'drift) in our simulator and actually 'crash' have already reached Sleepiness Scale scores of 8 or 9, which embody 'fighting' sleep. Under real driving conditions 'fighting sleep' implies that the driver would be performing acts such as opening the window and so forth, in attempts to overcome sleepiness and, in our opinion, these acts are self-evident of sleepiness.⁶³

2.2.22 A further limitation is that it is unclear how the results of any study can be applied to different circumstances and different periods of sleep limitation. For example, in Horne and Baulk's study the participant's sleep was restricted to five hours. They acknowledge that 'it could therefore be argued that our findings are only relevant to the level of sleepiness we induced, and that perhaps a sleepier driver [that is, one who had further sleep limitation] has less forewarning'.⁶⁴ Against this, they assert that the sleepier driver would still be responsible for any crash caused as the driver drove aware of their inadequate sleep, even if they had less forewarning of the onset of sleep.

2.2.23 In some jurisdictions, criminal liability for death caused by a motor vehicle crash that is the result of driver fatigue is defined in terms of a certain amount of sleep. For example, 'Maggie's law' in New Jersey defines fatigue as more than 24 hours of continuous sleep deprivation.⁶⁵ There is certainly a danger in attributing legal liability on the basis of the driver having had particular amount of sleep in the time preceding the crash as it appears that there is a high degree of variation between individuals.⁶⁶ Rajaratnam also discusses the limitations of sleep research if a high degree of variation is shown to exist between individuals.⁶⁷ This is especially a concern given the small numbers of people involved in the studies that have so far been conducted which may impact on the ability to assess such variation between individuals.

2.2.24 There is also concern about the application of the findings of these sleep studies to people with sleep disorders. As Desai et al have noted, the studies conducted have all involved healthy subjects, not those with any sleep disorders. They suggest that further research is required to study 'the perception of sleepiness before sleep onset' in other groups, particularly those with obstructive sleep apnoea.⁶⁸

⁶³ J Horne and S Baulk, above n 50, 164.

⁶⁴ Ibid.

⁶⁵ See discussion in A Fletcher et al, 'Countermeasures to driver fatigue: a review of public awareness campaigns and legal approaches' (2005) 29 *Australian and New Zealand Journal of Public Health* 471. See below 6.4.

⁶⁶ See M Ingre et al, 'Subjective sleepiness, simulated driving performance and blink duration: examining individual differences' (2006) 15 *Journal of Sleep Research* 47.

⁶⁷ Rajaratnam, above n 61, 109.

⁶⁸ A Desai et al, 'Fatal distraction: a case series of fatal fall asleep road accidents and their medicolegal outcomes' (2003) 178 *MJA* 396, 399.

Part 3

Current legislative and procedural framework in Tasmania

3.1.1 This Part provides an overview of the offences relevant to the circumstances where a person causes death or serious injury while driving a motor vehicle. In Tasmania, the relevant offences are contained in the *Criminal Code*, the *Traffic Act 1925* and the *Police Offences Act 1935*. As a preliminary matter, it is important to recognise that criminal offences are divided into indictable offences or crimes, and summary offences. This classification is important because it determines the court and procedure, as well as the applicable principles of criminal responsibility. The *Code* applies to all indictable offences and to summary offences with a *Code* parallel.⁶⁹ Indictable offences are heard in the Supreme Court. Summary offences are heard in the Magistrates Court. The common law principles of criminal responsibility apply to summary offences that have no parallel offence contained in the *Code*.⁷⁰

3.2 Criminal liability for driving causing death

3.2.1 Under the current criminal law in Tasmania, a person who drives a motor vehicle which is involved in a fatal crash faces the possibility of being charged with a number of different offences under the *Criminal Code* or the *Traffic Act 1925*. These are murder, manslaughter, causing death by dangerous driving and causing death by negligent driving. The crime of murder is the most serious charge that can be laid where death has arisen out the use of a motor vehicle and would only be applicable in cases where the vehicle was used as a weapon.⁷¹ Such a charge would not be applicable in the case of a person who caused the death of another by falling asleep at the wheel.

Manslaughter

3.2.2 The crime of manslaughter is created by s 159 of the *Criminal Code*. A charge of manslaughter is usually reserved for the most serious cases where the driving of a motor vehicle results in the death of another.⁷² As a matter of practice, manslaughter is reserved ‘for those cases involving homicide caused by extreme culpability arising out of situations of patent danger created, typically, by the combination of high speed and intoxication’.⁷³

⁶⁹ Section 36 *Acts Interpretation Act 1931* (Tas). A summary offence has a *Code* parallel if it is sufficiently similar to a crime in the *Code*, see *Gow v Davies* (1992) 1 Tasmania R 1, (Slicer J).

⁷⁰ Section 4(3) *Criminal Code Act 1924*.

⁷¹ The crime of murder is created by s 158 of the *Criminal Code*. See *R v Mayne*, Supreme Court of Tasmania, 12 September 2005, (Crawford J).

⁷² *O'Brien*, Serial No 43/1985, 1 (Wright J).

⁷³ *Ibid*, 1- 2 (Wright J).

Elements of the offence

3.2.3 Indictments for motor manslaughter typically rely on s 156(2)(b) of the *Criminal Code*, where a person is killed by an omission amounting to culpable negligence to perform a duty tending to the preservation of human life. In order to secure a conviction for manslaughter by criminal negligence where a motor vehicle is involved, it must be shown that:

(a) *the driver of the vehicle owed a duty to the victim to preserve life* – under s 150 of the *Criminal Code*, a person who has ‘anything in his charge or under his control... which, in the absence of precaution or care in its use or management may endanger human life’ has a duty to ‘take reasonable precautions against, and to use reasonable care to avoid, such danger.’ Motor vehicles are frequently cited by courts as the very type of ‘thing’ contemplated under s 150.⁷⁴

(b) *that this duty was breached by an omission to perform that duty* – the failure to take proper precautions in the use of a motor vehicle amounts to an omission to perform the duty to preserve human life specified in s 150 of the *Code*.⁷⁵

(c) *that the omission amounted to culpable negligence* – this is a question of fact to be decided on the circumstances of each case.⁷⁶ In *Bateman*, Lord Hewart stated that:

in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment.⁷⁷

This approach has been adopted in Tasmania.⁷⁸ In *Hall*, Crisp J noted in his charge to the jury that ‘the criminal degree of negligence of which you must be satisfied which must be more than that slight degree as would satisfy a civil case’ and it ‘must be more than just a simple lack of care due to thoughtlessness, inadvertence or inattention’.⁷⁹ A clear, or gross, departure from expected standards of driving would need to be demonstrated to found such a charge.

(d) *that the omission caused the death of the victim*.

Procedure and sentencing

3.2.4 This crime is tried in Supreme Court and is prosecuted by the Office of Director of Public Prosecutions. The maximum penalty following a conviction for manslaughter is 21 years imprisonment.⁸⁰

3.2.5 Where a person is tried for manslaughter, the alternative verdicts of causing death by dangerous driving under s 167A of the *Criminal Code* or reckless driving under s 32(1) of the *Traffic Act 1925* are available.⁸¹

⁷⁴ See *McCallum* [1969] Tas SR 73, where Burbury CJ observed that the phrase ‘use or management’ in s 150 ‘refers to the use or management for which the thing is expressly designed and would ordinarily be used; and if it is a thing which when it is used for its designed purpose may cause harm in the absence of proper precautions... such as a motor car... then I think the section imposes a duty’ [emphasis added].

⁷⁵ See discussion of requirements for manslaughter under s 156(2)(b) in J Blackwood and K Warner, *Tasmanian Criminal Law: Text and Cases* (2006) 610-634.

⁷⁶ *Criminal Code*, s 156(3).

⁷⁷ (1925) 19 Cr App R 8, 11.

⁷⁸ See, *Hall* Tas Unreported Serial No 122/1962, 2 (Crisp J).

⁷⁹ *Ibid*, 2.

⁸⁰ *Criminal Code*, s 389(3).

Causing death by dangerous driving

3.2.6 This offence is created by s 167A of the *Criminal Code* which provides that:

Any person who causes the death of another person by the driving of a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including in the case of the driving of a motor vehicle on a public street, the nature, condition and use of the street, and the amount of traffic which is actually at the time or which might reasonably be expected to be, on the street, is guilty of a crime.

Prior to the introduction of this offence in 1975, a driver who caused the death of another through the use of a motor vehicle could be charged with manslaughter, an offence under the *Traffic Act 1925* such as reckless driving, or with a regulatory offence.⁸²

3.2.7 In a survey of Tasmanian sentencing cases between 1997 and March 2007,⁸³ convictions for manslaughter arising out the use of motor vehicle and convictions for causing death by dangerous driving were both predominately associated with excessive speed and/or high blood alcohol readings.⁸⁴ It appears that the difference between manslaughter arising out the use of a motor vehicle and causing death by dangerous driving is one of degree.⁸⁵ The required fault for dangerous driving is a lesser standard than the required fault for manslaughter. As discussed above, conviction for manslaughter requires proof of culpable negligence – negligence showing such a disregard for safety that it is deserving of punishment. Dangerous driving (as will be explained in more detail below) requires proof of serious potentiality of danger to others and some feature of the driving which can be identified as subjecting the public to some risk over and above that ordinarily associated with driving a motor vehicle. There were no Tasmanian cases found where a driver was convicted of the offence of causing death or grievous bodily harm by dangerous driving in circumstances where the driver had fallen asleep.

Elements of the offence

3.2.8 In order to secure a conviction for this crime, the prosecution must establish that the accused was driving at ‘a speed or in a manner which is dangerous to the public’. In *McBride v The Queen*⁸⁶ the High Court considered a similar provision under s 52A of the *Crimes Act 1900* (NSW). Barwick CJ held that a court must ‘determine and present to the jury what precisely is the manner of driving which the Crown alleges the accused has pursued and which it claims is dangerous to the public’.⁸⁷ In

⁸¹ *Criminal Code* s 334.

⁸² The offence of reckless driving was introduced in 1957 and made an alternative offence to manslaughter. It was said that the amendments were made because of the reluctance of juries to convict motorists of manslaughter, see *R v Rau* [1972] Tas S R 59, 68 (Chambers J).

⁸³ The cases were obtained by a search of Tasinlaw.

⁸⁴ Manslaughter – *Hanson*, Tas Supreme Court, 26/3/07; *Riley*, Tas Supreme Court, 19/9/02; *Shipton* [2003] TASSC 23; *Watson* [2004] TASSC 51; *Wilson*, Tas Supreme Court, 23/10/2000; *Haddock*, Tas Supreme Court, 25/5/1999; *Salter*, Tas Supreme Court, 3/7/1997; *Bradford*, Tas Supreme Court, 12/2/1997. Causing death by dangerous driving – *Brazendale*, Tas Supreme Court, 12/2/04; *McGuire*, Tas Supreme Court, 18/4/05; *Barnes*, Tas Supreme Court, 6/8/03; *Taylor*, Tas Supreme Court, 4/3/02; *Dallas*, Tas Supreme Court, 8/2/06; *Yates*, Tas Supreme Court, 31/3/06; *Blake*, Tas Supreme Court, 19/6/06; *ALC*, Tas Supreme Court, 7/2/06; *Dowling*, Tas Supreme Court, 27/10/06; *Walker*, Tas Supreme Court, 8/12/00; *PMA*, Tas Supreme Court, 28/9/00; *Broughton*, Tas Supreme Court, 24/7/00; *Boweman*, Tas Supreme Court, 12/4/00.

⁸⁵ In *R v O'Brien*, (1987) 6 MVR 75, 80, Wright J stated that ‘whilst it may be difficult to jurisprudentially distinguish it from the analogous offence of **dangerous driving** causing death, it is perceived by lawyers and laymen alike as being a more serious crime and therefore, one deserving more severe punitive measures’.

⁸⁶ (1966) 115 CLR 44.

⁸⁷ (1966) 115 CLR 44, 49.

Tasmania, complaints and/or indictments for offences such as dangerous driving causing death, reckless driving and negligent driving will list as the particulars of the offence with which a person is charged the specific aspects of driving that the prosecution says are either dangerous or negligent. Barwick CJ further noted that the wording of the section,

imports a quality in the speed or manner of driving which either intrinsically in all circumstances, or because of the particular circumstances surrounding the driving, is in a real sense potentially dangerous to a human being or human beings who as a member or members of the public may be upon or in the vicinity of the roadway on which the driving is taking place... This quality of being dangerous to the public in the speed or manner of driving does not depend upon resultant damage... A person may drive at a speed or in a manner dangerous to the public without causing any actual injury: it is the potentiality in fact of danger to the public in the manner of driving, whether realized by the accused or not, which makes it dangerous to the public within the meaning of the section.

This concept is in sharp contrast to the concept of negligence. The concept with which the section deals requires some serious breach of the proper conduct of a vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others.⁸⁸

Such statements make it clear that the test to be employed in assessing the dangerousness of a person's driving is an objective one.

3.2.9 This decision was later confirmed by the High Court in *Jiminez v The Queen*.⁸⁹ In this case, the majority of the court constituted by Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ provided the following summary of the provision:

The manner of driving encompasses 'all matters connected with the management and control of a car by a driver when it is being driven'. For the driving to be dangerous for the purposes of s 52A there must be some feature which is identified not as a want of care but which subjects the public to some risk over and above that ordinarily associated with the driving of a motor vehicle, including driving by persons who may, on occasions, drive with less than due care and attention. Although a course of conduct is involved it need not take place over a considerable period. Nor need the conduct manifest itself in the physical behaviour of the vehicle. If the driver is in a condition while driving which makes the mere fact of his driving a real danger to the public, including the occupants of the motor vehicle, then his driving in that condition constitutes driving in a manner dangerous to the public. In the same way driving a motor vehicle in a seriously defective condition may constitute driving in a manner dangerous to the public, even though the defect does not manifest itself until such time as the vehicle is out of the control of the driver. But it should be emphasized, and it must always be brought to the attention of the jury, that the condition of the driver must amount to something other than a lack of due care, before it can support a finding of driving in a manner dangerous to the public. Driving in that condition must constitute a real danger to the public.⁹⁰

3.2.10 Following from this line of reasoning, it is clear that a mere departure from the laws and regulations governing the use of motor vehicles in public streets will not automatically constitute dangerous driving. The provision clearly specifies that where speed is involved, it must be a speed that is dangerous to the public. Whilst speed limits give an indication of accepted community standards, a breach of such standards will not necessarily amount to dangerousness. Similarly, where alcohol or drugs are concerned, it follows that evidence that a person drove with alcohol in his/her body in excess of the prescribed concentration would not be sufficient to establish dangerousness. It would need to be shown that the concentration of alcohol and/or drugs and its effect on the particular driver was such to render the resultant driving objectively dangerous. Evidence that a person continued to drive whilst

⁸⁸ (1966) 115 CLR 44, 49 – 50.

⁸⁹ (1992) 173 CLR 572.

⁹⁰ *Jiminez v The Queen* (1992) 173 CLR 572, 579 (reference omitted).

drowsy and in danger of falling asleep may mean that the accused was driving in a dangerous manner. However, ‘various matters will be relevant in determining that as an objective fact. For example, how long the defendant had been driving; lighting (day or night); degree of heating or ventilation; how tired the defendant was and any warning of drowsiness’.⁹¹

Procedure and sentencing

3.2.11 This crime is also tried in Supreme Court and prosecuted by the Office of Director of Public Prosecutions. A conviction of this crime carries with it a maximum penalty of 21 years imprisonment.⁹² There are no alternative verdicts specified for the offence of causing death by dangerous driving.

Negligent driving causing death

3.2.12 This offence is created by the *Traffic Act 1925* s 32(2A) which provides that ‘[a] person must not cause the death of another person by driving a motor vehicle on a public street negligently’. In determining whether a motor vehicle is being driven negligently, the circumstances of the case, the nature, condition and use of the public street and the amount of traffic that is actually at the time, or might reasonably be expected to be, on the public street are to be taken into account.⁹³ It is a summary offence and common law principles of criminal responsibility apply.

3.2.13 This offence was enacted in April 2000 following a recommendation by Coroner Ian Matterson that the Government consider introducing an intermediate offence between dangerous driving causing death and negligent driving. The view was that a person whose driving was negligent and resulted in the death of another could only be charged with negligent driving, which was punishable by fine and/or imprisonment. It was observed that the absence of such an intermediate offence occasionally caused police to charge persons with causing death by dangerous driving in circumstances where the driving may have been merely negligent.⁹⁴

Elements of the offence

3.2.14 The ingredients of the offence are identical to those for negligent driving under s 32(2) of the *Traffic Act 1925* save for the additional element of causing death. In *Wintulick v Lenthall*, Murray CJ held that:

[n]egligence is the breach of a legal duty to take care, and the duty imposed by the law on persons who drive vehicles on a public road is that they shall manage them with the same degree of care as an ordinary prudent man would deem necessary in the circumstances presented to him, in order to avoid injuring or causing damage to the person or property of others who may be using the road. The standard, it will be noted, is not that of the exceptionally careful man, nor is it that which the actual driver may consider to be sufficient, but the standard of the average man who has regard for the safety and the rights of others.⁹⁵

⁹¹ Blackwood and Warner, above n 75, 778.

⁹² *Criminal Code*, s 389(3).

⁹³ *Traffic Act 1925*, s 32(2C).

⁹⁴ See Tasmania, *Parliamentary Debates*, House of Assembly (second reading of *Driving Offences (Miscellaneous Amendments) Bill 1999*) 6 April 2000, 43-127, (Mr Peter Patmore, Attorney-General).

⁹⁵ [1932] SASR 60, 63

3.2.15 Negligent driving can arise in the context of either an act or omission, that is, where a person either does ‘what an ordinary prudent man would not do’ or fails to do ‘what an ordinary prudent man would do in the circumstances’.⁹⁶ Murray CJ further explained that:

[t]he duty of motor drivers to take care when driving on a public road.... involves, amongst other things, keeping a proper look out, giving timely warning of their approach to other persons who may not be aware of their coming, exercising proper control over the engine and steering gear of their cars, and using the brakes when necessary.⁹⁷

3.2.16 It can be seen from the above discussion about dangerous driving that the difference between the concepts of dangerous and negligent driving is one of degree. In negligent driving, the question is whether the driving falls short of the standard of driving expected of the reasonably prudent driver. Where dangerous driving is in issue, the question is whether the driving is such that it constitutes a serious breach of the proper conduct of a motor vehicle on the roadway giving rise to a real risk of dangerousness.

3.2.17 In determining whether the accused’s driving was negligent for the purposes of section 32(2A), it is clear that the prosecution is not required to prove that the defendant’s negligence was culpable. In other words, the prosecution does not have to prove negligence to a standard approximating the standard for negligence required for a conviction for manslaughter.⁹⁸ Similarly, the civil maxim *res ipsa loquitur* (that is, ‘the event speaks for itself’)⁹⁹ has no application in criminal prosecutions for negligent driving. Cases where vehicles cross to the wrong side of the road, leave the road, fail to negotiate bends or intersections are examples of events that give rise to the inference of negligence on the part of the defendant in civil cases. The prosecution cannot rely on this presumption in criminal cases. However, ‘the facts may be so strong that the only inference is that there has been careless driving unless and until something is suggested by a defendant by way of explanation’.¹⁰⁰

Procedure and sentencing

3.2.18 This is a summary offence. A police prosecutor prosecutes this offence in the Magistrates Courts. Following conviction, the maximum penalty available for a first offence is a fine not exceeding 10 penalty units and imprisonment for a term not exceeding one year. These penalties are doubled for subsequent offences.

3.3 Criminal liability for driving causing serious injury

3.3.1 Where serious injury (short of death) is caused by driving, a person may face a number of different charges under both the *Criminal Code* and the *Traffic Act 1925*. There is also an offence under the *Police Offence Act 1935*.

3.3.2 There are a number of offences that specifically apply to serious injury caused by the driving of a motor vehicle. These are the offences of dangerous driving causing grievous bodily harm, negligent driving causing grievous bodily harm, and wanton or furious driving.¹⁰¹

⁹⁶ Ibid, 64.

⁹⁷ Ibid, 65.

⁹⁸ *Filz v Knox* [2002] TASSC 82, 2 (Crawford J).

⁹⁹ F Trindade and P Cane, *The Law of Torts in Australia*, (3rd ed, 1999) 465.

¹⁰⁰ *Brown v Baker* [2001] TASSC 113, 2 (Cox CJ).

¹⁰¹ These offences are discussed below.

3.3.3 A number of other offences that are potentially available do not involve driving as an essential ingredient of the offence. For instance, a person who deliberately drives at another person with a motor vehicle and causes them injury could be charged with either committing an unlawful act intended to cause bodily harm (where the act of driving was committed with the intent to cause grievous bodily harm to any person or to resist or prevent the lawful arrest or detention of any person)¹⁰² or simply assault.¹⁰³ Indeed, a person was recently sentenced by the Supreme Court in Tasmania to six months imprisonment for an assault committed with a car.¹⁰⁴

3.3.4 Further, under s 172 of the *Criminal Code*, ‘any person who unlawfully wounds or causes grievous bodily harm to any person by any means whatever’ may be convicted of the offence of wounding or causing grievous bodily harm. In the case where a wound or grievous bodily harm is caused by the use of a motor vehicle, the offence would arise where the driver intended to cause a wound/grievous bodily harm, or foresaw or adverted to the likelihood of doing so yet nonetheless ignored that risk and caused a wound/grievous bodily harm to another.¹⁰⁵ In addition, the offence of wounding or causing grievous bodily harm under the *Criminal Code*, s 172 can be proven by relying on criminal negligence.¹⁰⁶ For example, in *Lovell*,¹⁰⁷ the accused was convicted of manslaughter and causing grievous bodily harm on the basis of culpable negligence following a motor vehicle crash. In *R v Todd Burnett*, a driver of a motor vehicle that was involved in a crash which resulted in the death of one person and serious injuries to another pleaded guilty to one count of dangerous driving causing death and one count of causing grievous bodily harm. The driver had been drinking heavily and taking Serepax and Valium. The trial judge accepted that he had no wish to cause death or serious injury. A global penalty of 12 month period of imprisonment was imposed along with a 3 year licence disqualification.¹⁰⁸

Dangerous driving causing grievous bodily harm

3.3.5 The offence of dangerous driving causing grievous bodily harm is contained in s 167B of the *Criminal Code*. It is a relatively new offence having been introduced in April 2000 as part of the raft of reforms which saw the introduction of the offences of negligent driving causing death and grievous bodily harm under ss 32(2A) and (2B) of the *Traffic Act 1925*. During the second reading speech of the *Driving Offences (Miscellaneous Amendments) Bill 1999*, the Attorney-General, Mr Peter Patmore, noted that ‘[w]here a person drives dangerously and causes grievous bodily harm to another person, that person can only be charged with dangerous driving under section 32 of the *Traffic Act*’. He noted that the bulk of such matters were therefore dealt with in the Magistrates Court. He argued that the consequence of causing grievous bodily harm through an act of driving should be taken into account when formulating the appropriate offence for the following reasons:

- it is generally accepted in law that consequences can affect the nature of the offence as illustrated by the different offences of murder and manslaughter and, indeed, the offence of causing death by dangerous driving;
- the public sense of justice requires that the very bad driver who has caused grievous bodily harm to someone else should be guilty of a more serious offence than simply dangerous driving – this exemplifies the concern for the safety of others;
- if someone drives so badly as to be reckless and dangerous, the consequences are not ‘fortuitous’, for the driver has created a real risk of injury.¹⁰⁹

¹⁰² *Criminal Code*, s 170(1)(a).

¹⁰³ *Criminal Code*, s 184.

¹⁰⁴ *R v Mark Andrew Wright*, 11 February 2004, Evans J.

¹⁰⁵ *Vallance* (1961) 108 CLR 56; *R v Bennett* [1990] Tas R 2.

¹⁰⁶ *Nelligan* [2005] TASSC 94.

¹⁰⁷ Tas Supreme Court, 1/5/91.

¹⁰⁸ *R v Todd Burnett*, 1 August 1996, Crawford J.

¹⁰⁹ *Parliamentary Debates*, above n 94.

3.3.6 While a person who causes grievous bodily harm as a result of a motor vehicle crash could be charged with causing grievous bodily harm by criminal negligence under s 172 and 150 of the *Code*,¹¹⁰ the offence of dangerous driving causing grievous bodily harm requires proof of a lesser standard of negligence.

Elements of the offence

3.3.7 The elements of this offence are identical to those of dangerous driving and dangerous driving causing death,¹¹¹ except for the requirement that the driving cause grievous bodily harm to another person. 'Grievous bodily harm' is defined in s 1 of the *Criminal Code* as 'any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause serious injury to health'. In *Tranby* [1991] 52 A Crim R 228 it was held by De Jersey J that the concept of grievous bodily harm did not encompass 'a cosmetic disability with no consequence upon the functioning of the body'.¹¹²

Procedure and sentencing

3.3.8 This crime is tried in Supreme Court and prosecuted by the Office of Director of Public Prosecutions. A conviction of this crime carries with it a maximum penalty of 21 years imprisonment.¹¹³

Negligent driving causing grievous bodily harm

This offence is contained in s 32(2B) of the *Traffic Act 1925*. As previously indicated, this offence was introduced in April 2000 at the same time as the offences of negligent driving causing death and dangerous driving causing grievous bodily harm. During the second reading speech the Attorney-General Mr Peter Patmore, noted that there were no offences which dealt with the consequences of negligent driving other than the offence of negligent driving *simpliciter*. Negligent driving is an offence which is punishable by fine and/or disqualification.¹¹⁴ This intermediate offence was introduced in recognition of the fact that motor vehicle crashes cause serious injury and suffering to persons.¹¹⁵ This is a summary offence and common law principles of criminal responsibility apply.

Elements of the offence

3.3.9 The elements of this offence under s 32(2B) of the *Traffic Act 1925* are identical to those for negligent driving or negligent driving causing death,¹¹⁶ save that the driving must be shown to have caused grievous bodily harm to another person. In determining the meaning of 'grievous bodily harm' common law definitions apply as this is a summary offence without a parallel offence in the *Criminal Code*. It has been interpreted at common law to mean 'bodily harm of a serious character'.¹¹⁷

¹¹⁰ For example, *Lovell*, Tas Supreme Court, 1/5/91. See 3.3.4 and *Nelligan* [2005] TASSC 94.

¹¹¹ See 3.2.6 ff.

¹¹² At 237.

¹¹³ *Criminal Code* s 389(3).

¹¹⁴ See s 32(2) *Traffic Act 1925*.

¹¹⁵ *Parliamentary Debates*, above n 94.

¹¹⁶ See 3.2.12 ff.

¹¹⁷ *Bronitt and McSherry*, *Principles of Criminal Law* (2nd ed, 2005) 516 referring to *DPP v Smith* [1961] AC 290, 334 (Viscount Kilmuir LC); *R v Metharam* [1961] 3 ALL ER 200; *R v Cunningham* [1982] AC 566; *R v Saunders* [1985] Crim LR 230.

Procedure and sentencing

3.3.10 This offence is prosecuted in the Magistrates Court by a police prosecutor. The penalty for a first offence consists of a fine not exceeding 10 penalty units, imprisonment for a term not exceeding six months and disqualification.¹¹⁸ The penalties double for any subsequent offence.¹¹⁹

Wanton or furious driving

3.3.11 Under s 36(1) of the *Police Offences Act 1935*, 'a person in charge of any... vehicle shall not, by wanton or furious riding or driving or racing or other wilful misconduct or wilful neglect, cause any bodily harm to any other person'. Brown notes that the expression 'furious driving' has a legislative history which pre-dates the advent of the motor vehicle.¹²⁰ An almost identical provision exists in NSW in s 53 of the *Crimes Act 1900*. It is also an offence in the United Kingdom,¹²¹ and is used 'particularly where the driving complained of did not take place on a road or other public place within the meaning of the 1988 Act'.¹²² A recent Home Office review of driving offences involving bad driving gave consideration to the abolition of the offence of wanton driving. After consultation, it was decided that the offence should be left in place given its application to private property and non-motorised vehicles.¹²³

Elements of the offence

3.3.12 In *R v Barnard*,¹²⁴ Crisp J considered the meaning of the term 'wanton driving'. He held that the term imported 'a degree of negligence higher than the civil standard' and was synonymous with the term 'recklessly'.¹²⁵ He further stated that the standard of negligent driving that needed to be proved to establish liability under s 36 of the *Police Offences Act 1935* could be equated with the standard of culpable negligence applicable to a charge of motor vehicle manslaughter.¹²⁶ Brown suggests that the term 'furious driving' in contrast with reckless or negligent driving connotes 'intense anger and in this context may suggest unrestrained speed. Arguably, it may contain a different degree of *mens rea* and signify a more deliberate disregard of certain consequences. It may require a measure of justifiable alarm and apprehension on the part of other road users.'¹²⁷

3.3.13 This offence prohibits wanton or furious driving which causes bodily harm to any other person. It is, therefore, necessary to prove that injury resulted from the act of driving. Unlike charges under s 32(2B) *Traffic Act 1925* and s 167B of *Criminal Code*, it need not be proved that *grievous* bodily harm resulted from the culpable driving. Arguably, this charge may still prove useful in circumstances where injury short of grievous bodily harm is caused. It also may be useful in the cases where the driving did not take place on a public street (as required for the offences of negligent driving causing death and negligent driving causing grievous bodily harm).

¹¹⁸ *Traffic Act 1925*, s 32(2B)(a).

¹¹⁹ *Traffic Act 1925*, s 32 (2B)(b).

¹²⁰ Douglas Brown, *Traffic Offences and Accidents*, (3rd ed, 1996).

¹²¹ *Offences Against the Person Act 1861* (UK), s 35.

¹²² K Swift, *Wilkinson's Road Traffic Offences*, (22nd ed, 2005) 5.94.

¹²³ Home Office, *A summary of the responses to the Road Traffic Offences consultation and proposals for the next steps*, <http://www.homeoffice.gov.uk/documents/cons-bad-driving-2005/?version=1> (accessed 28 May 2007), 6.

¹²⁴ [1956] Tas SR 19.

¹²⁵ *R v Barnard* [1956] Tas SR 19, 28.

¹²⁶ *R v Barnard* [1956] Tas SR 19, 28, 29.

¹²⁷ D Brown, above n 120, 99.

Procedure and sentencing

3.3.14 This offence is a summary offence which is usually dealt with in the Magistrates Court. A person charged under s 36, may, however, elect to be tried by a jury in which case the matter will be heard and determined in the Supreme Court. Alternatively, the court before which the person is charged can deem the offence a crime where it considers the offence is of so serious a nature that it should be tried on indictment.¹²⁸ Where the offence is dealt with summarily, the maximum penalty available is two years imprisonment.¹²⁹ Where the person is charged on indictment, the maximum penalty available to the court is 21 years imprisonment.¹³⁰

¹²⁸ *Police Offences Act 1935*, s 36(2).

¹²⁹ *Police Offences Act 1935*, s 36(1A).

¹³⁰ *Criminal Code*, s 389(3).

Part 4

The voluntary act of driving as it applies to fatigue-related crashes

4.1.1 In the previous chapter, this paper examined the offences with which a person could be charged following a motor vehicle crash resulting in death or serious injury. Some of the offences surveyed require that prosecution prove a defendant or accused possessed a particular state of mind at the time of the incident. For example, if a person is charged with causing grievous bodily harm under s 172 of the *Criminal Code*, it must be shown that the person either intended to cause grievous bodily harm or foresaw or adverted to the likelihood of causing grievous bodily harm yet nonetheless ignored that risk and caused grievous bodily harm to another. Not all offences, however, involve a particular state of mind as an element of the offence. Such offences are described as strict liability offences.

4.1.2 It is now well settled that the offences of dangerous driving causing death or grievous bodily harm under sections 167A and 167B of the *Criminal Code* and negligent driving causing death or grievous bodily harm under sections 32(2A) and (2B) of the *Traffic Act 1925* are strict liability offences, that is offences where no specific state of mind need be proved but where the defence of honest and reasonable mistake applies. The High Court's decision in *Jiminez v The Queen*, which discussed the analogous offence of culpable driving under s 52A of the *Crimes Act 1900* (NSW), held that:

[d]riving in a manner dangerous to the public is at once both the offence and, if it is relevant, the fault, but it will be a defence to establish an honest and reasonable mistake as to facts which if true would exculpate the driver.¹³¹

Whilst no specific state of mind need be proved, it is necessary to show that the act of driving which is the subject of the charge is a 'conscious and voluntary act'.¹³²

4.2 A voluntary act of driving

4.2.1 In the case of all offences where the charge relates to injury or death caused by the accused's driving, the Crown must prove beyond reasonable doubt that the act of driving was voluntary – that is that the act of driving was a willed act. In other words, the act of driving which is the subject of the charge must be shown to be a 'conscious and voluntary act'.¹³³ In Part 3, it was noted that the classification of offences according to whether they are an indictable offence or crime, or a summary offence was relevant to whether the common law or *Code* principles of criminal responsibility applied. This is relevant to the requirement for a voluntary act of driving. At common law, 'the requisite physical element of a crime must be performed voluntarily in the sense that it must be willed'.¹³⁴ Under the *Criminal Code*, the Crown must prove beyond reasonable doubt that the accused's act was

¹³¹ (1992) 173 CLR 572, 583.

¹³² *Jiminez v The Queen* (1992) 173 CLR 572, 577.

¹³³ *Ibid.*

¹³⁴ Bronitt and McSherry, above n 117, 163.

voluntary and intentional.¹³⁵ This means that the physical act of the accused must be the conscious product of a freely operating will.¹³⁶ As a practical matter, it can be seen that the requirements of voluntariness at common law and under the *Criminal Code* are the essentially same.

4.2.2 An act may be involuntary for three reasons:

- the relevant act was accidental;
- the relevant act was caused by reflex action; or
- when the conduct was performed whilst the accused was in a state of impaired consciousness (the accused is said to operate in state of ‘automatism’).¹³⁷

4.2.3 In driving cases, a person may claim that their driving was involuntary. A person may claim that their driving was not voluntary because it was a reflex action, such as where a person, while conscious, collides with another vehicle while attacked by a swarm of bees.¹³⁸ In the case where a person falls asleep at the wheel and is involved in a crash, a denial that the relevant act of driving was voluntary and intentional gives rise to a claim of automatism. Ashworth has described automatism in the following way:

Automatism is not merely a denial of fault ... It is more of a denial of authorship, a claim that the ordinary link between mind and behaviour was absent the person could not be said to be acting as a moral agent at the time – what occurred was a set of involuntary movements of the body rather than the ‘acts’ of D.¹³⁹

While the prosecution must establish the relevant act was voluntary, it need not be positively proved in all cases. Generally, the relevant act is presumed to be voluntary. In order to displace the presumption that an act is voluntary and intentional, there must be evidence capable of raising a reasonable doubt about the voluntariness of the act, which is attributed to a condition that is not a mental disease.¹⁴⁰

4.2.4 Courts have had difficulty grappling with the issue of voluntariness in cases where the driver has fallen asleep. If a person falls asleep and has a crash, any driving which occurs whilst asleep cannot be said to be the result of a conscious act. This reflects the fundamental principle of criminal responsibility that a person should only be held accountable for conduct that is voluntary and intentional. However, there is a view that a sleeping driver should be held responsible for the injuries caused by any motor vehicle crash. This accords with community concern about the dangers posed by drivers affected by tiredness or some other medical condition which may result in diminished concentration or a loss of consciousness. The difficulties courts have encountered are exacerbated by the reality that there may be few, if any, witnesses available in such cases. Often drivers or passengers sustain injuries which render them unable to recall the events preceding a crash. The way in which courts in various jurisdictions have dealt with this issue has not always been consistent, but now appears to be well settled in Australia following the decision of the High Court in *Jiminez v The Queen*.

¹³⁵ Section 13(1); *Vallance* [1960] Tasmania SR 51.

¹³⁶ *Vallance* (1961) 108 CLR 56, 64 - 65 (Kitto J); *Williams* [1978] Tasmania SR 98, 102 (Neasey J).

¹³⁷ This summary is taken from Bronitt and McSherry, above n 117, 163.

¹³⁸ Note the case of *Moses* [2004] All ER 128 where D was convicted of causing death by dangerous driving when he swerved onto the footpath while trying to swat a wasp that had flown into the bus.

¹³⁹ A Ashworth, *Principles of Criminal Law* (4th ed, 2003) 99.

¹⁴⁰ *The Queen v Falconer* (1990) 171 CLR 30; *Bratty v Attorney-General (Northern Ireland)* [1963] AC 386; *Williams v The Queen* [1978] Tasmania SR 98.

4.3 Decisions pre-Jiminez

4.3.1 Prior to the High Court's consideration of the issue in *Jiminez v The Queen*, the decisions of courts could be roughly divided into three categories:

1. Decisions where the issue of voluntariness was glossed over;
2. Decisions where court held there was not sufficient evidence to displace the presumption of voluntariness; and
3. Decisions where the issue of voluntariness was considered in the light of falling asleep.

In some cases, the decision of the court could be said to fall within more than one of these categories.

1. *Decisions where the issue of voluntariness was glossed over*

4.3.2 The decision of the South Australian Supreme Court in *Virgo v Elding*¹⁴¹ is a clear example of a case in this category. This case dealt with an appeal against the dismissal of a complaint for driving without due care and attention which arose when the respondent, having fallen asleep, ran off the road and into a watercourse. The Special Magistrate hearing the case accepted the respondent's explanation that he fell asleep and held that, absent evidence that the respondent 'had some warning that it was likely that he would fall asleep', he was not prepared to find the complaint proved.¹⁴² By contrast, Angas Parsons J held on appeal that the respondent's 'method of driving is driving without due care, and is a case of *res ipsa loquitur*. A motor car, in the ordinary course of things, does not behave in this way if the driver is exercising due care.'¹⁴³ Further, he stated that the respondent's explanation that he fell sleep without warning was no answer to such a charge:

It may be possible in some cases for a drunken driver to drive with due care, but it is impossible for a driver to do this when asleep, and whether he is overcome by sleep with or without warning is immaterial... It is manifest that a driver who goes to sleep at the wheel is driving without due care, and how sleep came upon him, or whether there was any premonition of its approach, is an irrelevant matter... I may add that a driver, however sleepy he may be, must drive with due care, and if he falls asleep he cannot do so; and, therefore, as in this case, he offends against the section.¹⁴⁴

4.3.3 This analysis was based on the view that the standard of driving expected is an objective one, and applicable in all cases.¹⁴⁵ No consideration was made of the issue of voluntariness in this case. It would seem that Angas Parsons J was suggesting that the same standard of driving is expected regardless of whether the driving complained of was the result of a conscious act or not, therefore suggesting that driving without due care and attention is an absolute liability offence.

4.3.4 A number of cases, particularly in the United Kingdom and the United States, have approached this issue with a view that where a person falls asleep while driving, there is an earlier period during which the driver is falling asleep and feeling drowsy. In such cases it is the duty of a driver to pull over and stop until fully awake, or, to keep him or herself awake. A failure to do so, resulting in a driver falling asleep and losing control of a motor vehicle, may give rise to a number of offences. Consideration initially was not given to whether the driver involved was in fact aware of their state of sleepiness, or whether a lack of awareness would change things. Examples of such

¹⁴¹ [1939] SASR 294.

¹⁴² *Virgo v Elding* [1939] SASR 294, 297.

¹⁴³ *Ibid*, 296.

¹⁴⁴ *Ibid*, 297.

¹⁴⁵ *Ibid*.

reasoning appear in *Kay v Butterworth*,¹⁴⁶ *Hill v Baxter*¹⁴⁷ and *State v Olsen*¹⁴⁸ where a number of other authorities are cited.

4.3.5 In *Kay v Butterworth*¹⁴⁹ and *Hill v Baxter*,¹⁵⁰ the loss of consciousness resulting from falling asleep is contrasted with situations where a person is rendered unconscious through no fault of their own, for example, ‘if he were struck by a stone or overcome by a sudden illness; or if the car was temporarily out of control by his being attacked by a swarm of bees or by wasps’.¹⁵¹ In such cases, automatism may be considered, as ‘it can be said that at the material time he is not driving and, therefore, not driving dangerously’.¹⁵² On the other hand, evidence that a person fell asleep would not give rise to a defence. Lord Goddard CJ stated in *Hill v Baxter* ‘[t]hat drivers do fall asleep is a not uncommon cause of serious road accidents, and it would be impossible as well as disastrous to hold that falling asleep at the wheel was any defence to a charge of dangerous driving. If a driver finds that he is getting sleepy he must stop’.¹⁵³ Pearson J in the same case likened the driver who falls asleep to the person who, knowing they are subject to epileptic fits, is rendered unconscious as a result of such a fit.¹⁵⁴

4.3.6 It should be noted that in the United Kingdom, the doctrine of automatism is limited by doctrine of prior fault. In Ashworth’s consideration of the law of automatism, he observes that:

Many of the early [automatism] cases were motoring offences for which strict liability is imposed and to which automatism is one of the few routes to acquittal. However, since automatism operates as such a powerful exculpatory factor, the courts have attempted to circumscribe its use by defining it fairly narrowly and developing three major doctrines of limitation.¹⁵⁵

4.3.7 One of the limits to the operation of automatism is the doctrine of prior fault as evidenced in the cases of *Kay v Butterworth* and *Hill v Baxter*. This doctrine looks at the blameworthiness of the defendant’s prior conduct - ‘if the “fault” exhibited by the defendant’s “prior” conduct is in itself sufficient to found liability for the offences charged, then the defendant is properly convicted of it under ordinary principles’.¹⁵⁶ So in the context of a driving case, if a driver starts to feel sleepy and fails to stop – the prior fault is continuing to drive and failing to stop at that time. This doctrine aims to ‘prevent [the] defendant taking advantage of a condition if it arose through [the] defendant’s own fault’.¹⁵⁷ So for example in *R v Gary Neil Hart*,¹⁵⁸ where the defendant was charged with the causing death by dangerous driving, the prosecution’s case was that he had fallen asleep and his vehicle had

¹⁴⁶ (1945) 61 TLR 452.

¹⁴⁷ [1958] 1 QB 277, 286.

¹⁴⁸ 160 P 2d 427, 428-429.

¹⁴⁹ (1945) 61 TLR 452.

¹⁵⁰ [1958] 1 QB 277, 286.

¹⁵¹ *Kay v Butterworth* (1945) 61 TLR 452, 453; *Hill v Baxter* [1958] 1 QB 277, 282-283, 286.

¹⁵² *Hill v Baxter* [1958] 1 QB 277, 286.

¹⁵³ *Ibid*, 282.

¹⁵⁴ *Ibid*, 286.

¹⁵⁵ A Ashworth, above n 139, 99. It should be noted that the doctrine of ‘strict liability’ (as applies in Australia) has no equivalent in the United Kingdom (*B v DPP* [2000] 2 AC 428). Brown et al comment that ‘the presumption in favour of mens rea is a presumption in favour of a mens rea standard turning on subjective awareness. If the presumption is rebutted, then liability is absolute (confusingly referred to as “strict” liability in UK decisions)’, Brown et al, *Criminal Laws*, 2006, 380. This was also noted by the High Court in *Jiminez* (1992) 173 CLR 572, 582. This means that the defence of honest and reasonable mistake of fact (as applied to strict liability offences in Australia) is not relevant to driving offences in the United Kingdom. The defendant’s awareness of the risk of falling asleep is relevant to automatism rather than the defence of honest and reasonable mistake.

¹⁵⁶ D Ormerod, *Smith and Hogan’s Criminal Law* (11th ed, 2005) 47.

¹⁵⁷ A Ashworth, above n 139, 104.

¹⁵⁸ [2003] EWCA 1268.

left the road, stopped on a railway line where it collided with a passenger train killing 10 people and causing 94 other casualties. At the trial, evidence was given by a sleep expert about the characteristics of sleep related motor vehicle crashes, as opposed to crashes caused by other factors. The prosecution's case was that 'the applicant fell asleep at the wheel, when he knew or could be expected to know that this would happen to him before it happened'.¹⁵⁹ It was the driving with the necessary pre-warning of sleep that must have occurred that was said to be dangerous. The defence did argue to the contrary but denied that the defendant had fallen asleep.

4.3.8 In *Wilkinson's Traffic Offences* it is stated that:

A driver who allows himself to be overcome by sleep, so that the car mounts the pavement or goes to the wrong side, is guilty at least of careless driving, for he should have stopped when he felt sleep overtaking him.¹⁶⁰

The Crown Prosecution Service charging practice says that driving when too tired to stay awake is an example of circumstances which may support an allegation of dangerous driving.¹⁶¹ This seems to contrast with the Tasmanian practice where recent cases involving a driver falling asleep and causing death as a result of a crash have been charged as negligent driving.¹⁶²

2. ***Decisions where court held there was not sufficient evidence to displace the presumption of voluntariness***

4.3.9 In the Tasmanian case of *R v Ives*¹⁶³ Gibson J was considering what matters were to be left to the jury on a trial for dangerous driving. Following a crash where two people were killed, the driver of the car, which travelled onto the incorrect side of the road, was charged with dangerous driving. He had suffered head injuries as a result of the crash, and his last memory consisted of a vague recollection of following a car about two bends before the scene of the crash. Evidence was called detailing medication he was taking at the time which had a tendency to cause drowsiness. The defendant denied the medication he took on the morning of the crash had ever had that effect. He did not recall having felt drowsy. He gave evidence that he was a driving instructor and ordinarily a careful driver. His lawyer submitted that the issue of voluntariness ought to be left to the jury suggesting it could be inferred from the surrounding circumstances that he either fell asleep, or suffered a loss of consciousness of some kind. Gibson J declined to so direct the jury. He held that:

the suggestion that the conduct of the accused was due to being overcome by sleep or at least drowsiness is not supported by any evidence. The circumstances may give rise to a conjecture but they are not, I think, sufficient to warrant drawing an inference.¹⁶⁴

The presumption of voluntariness was, therefore, not able to be held to have been displaced.

3. ***Decisions where issue of voluntariness considered in light of falling asleep***

4.3.10 In *Dennis v Watt*,¹⁶⁵ the Supreme Court of NSW considered whether a magistrate could properly dismiss a charge of negligent driving where the driver claimed to have crashed as a result of momentarily falling asleep with no prior warning of his inability to keep awake. At first instance, the magistrate had held that he could not be satisfied that the driver had been negligent. The decision was upheld on appeal, the court noting that:

¹⁵⁹ *R v Hart* [2003] EWCA 1268, [33].

¹⁶⁰ K Swift, above n 122, 5.53.

¹⁶¹ http://www.cps.gov.uk/legal/section9/chapter_b.html#14 (accessed 29 May 2007).

¹⁶² See Part 5.

¹⁶³ Tas Unreported Serial No 77/1966.

¹⁶⁴ *Ibid.*

¹⁶⁵ (1942) 43 SR (NSW) 32.

It is difficult to imagine that there can be any difference between such a happening and the circumstance of a driver fainting at the wheel without any previous knowledge or warning that such a calamity might occur. Nor could it be assumed beyond reasonable doubt that absence of sleep for fifteen hours must always in itself and in relation to every driver amount to a warning, more especially as the magistrate has found to the contrary in this case.¹⁶⁶

The court also considered the decision of *Virgo v Elding*, with 2 judges indicating that they did not agree with the case if it was intended to hold that any person who falls asleep at the wheel is necessarily guilty of driving negligently.¹⁶⁷

4.3.11 In *R v Scarth*,¹⁶⁸ the driver of a motor vehicle who ran into three people trying to start a motor-cycle, killing all three, was convicted of manslaughter. The driver had stated following the crash that he had fallen asleep, and that he had not felt sleepy at any time during the night. In summing up, the trial judge directed the jury that being asleep was not an excuse and in itself did not constitute a defence at all. The trial judge was of the view that s 23 of the *Criminal Code* (Qld) which states '[s]ubject to the express provision of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident' expressly excluded consideration of voluntariness where negligence was alleged.¹⁶⁹ This view was rejected on appeal, with Philp J stating that 's 23 does not exclude involuntariness or accident from consideration in negligence cases, but merely makes their consideration subject to the express provisions of the code relating to negligent acts.'¹⁷⁰ All three judges agreed that being asleep at the time of a crash did not of itself amount to a defence.¹⁷¹ However, all three also stated that the jury ought to have been directed:

to consider all the circumstances and, if they found as a fact that the prisoner was asleep at the material time, to consider whether he had fallen asleep suddenly and without warning; and, if he had, whether in all the circumstances he ought to have known that he was likely so to fall asleep; and if they found that he had continued driving with knowledge that he was likely to fall asleep or under such circumstances that he ought to have known that he was likely to fall asleep, they should consider whether he was so criminally negligent as to justify a verdict of 'guilty of manslaughter'.¹⁷²

4.3.12 This issue has also been considered in overseas jurisdictions. In *State v Olsen*, briefly discussed above, the Supreme Court of Utah upheld a verdict of involuntary manslaughter in the case of a truck driver who, as a result of falling asleep, crashed and killed a child playing on the pavement. Whilst the majority of the court was of the view that falling asleep *per se* amounted to culpable negligence, two judges did not agree with this reasoning. In particular, Wolfe J, stated that he could not 'agree that "the fact of going to sleep at the wheel of an automobile, without more, at least presents a question for the jury as to whether the driver was negligent" when such rule is applied to a criminal case'. He referred to numerous authorities and noted that courts in civil cases have paid attention to the events preceding falling asleep to ascertain whether a driver was negligent.¹⁷³ He stated that '[t]he focal point of the inquiry then must be whether or not the driver continued to operate the automobile after such prior warning of the likelihood of sleep so that continuing to drive constituted marked disregard of the safety of others.'¹⁷⁴ Importantly, he noted that:

¹⁶⁶ *Dennis v Watt* (1942) 43 SR (NSW) 32, 36 (Davidson J) see also 36 -37 (Halse-Rogers J).

¹⁶⁷ *Ibid*, 34, 36.

¹⁶⁸ [1945] St R Qld 38.

¹⁶⁹ *R v Scarth* [1945] St R Qld 38, 51.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid*, 42, 54.

¹⁷² *R v Scarth* [1945] St R Qld 38, 55 (Stanley AJ).

¹⁷³ *State v Olsen* (1945) 160 P 2d 427, 429.

¹⁷⁴ *Ibid*, 430.

It is a common experience of man that sleepiness does not overtake the driver of an automobile without some prior warning of its approach... [N]o matter what the cause of sleepiness, whether from exhaust [sic] fumes or complete physical exhaustion, it is not probable that sleep would overtake the driver without him having some [sic] prior warning. The jury may take this probability into account. However, I do not believe that it is correct to say that this raises a presumption of criminal negligence. It is but an evidentiary fact to be submitted to the jury along with all other facts and circumstances. If under all the circumstances the evidence discloses that the driver continued to operate the car without regard to premonitory symptoms of sleepiness, then the jury could find that he was driving in marked disregard of the safety of others. But a mere showing that the defendant went to sleep while driving will not by itself overcome the presumption of innocence or prima facie show criminal negligence sufficient to take the case to the jury.¹⁷⁵

4.3.13 In the Tasmanian case of *Robertson v Watts*¹⁷⁶ Crawford J dealt with an appeal from a lower court where the defendant was found not guilty of negligent driving under s 32(2) of the *Traffic Act 1925*. The appeal proceeded by way of a hearing *de novo*. The defendant in the case claimed to have fallen asleep without warning just prior to the crash that was the subject of the charge and stated '[u]p to dozing off, I had no indication I was going to sleep... I didn't feel sleepy at all prior to losing consciousness'.¹⁷⁷ This explanation was accepted by Crawford J. In his decision, Crawford J examined a number of cases from Victoria, South Australia, Western Australia, New South Wales, Tasmania and England many of which are discussed above. Crawford J approved, amongst others, the decision in *Dennis v Watt*, and held that it was open for him 'to find that if the defendant fell asleep and had no prior warning of his inability to keep awake he was not driving negligently'. He dismissed the complaint, having accepted the defendant's explanation and the proposition that 'if a person could fall asleep under these circumstances, he could do so very suddenly indeed without warning'.¹⁷⁸

4.3.14 In *Kroon v The Queen*,¹⁷⁹ the South Australian Court of Criminal Appeal considered the legal consequences of falling asleep at the wheel in the context of a charge of causing death by dangerous driving. In this case, a truck moved suddenly onto the incorrect side of the road, colliding with a car and causing the death of three people. The truck driver could not explain how the crash occurred. He was uninjured, but denied going to sleep. King CJ observed that 'there appears to be no explanation for this tragic accident except that the appellant lost control of his vehicle by reason of falling asleep'.¹⁸⁰ King CJ stated that while the standard of driving to be applied when assessing dangerousness is an objective one 'it is applicable only to a voluntary act of driving'.¹⁸¹ He referred to a number of cases, including *Dennis v Watt*, and observed that:

the notion that the offences of causing death or bodily injury by dangerous driving, or of negligent driving, can be committed while asleep and that the circumstances in which sleep occurs is irrelevant, has not won general acceptance. At common law criminal liability attaches only to acts or omissions which are voluntary, that is to say the result of an exercise of the will of the accused person. There is a presumption that the legislature, when creating a statutory offence, does not intend to exclude such a basic principle of the criminal law and that the presumption can only be rebutted by express words or the clearest of implications.¹⁸²

He held that 'neither the crimes of causing death or bodily injury by driving in a manner dangerous to the public nor the offence of driving without due care can be committed while asleep' and concluded that the decision of *Virgo v Elding* was wrongly decided.

¹⁷⁵ Ibid.

¹⁷⁶ Serial No 51/1964.

¹⁷⁷ Ibid, 2.

¹⁷⁸ Ibid, 20.

¹⁷⁹ (1990) 52 A Crim R 15.

¹⁸⁰ *Kroon* (1990) 52 A Crim R 15, 16.

¹⁸¹ Ibid.

¹⁸² Ibid, 17.

4.3.15 He did not, however, suggest that falling asleep at the wheel provided an absolute defence. On the contrary, he stated that:

[e]very act of falling asleep at the wheel is preceded by a period during which the driver is driving while awake and therefore, assuming the absence of involuntariness arising from other causes, responsible for his actions. If a driver who knows or ought to know that there is a significant risk of falling asleep at the wheel, continues to drive the vehicle, he is plainly driving without due care and may be driving in a manner dangerous to the public. If the driver does fall asleep and death or bodily injury results, the driving prior to the falling asleep is sufficiently contemporaneous with the death or bodily injury... to be regarded as the cause of the death or bodily injury.

It is clear then that the question how sleep came upon an accused person and whether he had any premonition of it... is the crucial issue in determining whether the period of conscious and voluntary driving which preceded the sleep amounted to the offence or offences charged. There must be very few cases in which a normal healthy person falls asleep at the wheel of a vehicle without any prior warning... I should think that in almost every case a driver, before falling asleep, has a sensation of drowsiness at least for the brief period of time necessary to warn him to stop the vehicle. The cases must be rare in which a driver who falls asleep can be exonerated of driving without due care at least, in the moments preceding sleep.¹⁸³

4.3.16 This important case clearly sets out the approach to be taken by courts dealing with this fraught issue. It provides a framework for considering cases where it is suggested that acts of driving may be involuntary. It also, importantly, suggests that the presumption of voluntariness can be displaced in situations where it is not being specifically asserted that the driver fell asleep. Finally, the case notes that human experience suggests that normal healthy people do not fall asleep without warning.

4.4 Jiminez's case

4.4.1 In this case the courts were dealing with a crash which occurred during a night-time trip from the Gold Coast to Sydney. The driver, Jiminez, had a nap for about four hours in the afternoon. One of his companions drove for the first 400 km. Mr Jiminez slept during this period. He took over the driving at about 3.30 am. At 6.00 am, his car failed to negotiate a bend in the highway, left the road and crashed into a tree. One of the passengers was killed. Mr Jiminez indicated when questioned after the crash that he must have fallen asleep. He stated 'I don't know what happened, I was driving, I was thinking about stopping in the next town. The heater was on.' At trial his evidence was that he intended to stop at the next town for breakfast and that he did not feel like sleeping at all. He was charged with culpable driving under s 52A of the *Crimes Act 1900* (NSW), which is a similar offence to causing death by dangerous driving under s 167A of the *Criminal Code* (Tas).

4.4.2 During his trial, the Crown put their case on the basis that Mr Jiminez had driven 'in a manner dangerous to the public by reason of having closed his eyes or having fallen asleep at the wheel'. The defence case was that Mr Jiminez had no warning he would fall asleep. It was pointed out that Mr Jiminez had rested prior to the journey and had slept in the car at the beginning of the trip. In summing up, the trial judge stated that '[f]inally the defence say to you whilst the events of this early morning are indeed unfortunate there is no evidence to satisfy you beyond reasonable doubt that he drove in a manner dangerous to the public as I have explained to you.'¹⁸⁴ Defence counsel raised with the trial judge that the issue of whether the driving was involuntary had not been mentioned in the summing up. This issue was not vigorously pursued and the trial judge did not add to his summing up.¹⁸⁵ Jiminez was found guilty and sentenced to 6 months periodic detention and disqualified for 5 years.

¹⁸³ Ibid, 18-19.

¹⁸⁴ *The Queen v Jiminez* (1991) 23 NSWLR 394, 411.

¹⁸⁵ Ibid, 410.

High Court appeal

4.4.3 In a joint judgment, six judges of the High Court quashed the conviction and ordered that Mr Jiminez not be retried. McHugh J, in a separate judgment, agreed with the majority's orders. In their decision, the majority firstly made clear that:

if the applicant did fall asleep, even momentarily, it is clear that while he was asleep his actions were not conscious or voluntary (an act committed while unconscious is necessarily involuntary) and he could not be criminally responsible for driving the car in a manner dangerous to the public. The offence of culpable driving is, in this respect, no different to any other offence and requires the driving, which is part of the offence, to be a conscious and voluntary act.¹⁸⁶

4.4.4 The court noted that the offence of culpable driving required proof that the motor vehicle was being driven in a manner dangerous to the public *at the time* of the impact which caused death. It was held that this did not mean that it must be proved that the motor vehicle was being driven dangerously at the 'precise moment of impact' but that a court could have regard to the driving which was so nearly contemporaneous with the impact and examine whether that driving was in fact dangerous. The issues of contemporaneity and dangerousness are questions of fact. The court held, following the decision of King CJ in *Kroon*, that in the context of falling asleep cases, this means that the relevant period of driving:

is that which immediately precedes his falling asleep. Not only must the period be sufficiently contemporaneous with the time of impact to satisfy the requirement of s 52A but the driving during that period must be, in a practical sense, the cause of the impact and the death. The relevant period cannot be that during which the driver was asleep because during that time his actions were not conscious or voluntary. And ... if the driver's actions upon waking up amount to no more than an attempt to avoid an accident, it cannot be that period of driving.¹⁸⁷

4.4.5 The court examined the decision in *R v Coventry and McBride v The Queen* and held that:

For a driver to be guilty of driving in a manner dangerous to the public because of his tired or drowsy condition that condition must be such that, as a matter of objective fact, his driving in that condition is a danger to the public. Various matters will be relevant in reaching such a conclusion. The period of the driving, the lighting conditions (including whether it was night or day) and the heating or ventilation of the vehicle are all relevant considerations. And, of course, it will be necessary to consider how tired the driver was. If there was a warning as to the onset of sleep that may be some evidence of the degree of his tiredness. And the period of driving before the accident and the amount of sleep that he had earlier had will also bear on the degree of his tiredness. But so far as 'driving in a manner dangerous' is concerned, the issue is not whether there was or was not a warning of the onset of sleep, but whether the driver was so tired that, in the circumstances, his driving was a danger to the public. The various matters which bear on that question and the way in which they bear on it, should be carefully drawn to the attention of the jury.¹⁸⁸

4.4.6 The court then went on to examine the decision of Lord Goddard CJ in *Hill v Baxter*,¹⁸⁹ particularly the passage discussed above. The court stated that:

¹⁸⁶ *Jiminez v The Queen* (1992) 173 CLR 572, 577.

¹⁸⁷ *Ibid*, 578-579.

¹⁸⁸ *Ibid*, 579-580.

¹⁸⁹ (1958) 1 QB 277.

If... his Lordship was saying that falling asleep at the wheel is inevitably preceded by a period of drowsiness such that the driver has an opportunity to stop, then we are, with respect, unable to agree. That may be a convenient assumption upon the view that 'it would be impossible as well as disastrous to hold that falling asleep at the wheel was any defence to a charge of dangerous driving', but it is not otherwise supportable. No doubt it may be proper in many cases to draw an inference that a driver who falls asleep must have had warning that he might do so if he continued to drive or that otherwise he knew or ought to have known that he was running a real risk of falling asleep at the wheel. But it does not necessarily follow that because a driver falls asleep he has had a sufficient warning to enable him to stop.¹⁹⁰

They also noted that Lord Goddard CJ's approach suggested that:

a person while asleep is capable of driving consciously and voluntarily. Such is clearly not the case and if that is the suggestion it appears to be made upon the basis that a driver can avoid lapsing into sleep, whereas he cannot avoid other states of unconsciousness or involuntariness, such as those induced by epilepsy or being stung by a swarm of bees. But if a person's condition is such that his actions are unconscious or involuntary, it does not matter what the cause is: he cannot be found guilty of an offence, whether statutory or otherwise, unless the acts which constitute it have been done voluntarily.¹⁹¹

4.4.7 In summary, in order to obtain a conviction for dangerous driving causing death, the prosecution must establish that the act of driving said to show the necessary degree of dangerousness was voluntary and intentional. The High Court held that an act of driving is not voluntary and intentional if the driver is asleep at the relevant time. So, if a driver is asleep at the time the vehicle leaves the road or crosses the centre line – that driving cannot amount to dangerous driving. The prosecution must point to some other period when the driving was voluntary and intentional (that is, when the driver is awake), and prove that that period of driving was dangerous. In the case of a driver who falls asleep, the period of driving where the driver had warning of sleepiness and did not stop is said to amount to dangerous driving. And, in relation to this period of driving, it is open to the accused to raise a defence of honest and reasonable mistaken belief – that is, that the driver honestly believed on reasonable grounds that it was safe to drive.

4.4.8 The High Court held that as culpable driving was a strict liability offence, the defence of honest and reasonable mistaken belief was available. In the context of such cases, where an accused raises the possibility that they believed that their driving was not dangerous in the circumstances, the burden falls on the prosecution to prove beyond reasonable doubt that the accused did not honestly believe on reasonable grounds that his or her driving was not dangerous. In the context of fall-asleep cases, where it is suggested that the accused had no prior warning of sleep, and therefore, honestly believed on reasonable grounds that it was safe to drive, this defence is especially relevant, and it will fall to the prosecution to disprove such a suggestion.¹⁹²

4.4.9 Importantly, the Court held that, in such cases, it is 'essential for the trial judge to identify the period of driving during which it was alleged that the driving was dangerous', and further, to inform the jury 'that if the applicant fell asleep, his actions while he was driving were not voluntary and could not amount to driving in a dangerous manner.'¹⁹³ These matters were not clearly identified and the trial, therefore, miscarried.

¹⁹⁰ *Jiminez v The Queen* (1992) 173 CLR 572, 581.

¹⁹¹ *Ibid*, 581.

¹⁹² *Ibid*, 584 and preceding discussion.

¹⁹³ *Ibid*, 584.

4.5 Commentary about the decision in *Jiminez*

4.5.1 As can be seen, the decisions in cases such as *Kroon* and *Jiminez* require that the assessment of a driver's criminal responsibility focus upon the driving that occurred at a time when the driver was exercising control over the motor vehicle. Commentators have noted that this approach is not a new one, but one that has been employed by Courts in many jurisdictions over a number of years.¹⁹⁴ The above discussion of the relevant case law where voluntariness was considered in light of falling asleep demonstrates this clearly.¹⁹⁵

4.5.2 David Lanham has noted the 'paradox' which arises in situations where a driver falls asleep resulting in a motor vehicle crash as 'the fact of sleep constitutes both the danger and a possible ground for exculpating the alleged offender'.¹⁹⁶ He suggests that the 'proper resolution of the problem' which this paradox gives rise to 'lies in recognizing that in some circumstances the defendant will be liable and in others not'.¹⁹⁷

4.5.3 Although the approach employed in *Jiminez* is not a novel one, McCutcheon comments that:

What does strike the foreign observer as different in *Jiminez* is the onerous standards of proof which the High Court seems to demand. It is probable that courts in other jurisdictions would on identical facts hold that the accused bears a burden of going forward in the evidence. In particular, the courts in other jurisdictions are prepared to facilitate the drawing of adverse inferences which will result in a conviction unless the accused discharges an evidential burden. Indeed, it is reasonable to speculate that a future Australian case on similar facts would result in a conviction since the appropriate direction has been clarified and prosecutors should be aware of the proofs that will be demanded of them. These, however, are matters for the law of evidence and do not detract from the substantive principle which was involved.¹⁹⁸

4.5.4 There certainly appears to be a perception that the decision in *Jiminez* has made it more difficult for prosecutors to obtain convictions where a driver claims to have fallen asleep.¹⁹⁹ There would, however, appear to have been a number of successful prosecutions in fall-asleep cases since *Jiminez*, along with pleas of guilty in such cases.²⁰⁰

4.6 Decisions post-*Jiminez*

4.6.1 The decision in *Jiminez* has provided clear guidance to courts dealing with the issues surrounding crashes resulting from falling asleep at the wheel. Reported decisions since *Jiminez* suggest that courts are dealing with such cases and that convictions are being obtained. Examples include *Tresize v Jensen*,²⁰¹ *Wood v The Queen*,²⁰² *Hasani v Read*,²⁰³ *Stack v Appleby*,²⁰⁴ and *Plenty v*

¹⁹⁴ See in particular discussion in J McCutcheon, 'Involuntary Conduct and the Case of the Unconscious "Driver": Reflections on *Jiminez*', (1997) 21 *Criminal Law Journal* 7.

¹⁹⁵ See *Dennis v Watts* (1942) 43 SR (NSW) 32; *R v Scarth* [1945] St R Qd 38; *Robertson v Watts* Serial No 51/1964; *Kroon* (1990) 52 A Crim R 15.

¹⁹⁶ David Lanham, 'Involuntary Acts and the Actus Reus' 17 (1993) *Criminal Law Journal* 97, 97.

¹⁹⁷ *Ibid.*

¹⁹⁸ McCutcheon, above n 194, 79.

¹⁹⁹ See for example *Staysafe 25*, *Issues in Dangerous Driving*, 158-161; Victoria Department of Justice, *Culpable and Dangerous Driving Laws: Discussion Paper* (January 2004) 25.

²⁰⁰ See for example, *Hasani v Read* [2003] WASCA 40; *Stack v Appleby* [1999] WA (Unreported, 2 February 1999); *Plenty v Bargain* [1999] WASCA 67.

²⁰¹ [2005] QDC 226 (driving without due care and attention).

²⁰² [2002] WASCA 95 (dangerous driving causing death).

²⁰³ [2003] WASCA 40 (dangerous driving causing grievous bodily harm).

Bargain,²⁰⁵ all cases where courts were satisfied that there was evidence the driver fell asleep and had ample warning of onset of sleep. The Launceston Magistrates court also recently dealt with such a case and found the driver, Jill Louise Bailey, guilty of negligent driving causing death.²⁰⁶ In other cases, pleas of guilty have been entered to driving offences where the accused has fallen asleep.²⁰⁷

4.6.2 Appeals against convictions have been allowed where courts have failed to properly direct juries according with the principles laid out in *Jiminez*. Examples include *R v Franks*²⁰⁸ and *R v Rowlson*.²⁰⁹ In both of these cases the Crown alleged that the accused drivers had fallen asleep in circumstances where they ought to have been alert to the possibility of falling asleep, and had then become involved in a crash. Both cases involved truck drivers, and in both cases the accused expressly denied falling asleep at the wheel.

4.6.3 In *Rowlson*,²¹⁰ the accused was charged with dangerous driving causing death. The driver alleged that the crash was caused when the load he was carrying shifted, causing his truck to lurch. This explanation was contradicted by two prosecution witnesses and would appear to have been rejected by the jury given their guilty verdict at the original trial. The Crown case, as summarised by the trial judge, was that:

the accused had become sleepy and momentarily dropped off to sleep, not becoming aware of the collision until awakened by the noise of it, the road train having failed to properly negotiate the curve, simply continuing on its course. The prosecution says that the accused was driving in a manner dangerous to the public because he must have been aware that he was sleepy and at risk of falling asleep, but kept on driving nevertheless. The prosecution says, in effect, there is really no other explanation for the collision.²¹¹

4.6.4 The accused, on the other hand, gave detailed evidence of the events leading up to the crash, and categorically denied feeling sleepy or falling asleep. Evidence was given by police officers that the accused had fallen asleep a number of times on the journey to Ceduna in the police vehicle, however, this was some four hours after the crash. In summing up, the trial judge stated:

For you to find the accused guilty... you will have to be satisfied beyond reasonable doubt that the inference the prosecution asks you to draw is the only rational inference open on the facts as you find them to be, and then you will have to be satisfied beyond reasonable doubt that, in those circumstances, the accused, on the occasion in question, was driving in a manner dangerous to the public.²¹²

4.6.5 The South Australian Court of Criminal Appeal held that this summing-up was insufficient and failed to properly direct the jury in accordance with the decision in *Jiminez*. In particular, Olsson J stated that:

²⁰⁴ WA (Unreported, 2 February 1999) (dangerous driving causing grievous bodily harm).

²⁰⁵ [1999] WASCA 67 (dangerous driving causing bodily harm).

²⁰⁶ See 5.4.

²⁰⁷ *R v Besant* [2003] NSWCCA 388 (dangerous driving causing death x 2); *R v Pellows*, CCA NSW (Unreported, 1 August 1997) (dangerous driving causing death, dangerous driving causing grievous bodily harm); *Taylor v R* [2006] NSWCCA 7 (dangerous driving causing grievous bodily harm); *R v Clark*, CCA NSW (Unreported, 24 April 1995) (culpable driving); *R v Satalich* [2004] VSCA 132 (culpable driving); *DPP v Oates* [2007] VSCA 59 (dangerous driving causing death and serious injury).

²⁰⁸ [1998] VSCA 100 (culpable driving causing death).

²⁰⁹ [1996] SASR 96 (dangerous driving causing death).

²¹⁰ [1996] SASR 96.

²¹¹ *R v Rowlson* [1996] SASR 96, 101 (cited by Olsson J).

²¹² *Ibid*, 102 - 103 (cited by Olsson J).

the law was not spelt out, in terms of [Jiminez] with clarity. The Jury was not specifically warned that the appellant could not be convicted of the offences charged, on the basis contended for by the Crown unless they were satisfied, beyond reasonable doubt, that the condition of the appellant, immediately prior to the impact, was such that his continuing to drive in that condition constituted an abnormal danger to the public.

It was vital to stress that it was not enough simply to infer, beyond reasonable doubt, that the appellant did doze off at the wheel... They had to be told that the appellant could not properly be convicted unless – given the state of the evidence – the only reasonable and rational inference which arose was that, because of his actual awareness that he was becoming drowsy, and/or events leading up to the incident which must, patently, have given rise in the ordinary person to undue fatigue, his continued driving at the time constituted ‘a real danger to the public’.²¹³

4.6.6 In the case of *R v Franks*,²¹⁴ the accused was charged with culpable driving causing death. The Crown lead evidence to establish the driving and rest patterns of the accused over the 18 days preceding the crash. They relied on evidence of an ‘expert in driver fatigue’ who described the effect of ‘accumulated fatigue’ on driving. The accused on the other hand, gave evidence that he was alert and had ample rest in the previous 48 hours. He stated that the vehicle he collided with was travelling slowly in the emergency lane and had suddenly swung into the lane in front of him, not leaving him sufficient room to brake and avoid the crash. The trial judge in summing up directed the jury as to the legal elements of the offence of culpable driving. He referred to the Crown case, stating that:

[i]t has built up a story and that... was driving that was uninterrupted for 18 days... From this it seeks that you draw an adverse inference with respect to the driver’s condition at the time of the accident. Sufficient... the Crown says, to constitute fatigue which would amount to the gross negligence required by the charge.²¹⁵

4.6.7 He also gave directions in relation to the defence of honest and reasonable mistaken belief. According to Winneke P, the trial judge failed to draw the jury’s attention to the ‘critical conduct’ upon which the Crown was seeking to rely to establish ‘culpable driving’ as the judge:

did not tell them that, before they could convict the accused of the offence, they would have to be satisfied beyond reasonable doubt that, at a time sufficiently contemporaneous with the death as to render it an operative cause thereof, the applicant continued to drive his semi-trailer when he knew or ought to have known that there was a real risk that he would fall asleep or lose control of his vehicle.²¹⁶

4.6.8 Further, he stated that:

[t]o continue to drive when one is ‘tired’ or ‘fatigued’, words of wide import, will not necessarily represent a departure from the standards expected of the prudent driver, such as to attract the epithet ‘gross’. In my view it will only become so when the fatigue has reached a point where the driver is or should be aware that continuing to drive poses the risks to which I have referred.²¹⁷

4.6.9 He also held that the jury ought to have been instructed in clear terms that the period of driving whilst asleep could not constitute culpable driving; instead, their attention ought to be focused on the period of driving immediately prior to falling asleep whilst he was conscious and therefore responsible for his actions.²¹⁸

²¹³ Ibid, 105.

²¹⁴ [1998] VSCA 100.

²¹⁵ *R v Franks* [1998] VSCA 100, 117.

²¹⁶ *R v Franks* [1998] VSCA 100, 123.

²¹⁷ Ibid.

²¹⁸ Ibid, 126.

4.6.10 An examination of these cases reveal the care with which a trial judge must direct a jury as to the relevant legal issues involved. Importantly, it must be highlighted that a person cannot be held criminally responsible for the driving which occurs whilst asleep. Attention is to be focused on that driving which immediately precedes the falling asleep to determine whether such driving was dangerous or negligent in light of the surrounding circumstances. Similarly, magistrates also need to properly instruct themselves in respect of the law as formulated by *Jiminez* and *Kroon*.

4.7 Other cases of involuntary driving

4.7.1 The legal approach outlined in cases such as *Jiminez* and *Kroon* is just as applicable to crashes resulting from other forms of involuntary driving, for instance caused by the onset of a medical condition rendering the driver unconscious. Similar principles have long been applied to such cases.

4.7.2 First, courts need to consider whether the circumstances were such that they deprived the act of driving of its voluntary and intentional character. The defence bears the evidentiary burden of displacing the presumption of voluntariness. For example, in *Attorney-General's Reference (No. 2 of 1992)*,²¹⁹ the appellant had argued at his trial on charges of causing death by reckless driving that he was driving in an automatistic state referred to as 'driving without awareness', and described by a defence witness as 'a trance-like state brought on by repetitive visual stimulus experienced on long journeys on straight flat roads'.²²⁰ The witness gave evidence that in such a state, the driver was deprived of the ability to avoid a crash, could 'not see what was in front of him, but ... continued to be able to steer because visual information entered his peripheral vision and enabled him to steer "subconsciously"'. Further, he said that such a 'state could occur without drivers being aware that it was happening'.²²¹ It was held that the evidence taken at its highest did not lay the 'proper evidential foundation' to raise the defence of automatism as there must be a 'total destruction of voluntary control on the defendant's part. Impaired, reduced or partial control is not enough'. According to the defence 'expert', someone 'driving without awareness' retains some control albeit substantially reduced, therefore excluding the operation of the defence.²²²

4.7.3 Other examples where courts have rejected the defence of automatism include:

- *Watmore v Jenkins*²²³ – where the diabetic driver suffered a hypoglycaemic episode as a result of the unexpected improvement in liver function causing him to drive in a highly confused state. On appeal, it was held that there was sufficient evidence to displace the presumption of voluntariness, but that the evidence did not show that the defendant was experiencing 'a complete destruction of voluntary control as could constitute in law automatism' over the entire five mile journey during which the driving was objectively dangerous.²²⁴
- *Broome v Perkins*²²⁵ – where a diabetic driver suffered a hypoglycaemic episode causing erratic driving. Again, on appeal, it was held that there was sufficient medical evidence to raise the defence, but that on the evidence before the court it could only be concluded 'that for parts of the journey the defendant's mind was controlling his limbs and that thus he was driving'.²²⁶

²¹⁹ [1994] QB 91.

²²⁰ *Attorney General's Reference (No. 2 of 1992)* [1994] QB 91, 93.

²²¹ *Ibid*, 94.

²²² *Ibid*, 105.

²²³ [1962] QB 572.

²²⁴ *Watmore v Jenkins* [1962] QB 572, 585, 587.

²²⁵ (1987) 85 Cr App R 321.

²²⁶ *Broome v Perkins* (1987) 85 Cr App R 321, 332-333.

4.7.4 Where evidence raises a doubt about voluntariness of the driving which resulted in the crash, the focus then shifts to whether the driving prior to losing consciousness was dangerous or negligent. Examples where courts have found a driver liable for the crash include:

- *Gillett v R*²²⁷ – a driver suffered an epileptic seizure causing him to lose control of his motor vehicle. His vehicle was involved in three separate collisions, and he did not stop his vehicle until he had collided with the third vehicle. In the second crash, his vehicle collided with the rear of another vehicle causing it to move into the path of oncoming traffic. All three occupants of the vehicle were killed and the accused was charged with dangerous driving causing death. The court held that he was liable as driving with a medical condition which had an inherent capacity to bring about a seizure was objectively dangerous. In respect of the defence of honest and reasonable mistake, the court held that the accused's prior conduct showed that he did not honestly believe that his driving was not dangerous.
- *R v Day*²²⁸ – where the driver had taken pain killers prior to the crash, and had a high level of morphine in her blood at the time of the crash. She drove across the median strip and collided with an oncoming vehicle, killing the driver of that vehicle. She was charged with dangerous driving causing death. At her trial by judge alone, the judge accepted that at the time of crash the driving was not voluntary as the accused had lost consciousness. The accused asserted that the loss of consciousness was the result of a 'micro-sleep'. The judge considered that the accused's loss of consciousness was caused by her high levels of morphine, and that the accused was aware of the fact that morphine had the potential to affect her ability to drive.
- *People v Decina*²²⁹ – a driver suffered an epileptic seizure causing him to lose control of his motor vehicle and crash into a group of schoolchildren, killing three. In light of evidence that the driver had suffered such seizures, was aware that he was susceptible to such attacks and had disregarded the risk, he was found guilty of culpable negligence. The situation was contrasted with examples such as 'sudden sleeping spell, an unexpected heart or other disabling attack' which occurred 'without any prior knowledge or warning thereof'.²³⁰
- *R v Shaw*²³¹ – a person who suffered a fainting spell or fit, which rendered him unconscious resulting in a crash which killed two people was held to have a case to answer on a charge of causing grievous bodily harm where the evidence showed he had suffered from such attacks before and must, therefore, have been aware of the dangers inherent in operating a motor vehicle under such circumstances.
- *State v Gooze*²³² – The driver in this case had previously been diagnosed as suffering from Meniere's syndrome which resulted in sudden attacks of dizziness and loss of consciousness. He suffered such an attack while driving resulting in a crash which caused the death of another road user. The court held that he was criminally liable as he had driven knowing that 'he might at any time suddenly, without warning, lose consciousness or suffer a dizzy spell'. Further, it was stated that it 'was reasonably foreseeable that if he "blacked out" or became dizzy without warning, its probable consequences might well be injury or death to others'.²³³

²²⁷ [2006] NSWCCA 370.

²²⁸ [2006] SADC 64.

²²⁹ (1956) 138 NE2d 799.

²³⁰ *People v Decina* 138 NE2d 799, 804.

²³¹ [1938] 3 DLR 140.

²³² (1951) 81 A2d 811.

²³³ *State v Gooze* (1951) 81 A2d 811, 816.

Part 5

The need for reform: Tasmanian case studies

5.1.1 There have been several Tasmanian cases that have examined the issues that arise in respect of criminal liability in cases where a driver has fallen asleep and caused death or serious injury as a result of a motor vehicle crash. These cases are used to highlight some of the difficulties encountered in the prosecution of cases where the issue of voluntariness is raised.

5.1.2 Shortly after the introduction of the offence of negligent driving causing death in the *Traffic Act 1925*, s 32(2A), Dr Jerry Courvisanos and William Robert Piggott were both prosecuted in relation to crashes where it was alleged that they had fallen asleep at the wheel. Both cases proceeded to hearing and both cases resulted in acquittals. In order to examine these cases, reference has been made to the Magistrates Court file in each case, transcripts of the Magistrates' decisions, an audio copy of the proceedings in the Piggott case, copies of transcripts of the video records of interview conducted with the defendants, copies of other documents tendered to the court and discussions with prosecutors involved in the cases.

5.2 Dr Jerry Courvisanos

5.2.1 There was no transcript or audio recording of the hearing available in relation to this case.

5.2.2 The facts surrounding this matter involved a crash that occurred on the Midlands Highway on 10 November 2000. The Chief Magistrate found that a crash between the vehicles driven by Dr Courvisanos and Mr Charles Butler, the deceased, occurred when Dr Courvisanos' vehicle crossed from its south bound lane of the Midlands Highway into the north bound lane and collided head on with Mr Butler's vehicle. The evidence indicated that, apart from crossing onto the incorrect side of the road, Dr Courvisanos' vehicle was otherwise being driven correctly. Only shortly before the crash, his vehicle had successfully negotiated a sweeping bend. The crash itself occurred on a straight piece of road.

5.2.3 The complaint of negligent driving causing death cited the following particulars of negligence:

- (a) failed to maintain a proper lookout;
- (b) failed to manoeuvre your vehicle so as to avoid a collision;
- (c) failed to exercise all proper skill and handling of a motor vehicle;
- (d) crossed to the incorrect side of the road;
- (e) drove a motor vehicle knowing that you were fatigued and you continued to drive that motor vehicle in that condition.

5.2.4 The following is a summary of Dr Courvisanos video-recorded interview with police:

- He was unconscious for a while after the crash. His recollection of directly before the crash was pretty vague and he did not have a very good recollection of that period.
- The last thing he remembered was seeing a car with a trailer on the back heading towards him. He moved to the left to avoid it, but the other car appeared to go in the same direction.
- He did not recall being in the incorrect lane.
- In the 24 hours before the crash he had worked through the day marking exam papers until about 10.00 pm the previous night. He had then read two students' theses. He was due to interview the students in Hobart about their work on the day of the crash. He kept falling asleep whilst reading the theses, and did not actually go to bed that night.
- He had finished the work by the morning and felt reasonably good. He had a shower, shaved and got ready to come down to Hobart. He commenced his journey from Launceston to Hobart with the purpose of attending the interviews at 11.00 am.
- He did not feel tired. He felt relaxed and renewed. He felt good during the trip. As he was going through Ross he yawned once. He initially planned to stop just past Oatlands to have a drink and a snack but felt reasonably good, so kept driving. He had no other warning signals of tiredness.
- He had earlier stopped at Perth to take off his jacket and got some taped music out of the rear of the car to play. He was not tired at that stage.
- Taking into account naps, he had slept during the night for a total of about three and a half to four hours.
- He was running on time for his appointment.
- He had not drunk in the 24 hours prior to the crash
- He was driving a university vehicle at the time of the crash. He had driven that particular car on three – five occasions. He had not experienced any problems with the car at all during the trip.
- He regularly travelled down the Midlands Highway.
- He was listening to the radio, but it was not being played loudly. There were no other distractions.
- He made a judgment at the beginning of the day that he was fit enough to drive. He had yawned once at Ross but it did not give him a signal that he was incapable of continuing to drive.

5.2.5 During the course of the hearing, evidence was received, and accepted, from Dr Markos, a respiratory physician and sleep medicine specialist. He examined Dr Courvisanos some months after the crash and also requested a sleep study be performed. The sleep study revealed that Dr Courvisanos suffered from obstructive sleep apnoea that was of moderate severity. In his report that was tendered to the court, he stated that he considered it:

possible that he fell asleep whilst driving, even in the absence of repeated warning signs of drowsiness. He made a judgment at the start of his journey that he had sufficient sleep, based on his past experience and that he felt sufficiently well to undertake the journey from Launceston to Hobart. However, the presence of obstructive sleep apnoea of moderate severity would act to increase the severity of his sleep deprivation. The added effects of untreated sleep apnoea above and beyond the effects of sleep time deprivation could, in my opinion, give rise to a situation where he might have fallen asleep, even in the absence of repeated warnings of impending sleep.²³⁴

5.2.6 He further stated that '[h]ad Dr Courvisanos been losing concentration and nearly falling asleep whilst driving, then I would expect that he would have had difficulty in keeping his car position correctly on his lane and that an observer of this may have seen him veering at times to either side of the roadway'.²³⁵ The evidence did in fact suggest that there was nothing at all untoward about Dr Courvisanos' control of his car prior to the crash.

5.2.7 It would appear from Dr Courvisanos' interview and the comments of the Chief Magistrate that Dr Courvisanos did not recall having fallen asleep shortly prior to the crash. The Chief Magistrate, however, found that he had fallen asleep moments before the impact and that he was asleep at the time his vehicle crossed into the path of the oncoming vehicle. Further, he found that Dr Courvisanos was either asleep at the time of the impact or alternatively had awoken in the instant before the crash but too late to avoid it.

Decision of the Magistrate

5.2.8 The Chief Magistrate found Dr Courvisanos not guilty of negligent driving causing death and gave three alternative reasons for his decision. They were:

(1) That the offence of negligent driving requires proof that the relevant act of driving was voluntary and intentional. He held, that as Dr Courvisanos was asleep at the material time, the relevant act was not voluntary and intentional. He referred to *Jiminez v The Queen* as support for this proposition. There, the majority judges stated:

If the applicant did fall asleep, even momentarily, it is clear that while he was asleep his actions were not conscious or voluntary (an act committed while unconscious is necessarily involuntary) and he could not be criminally responsible for driving the car in a manner dangerous to the public. The offence of culpable driving is, in this respect, no different to any other offence and requires the driving, which is part of the offence, to be a conscious and voluntary act.²³⁶

Clearly, on this analysis, the learned chief magistrate was of the view that the relevant act of driving occurred during the period the car crossed to the incorrect side of the road.

(2) That the prosecution had failed to establish, that if there was negligence in Dr Courvisanos' manner of driving, that it was negligence that constituted a criminal standard. He held that proof of this offence required proof of negligence which was higher than the civil standard and that the evidence led did not establish proof of negligence to the requisite criminal standard.²³⁷

²³⁴ Proof of Evidence, Dr James Markos, (1 March 2002) 4.

²³⁵ Ibid.

²³⁶ (1992) 173 CLR 572, 577.

²³⁷ It is now clear that the Crown is not required to prove that the defendant's negligence was culpable. In other words, the Crown does not have to prove the negligence to a standard approximating the standard for negligence required for a conviction for manslaughter. See *Filz v Knox* [2002] TASSC 82, 2 (Crawford J).

(3) That the defence of honest and reasonable mistake applied in this case. This defence was specifically relevant to the particular of negligence alleged that Dr Courvisanos had driven his motor vehicle knowing he was fatigued yet continued to drive in that condition. The learned magistrate appeared to accept that such a particular was capable of constituting negligence, however, his findings of fact indicated that Dr Courvisanos had good cause to believe he was fit to drive a motor vehicle. He held that Dr Courvisanos had discharged the evidentiary onus of raising the defence. He held, however, that the prosecution had failed to prove beyond reasonable doubt that Dr Courvisanos was not honestly and reasonably mistaken as to the relevant fact, being in this case the fact of his fitness to drive a motor vehicle.

5.2.9 Dr Courvisanos also faced a charge under the *Traffic (Road Rules) Regulations 1999* (Tas) of failing to keep left of the dividing line. The learned Chief Magistrate found the charge proved and Dr Courvisanos was fined \$200. There was no discussion in the learned Magistrate's decision as to how the finding of fact that Dr Courvisanos had fallen asleep at the wheel at the time of crossing to the other side of the road affected liability for this regulatory offence.²³⁸

Commentary

5.2.10 On the facts, the decision of the learned Chief Magistrate represents a correct application of *Jiminez* to the *Traffic Act* s 32(2A). However, an examination of the issues raised by the case highlights some of the difficulties that arise in the prosecution of cases where the driver has fallen asleep.

5.2.11 The learned Chief Magistrate correctly identified that a driver who is asleep is not capable of being found to have committed a voluntary and intentional act at the time of being asleep. Of the five particulars of negligence cited in the complaint, the first four particulars related to the period during which Dr Courvisanos was asleep, and the particularised driving was therefore involuntary (once it was accepted that the Dr Courvisanos was asleep).

5.2.12 The final particular, that Dr Courvisanos drove knowing he was fatigued and continued to drive in that condition, covered a period during which it could be said his actions were voluntary and intentional. The decision in *Jiminez* makes it clear that in such cases the relevant act of driving also includes those periods during which the driver was conscious provided they could be said to be sufficiently contemporaneous with the events giving rise to the crash. The final particular of the complaint clearly included that period of driving immediately prior to the alleged fall-asleep incident, and cited circumstances that were capable of constituting negligence.

5.2.13 The learned Chief Magistrate correctly considered the availability and application of the defence of honest and reasonable mistaken belief to this period of driving. There was evidence that Dr Courvisanos was not feeling overly fatigued and felt quite capable of driving. The court also had the benefit of expert evidence, which does not appear to have been contested, that Dr Courvisanos was suffering from sleep apnoea which was undiagnosed at the time of the incident. The evidence was that such a condition rendered Dr Courvisanos liable to fall asleep without warning. On the other hand, the evidence also showed that Dr Courvisanos had very little sleep on the evening prior to the crash. This would appear to be a case where the prosecution could have considered calling expert evidence of its

²³⁸ It is a breach of the *Traffic (Road Rules) Regulations 1999* to fail to keep the left of the dividing line. Unlike the offences created by the *Traffic Act 1925* and the *Criminal Code*, the magistrate did not appear to consider that it was necessary for the prosecution to establish a voluntary act of driving for this regulatory offence. The magistrate had found that the accused had fallen asleep prior to impact and was asleep at the time he crossed into the path of the oncoming vehicle. It is difficult to reconcile this finding with the conviction for failing to keep to the left of the dividing line.

own to show the clear connection between lack of sleep and the likelihood of falling asleep whilst driving.

5.2.14 This case highlights the difficulties faced by prosecution when a defendant claims to have had no warning they were about to fall asleep. This is especially so where there is evidence of an undiagnosed sleep disorder such as sleep apnoea. As the discussion in Part 2 highlights, sleep researchers suggest that those who fall asleep at the wheel would have some warning that they were sleepy. There has, however, been little research conducted into the impact of sleep disorders in this context and the clear suggestion is that the warning signs may not be so evident.

5.3 William Robert Piggott

5.3.1 An audio recording of the proceedings was available in relation to this matter, along with a transcript of the submissions made to the presiding Magistrate and his ruling on those submissions. Further material was also provided by Tasmania Police Southern District Prosecution Service.

5.3.2 The facts surrounding this matter involved a crash that occurred on the Tasman Highway at Cambridge on 2 November 2000. The prosecution case was that Mr Piggott had fallen asleep at the wheel, crossing to the wrong side of road, causing him to collide with an oncoming vehicle driven by Francis Leonard Jones who was killed as a result of the crash. Mr Piggott pleaded not guilty to charges of negligent driving causing death, failing to keep to the left side of the road and failing to keep left of the dividing line. The matters proceeded to hearing in 2003.

5.3.3 The complaint of negligent driving causing death cited as particulars of negligence:

that you:

- (a) drove whilst your judgement was affected by your physical state, namely fatigued.
- (b) you failed to keep a proper lookout.
- (c) you failed to maintain safe and proper control of your motor vehicle.
- (d) you failed to manoeuvre to avoid a collision.

5.3.4 The court heard evidence from a number of witnesses, the admissible parts of which are summarised below:

- Leon Bailey gave evidence that he worked with Mr Piggott at Inghams Chicken Factory and that he had arrived at work at around 4.30 am on the day of the crash. Mr Piggott was already at work when he arrived and appeared to be tired. He was described as leaning on the table in the crib room with his head in his hands, and that he would look up as people entered the room. Under cross-examination Mr Bailey was unable to rule out that he had seen him dozing in a similar manner on other days prior to a shift commencing. He also acknowledged not noticing anything out of the ordinary or indicative of tiredness when he saw Mr Piggott during other breaks over the day.
- Lionel Graham Stewart was also an employee at Inghams. He remembered seeing Mr Piggott at work on the day of the crash and recalled that he looked tired. He thought he made this observation at the time he was finishing up for the day which could have been any time between 11.00 am and 2.00 pm. He noticed that he yawned. He conceded he had not told police this when he made his statement about the incident.

- Statements from two witnesses were tendered by consent. They indicated that they had seen Mr Piggott's vehicle cross to the incorrect side of the road and collide with the deceased's vehicle.
- Jennifer Nichols was travelling towards Cambridge behind Mr Piggott's car just prior to the crash. She had been travelling behind his car for some distance. There had been nothing unusual about Mr Piggott's manner of driving prior to the crash. He had negotiated a number of bends and had been following the speed limit. She then saw the car start to drift across the road until it was entirely in the wrong lane. There was no indication that the driver had tried to stop or change course.
- There was evidence that the deceased's car had significant rust damage and was not in a roadworthy condition.
- A police officer gave evidence that he spoke with Mr Piggott at the hospital after the crash. He was very upset and made the comment that he thought he had fallen asleep.

5.3.5 A video recorded interview was conducted with Mr Piggott on 30 November 2000. Parts of the interview were difficult to understand due to problems with the audio recording of the interview. What follows is a summary of the audible parts of Mr Piggott's interview to police:

- He knocked off work at 1.10 pm. He was driving along the highway following a white van and next minute he hit something.
- He had started work at Inghams around three or four o'clock in the morning.
- He usually returned home via Seven Mile Beach, but had to go to the bank and returned home along the Tasman Highway.
- He recalled nothing leading up to the crash.
- He indicated he was a bit tired during the day at work for no particular reason. He had gone to bed early the night before and had not had any alcohol, drugs or medication of any sort.
- He did not recall feeling fatigued, nor did he recall having fallen asleep.
- He had driven his car for over a year. He was also familiar with the stretch of road.
- He had felt tired at work between 10 and 11 o'clock. He was sleeping on and off through his lunch break. He also indicated that he might have had a sleep in the morning before his shift, but that was something he did on other mornings as well.
- When he travelled home, he felt fit enough to drive and did not feel tired at that stage.
- He had no idea how his vehicle ended up on the other side of the road.

5.3.6 Following the conclusion of the prosecution case, counsel for Mr Piggott made a 'no-case' submission. Such a submission is made on the basis that the prosecution case was such that there was no evidence capable of supporting a conviction for the offence and usually arises in the context of prosecutions which have failed to lead evidence capable of proving an element of a charge. In this case, the submission was made on the basis that the manner in which the charge had been particularised did not disclose an offence known to law.

5.3.7 Defence counsel referred to correspondence that had passed between himself and Tasmania Police Southern District Prosecution Service which had carriage of the prosecution. Prior to the hearing of the matter, defence counsel made a request in writing for particulars of the time and of the

period of driving which was alleged to have been negligent. The police prosecutor with carriage of the file responded in writing twice to this request. In a letter dated 8 May 2003 he wrote:

the period of driving is from that point a reasonably prudent driver would not have driven. Whilst that may seem somewhat trite, the reality is that the act would start at the point where he fell asleep, the negligence would also encompass the fact that he allowed himself to drive when he should not have done considering his tired state.

In a further letter dated 14 May 2003 he wrote:

the act of negligence commences from that point where he fell asleep and allowed his vehicle to leave its own lane on the Tasman Highway, and travel directly into the path of an oncoming vehicle, without taking any action prior to the collision, the act ending at the time of the collision.

5.3.8 Counsel argued the particulars of the charge of negligent driving being relied upon by prosecution were to be found within this correspondence. In essence, he argued that prosecution had confined their case to the period *after* which Mr Piggot had allegedly fallen asleep at the wheel. He submitted that no criminal responsibility can attach to acts occurring whilst a person is asleep and relied on the decision in *Kroon* as authority for this submission. The learned magistrate adjourned his decision, noting that he '[took] the view that prosecution must identify before or during the trial the precise nature of the case and once identified be confined to it' and that he needed to satisfy himself the extent to which prosecution had confined itself.

Decision of the Magistrate

5.3.9 The complaint of negligent driving causing death was dismissed on the basis that the learned magistrate found that the defendant had been 'charged with driving negligently while asleep and solely while asleep. He is not charged with negligent driving at any time before he fell asleep and it is not suggested he awoke at any time before the collision'.²³⁹ In reaching this decision, it was accepted that the prosecution had confined its case to the period of driving after Mr Piggot had fallen asleep. He also made the following observations of the legal issues relating to this case:

A defendant is entitled to know the exact nature of the case he has to answer...

Secondly, as a matter of law the defendant cannot be convicted for what happened when, or as the result of unconsciousness or asleep.

Third, the prosecution case excludes me from considering an allegation of negligence arising before the defendant fell asleep. It is confined, and I quote again 'from that point where he fell asleep'.

Fourth, there is no evidence which could prove the defendant committed any acts to prove particulars (b), (c) or (d) [of the charge of negligence] while he was awake and particular (a) is to be read subject to the ... [prosecution] letter of 14th of May.

For those reasons no reasonable jury properly directed could conclude on the prosecution case, and I heavily underscore those words, that this defendant had driven negligently.²⁴⁰

As a result the complaint of negligent driving causing death was dismissed.

5.3.10 The court then went on to consider the remaining charges of failing to keep to the left side of the road and fail to keep to the left of the dividing line. Defence counsel argued that the charge could not be proved beyond reasonable doubt on the basis that if the relevant acts occurred at a time when

²³⁹ Transcript of Magistrate's Ruling in the matter of *Graeme Brown v William Robert Piggott*, (11 August 2003) 2.

²⁴⁰ *Ibid*, 3-4.

Mr Piggott was asleep, he could not be held criminally responsible. The prosecution argued that, unlike with the negligent driving causing death complaint, their case was not confined to the period of time after which it was alleged Mr Piggott fell asleep.

5.3.11 The learned magistrate found the charges proved. He noted that he was satisfied that Mr Piggott had fallen asleep at the wheel in the absence of any other convincing explanation. He was satisfied that Mr Piggott ‘had a premonition of drowsiness or falling asleep’.

Commentary

5.3.12 It would seem that there was some confusion on the part of prosecuting authorities about the relevant legal principles involved in this case. The suggestion in the correspondence that the period of negligent driving commenced at the time that Mr Piggott fell asleep could not support a conviction according to the relevant legal authorities. The original complaint also failed to particularise the allegation of negligence in a clear fashion. The particular employed in the Courvisanos case, which was noted above, was much better expressed. To address future inconsistencies and difficulties, prosecuting authorities may consider formulating a precedent for the particularisation of charges of this type where it is alleged that a driver fell asleep at the wheel.

5.3.13 It is clear that the presiding magistrate correctly identified the legal issues raised by cases such as *Kroon* and *Jiminez* and correctly applied them to what he held to be the particulars of negligence pursued by the prosecution. There is, however, an argument that he erred in finding that the particulars of negligence were confined to the period of time after Mr Piggott fell asleep at the wheel. The matter was referred to the Office of the Director of Public Prosecutions for advice as to whether the learned magistrate’s decision ought to be appealed. Although Crown Counsel who provided the advice was of the opinion that the particulars of negligence were not so confined, and that in any event the learned magistrate had the power to amend the complaint and could have done so without prejudice to the defendant, ultimately, their advice was that there was no merit in appealing the decision. In their view, ‘the evidence as to tiredness, potential to fall asleep (and the defendant’s awareness of that) and general unfitness to drive was not strong, the most incriminating evidence being of the defendant having a catnap in the cribroom at his workplace nearly nine hours before the accident’.

5.3.14 In this context, the case clearly highlights the difficulties faced by prosecuting authorities seeking to prosecute such charges in proving first, that a person fell asleep at a time prior to the crash, and secondly, that prior to falling asleep, they had or ought to have had warning that they were likely to do so.

5.4 Other cases

Jill Louise Bailey

5.4.1 Ms Bailey was charged with negligent driving causing death contrary to the *Traffic Act 1925*, s 32(2A) following a crash which occurred in August 2002. It was alleged that she drifted to the incorrect side of the road as a result of falling asleep, and ultimately collided with another vehicle, killing its driver. She was found guilty of this offence.

5.4.2 Following the crash, Ms Bailey had been interviewed by accident investigators. She admitted feeling sleepy but suggested she could not stop to rest as there were no suitable resting spots. The accident investigator gave evidence at the hearing of the complaint that there were places where Ms Bailey could have stopped on the stretch of road where she began to feel tired. The magistrate hearing

the complaint found that Ms Bailey ‘had decided to drive on, weighing the risk of stopping in an awkward or possibly dangerous spot against the risk of falling asleep’.²⁴¹

5.4.3 The writer had a conversation with the accident investigator involved in this case. It was clear that he was very experienced and also very aware of the legal issues involved in such ‘fall asleep’ cases. The driver made an admission that she had not only fallen asleep, but that she had felt sleepy. The investigator was able to anticipate the legal issues and addressed them in the course of interviewing the driver and his other investigations into the crash.

Deborah May Lynch

5.4.4 Ms Lynch was the driver of a vehicle that crossed the centre line of the road and collided with another vehicle, killing the passenger in the vehicle. Prior to the crash, Ms Lynch had worked until 2 am and then went to bed at 3 am. She needed to be up at 8.30 am, at which time she had breakfast and a cup of tea. She still felt tired. She drove her son to cricket and after a while decided to return home. During the drive, her vehicle crossed over onto the incorrect side of the road and collided with the other vehicle. The accident investigator concluded:

Deborah Lynch stated that she felt tired and cannot recall why the crash occurred. She cannot recall if she fell asleep or not. She travelled across the centre line into the oncoming lane but whether she was asleep or about to fall asleep at the time of impact is undetermined.²⁴²

5.4.5 Initially, Ms Lynch was charged with causing the death of another person by negligent driving; negligent driving; drive without due care and attention; fail to keep to the left of oncoming vehicles; and fail to keep to the left side of the road. Ms Lynch pleaded guilty to the charge of driving without due care and attention and received a fine of \$250 and three months disqualification. The Coroner comments that ‘for reasons unknown, the Police Prosecution Section (Western District) did not proceed with the remaining charges which were subsequently dismissed’.²⁴³

5.5 Prosecution of cases involving motor vehicle crashes

5.5.1 All serious and fatal motor vehicle crashes are investigated by the Accident Investigation Squads. Such police will have specific skills and training in accident investigation. Their role is to determine who was driving the vehicles involved in the crash and any factors that affected the driving of those vehicles. Where the investigating officer believes that a crime or a summary offence has been committed, he or she would then prepare a file which is forwarded to the prosecution section of Tasmania Police. Officers in the prosecution section then draft and file complaints in the Magistrates Court.

5.5.2 The Institute has not reached the view that the case studies in this Issues Paper necessarily demonstrate a problem with the substantive law concerning voluntariness and fall-asleep cases. However, the discussion of the Tasmanian cases highlights the potential difficulties that may arise in proving dangerous driving or negligent driving in cases where the driver has fallen asleep. It appears that great care needs to be taken in the preparation of these cases, to ensure that the case is particularised to include the period of driving prior to falling asleep.

²⁴¹ Quoted in Nick Clark, ‘Death driver escapes prison’, *The Mercury* (Hobart), 7 July 2004.

²⁴² *Woolley* [2006] TASCDC 076.

²⁴³ *Ibid.*

5.5.3 There are a large range of offences which may apply to a driver involved in a motor vehicle crash. As outlined at 3.1.1, these offences are divided into two categories: crimes and summary offences. An observation that can be made in relation to the Tasmanian cases concerning death or grievous bodily harm arising out the use of a motor vehicle where the driver has fallen asleep is that a search of Tasmanian Supreme Court cases did not reveal any cases where a driver was charged with the crimes of manslaughter or causing death or grievous bodily harm by dangerous driving.²⁴⁴ The Tasmanian cases identified in this Issues Paper involved the (lesser) summary offence of causing death by negligent driving. This is in contrast to the position in other jurisdictions, where fall asleep cases (in some instances) have proceeded on the basis of culpable driving or dangerous driving.²⁴⁵ It is difficult to assess whether these cases represent the general trend in relation to charging in those jurisdictions. However, there are some indications that fall-asleep cases are treated akin to cases where the driver is driving at speed or under the influence of alcohol or drugs. For example, in the United Kingdom, charging practice is that driving when too tired to stay awake is an example of circumstance which may support an allegation of dangerous driving. In Victoria, driving when the driver knew or ought to have known that there was an appreciable risk of falling asleep is relevant to proof of culpable negligence.²⁴⁶ The approach to sentencing in fall-asleep cases also provides an insight into the perceived seriousness of the offence. In New South Wales, the guideline judgment for cases of dangerous driving occasioning death or grievous bodily harm was reformulated in *R v Whyte*,²⁴⁷ to include the degree of sleep deprivation in the list of aggravating features. In the United Kingdom, the guideline judgment for cases of driving offences resulting in death lists driving when knowingly deprived of adequate sleep or rest as an aggravating factor under the heading ‘highly culpable standard of driving at the time of the offence’.²⁴⁸

5.5.4 There appears to be recognition of the need for greater involvement of the Office of the Director of Public Prosecution in the case of traffic matters where death has occurred. In the 2005-2006 Office of the Director of Public Prosecution *Annual Report*, it is noted that the DPP will ‘take on an oversight role in relation to traffic matters where death has occurred’ in a rationalization of summary prosecutions.²⁴⁹ The Director or Deputy Director of Public Prosecutions now review all files and recommend what charges ought to be laid where there is death arising out of the use of a motor vehicle.

5.5.5 Consideration also needs to be given as to how to counter any defence of honest and reasonable mistake that may be asserted by the defence. It may be that the use of expert evidence in relation to sleep research may assist in the prosecution of such cases. It appears that the use of expert evidence has been used in other jurisdictions to assist the prosecution establish that the driver fell asleep, and that the driver had prior warning of falling asleep.²⁵⁰ In the case of *Courvisanos*, there was evidence that the accused had had little sleep in the 24 hours before the crash. The defence relied upon the uncontested evidence of a sleep-expert in relation to the accused’s sleep apnoea to support the defence that the accused honestly and reasonably believed that it was safe to drive. It may have been useful for the prosecution to have called expert evidence of its own to highlight the relationship between lack of sleep and liability to fall asleep while driving. It is difficult for the Institute to evaluate this issue in the broader context of what is happening in Tasmania in the prosecution of fall asleep cases, as Magistrates Court decisions are not available electronically. The Institute would welcome comment on this issue.

²⁴⁴ A search was conducted of Tasinlaw cases (sentencing cases), LexisNexis unreported judgments (appeals against conviction and sentencing), LawBook company unreported judgments (appeals against conviction and sentencing).

²⁴⁵ See cases referred to at 4.6.1, footnote 207, *Rowlson* [1996] SASR 96; *R v Franks* [1998] VSCA 100.

²⁴⁶ See *Crimes Act 1958* (Vic), s 318 discussed at 6.2 and 7.3.2.

²⁴⁷ (2002) 55 NSWLR 252, reformulating the guideline judgment in *R v Jurisic* (1998) 45 NSWLR 209.

²⁴⁸ See <http://www.sentencing-guidelines.gov.uk> (accessed 4 July 2007).

²⁴⁹ T J Ellis, *DPP Annual Report 2006*.

²⁵⁰ See *R v Franks* [1998] VSCA 100; *R v Hart* [2003] EWCA Crim 1268.

Questions

1. Do you think it is appropriate that police prosecutors are responsible for prosecuting drivers charged with negligent driving causing death or grievous bodily harm?
2. Do you think that there needs to be a change in the way fall-asleep cases are charged, for example should it be specified in relation to charging that driving when too tired to stay awake is an example of circumstances that may support an allegation of dangerous driving?
3. Are there any deficiencies in the way evidence is collected in cases of motor vehicle crashes causing death or serious injury?
4. Do you think that greater use of expert evidence would assist in the prosecution of fall-asleep cases?
5. Do you think there are any other ways in which the prosecution of these offences could be improved?

Part 6

Reforms in other jurisdictions

In some jurisdictions, the issue of falling asleep at the wheel has been specifically examined and reforms have been implemented to deal with aspects of the problems identified.²⁵¹

6.1 New South Wales

Joint Standing Committee Upon Road Safety (STAYSAFE)

6.1.1 In March 1994, the NSW Parliament STAYSAFE committee tabled a report entitled *Death and Serious Injury on New South Wales Roads: An Examination of the Provisions of the Crimes Act 1900 (NSW) Regarding Dangerous Driving*.²⁵² The report examined, amongst other things, the impact of the decision in *Jiminez v The Queen* upon the law applying where crashes are caused by falling asleep at the wheel or being fatigued. A number of witnesses who appeared before the STAYSAFE committee were questioned about the consequences of the decision. It was noted by accident investigators that they were required to be able to point to evidence that a driver had prior warning of the likelihood of falling asleep in order to secure a conviction. Understandably, such evidence is difficult to ascertain in most cases, absent admissions by the driver or other evidence of impaired driving.²⁵³

6.1.2 In the course of taking submissions, the Committee received a proposal that s 52A of the *Crimes Act 1900* (NSW) be amended to provide that falling asleep cannot be offered as a defence to a prosecution under the section. The committee did not support the recommendation, but referred the matter to the Attorney-General and the Minister for Roads to look at the complex issues raised in considering the decision in *Jiminez*.²⁵⁴ There does not appear to have been any further analysis of this issue since this report.

Amendments to driver licensing regulations

6.1.3 Whilst there have been no substantive changes to provisions in the *Crimes Act 1900* or the *Traffic Act 1909* to deal with this issue, an amendment has been made to the *Road Transport (Driver Licensing) Regulations 1999* which allows the Roads and Traffic Authority to ‘suspend a person’s driver licence if it appears... that, while driving a motor vehicle, the person has occasioned death or grievous bodily harm to some other person as a result of having become incapable of controlling the

²⁵¹ In the Appendix, a table sets out the range of offences available in other jurisdictions where death or serious injury results from a car crash.

²⁵² Joint Standing Committee Upon Road Safety (STAYSAFE Committee), *Death and Serious Injury on New South Wales Roads: An Examination of the Provisions of the Crimes Act 1900 (NSW) Regarding Dangerous Driving*, STAYSAFE Report Number 25, March 1994, Parliament of New South Wales.

²⁵³ *Ibid*, 158-159.

²⁵⁴ *Ibid*, 161. See recommendation 20 ‘The Attorney-General and the Minister for Roads examine the implications of the High Court decision in *Jiminez v R* 106 ALR 162 for relevant legislation relating to driving a motor vehicle, notably the *Crimes Act 1900* and the *Traffic Act 1909*.’

motor vehicle (for example, as a result of sleep or loss of consciousness)'.²⁵⁵ Such action may be taken regardless of whether the person is to be prosecuted for an offence.²⁵⁶ Further, the Authority 'need not inquire into the likelihood of the person again becoming incapable of controlling a motor vehicle in similar circumstances'.

6.1.4 The practice is for police and the Office of the Director of Public Prosecutions to bring to the attention of the Roads and Traffic Authority any cases in which the *Jiminez* argument arises either at the time of charging or otherwise in the course of proceedings.²⁵⁷ The amendment was announced in NSW Parliament on 26 June 2001 by the then Minister for Transport, Mr Scully. He noted that fatigue had killed 123 people on NSW roads in 2000. The amendment aims to remove motorists from NSW roads where they claim to have fallen asleep at the wheel. If there is a medical reason for doing so, such as sleep apnoea or narcolepsy, such drivers will need to be examined by a doctor before they may again be licensed.²⁵⁸

6.1.5 In the period since the provision came into effect on 17 August 2001 to 20 June 2005, the Roads and Traffic Authority of New South Wales has taken action to suspend a driver's licence under the provisions of regulation 38(1A) on 17 occasions. The licence can only be re-instated by way of an order by a Local Court on appeal.²⁵⁹

6.2 Victoria

Department of Justice Discussion Paper on Culpable and Dangerous Driving Laws

6.2.1 In January 2004, the Victorian Department of Justice released a discussion paper addressing culpable and dangerous driving laws in Victoria.²⁶⁰ One of the areas addressed by the paper was 'whether the existing law of culpable driving causing death adequately deals with drivers who cause fatal accidents when they fall asleep at the wheel or drive when very drowsy'.²⁶¹

6.2.2 The paper noted a level of concern about the failed prosecution of a number of cases of culpable driving where falling asleep at the wheel or fatigue was alleged. This had given rise to a perception that 'the law has made it too difficult to establish that the falling asleep at the wheel or the fatigued driving amounted to a form of culpable driving'.²⁶² The decision of Winneke P in *R v Franks* was cited as stating the current law in Victoria. His Honour stated that:

To continue to drive a vehicle when one is 'tired' or 'fatigued', words of wide import, will not necessarily represent a departure from the standards expected of the prudent driver, such as to attract the epithet 'gross'. In my view it will only become so when the fatigue has reached a point where the driver is or should be aware that continuing to drive poses the risks to which I have referred [i.e., the risk of falling asleep or losing control of the vehicle].²⁶³

²⁵⁵ *Road Transport (Driver Licensing) Regulation 1999* (NSW), reg 38(1A)(a).

²⁵⁶ *Road Transport (Driver Licensing) Regulation 1999* (NSW), reg 38(1A)(b).

²⁵⁷ Letter dated 24 November 2003 to Tasmania Law Reform Institute from NSW Director of Public Prosecutions, Mr N R Cowdery AM QC.

²⁵⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 June 2001, 15355 (Carl Scully, Minister for Transport).

²⁵⁹ *Road Transport (Driver Licensing) Regulation 1999* (NSW), reg 39(4A). Also letter dated 20 June 2005 from G Crouch, For Manager, Driver Sanctions, Roads and Traffic Authority, NSW.

²⁶⁰ Victorian Department of Justice, *Culpable and Dangerous Driving Laws: Discussion Paper* (2004).

²⁶¹ *Ibid*, 3.

²⁶² *Ibid*, 25.

²⁶³ *R v Franks* [1999] 1 VR 518, 23 (Winneke P) who referred to Victorian Department of Justice, *Culpable and Dangerous Driving Laws: Discussion Paper* (2004) 25. This quote was also extracted at 4.6.8.

6.2.3 The case of *R v Marriot*²⁶⁴ was also referred to in the report where a County Court judge held that an accused had no case to answer during a trial held in 2002 as there was ‘insufficient evidence’ to persuade a jury ‘beyond reasonable doubt that the defendant ought to have known he was in danger of falling asleep’.²⁶⁵ Clearly, the law in Victoria was able to accommodate a prosecution of a driver in such circumstances. However, the perceived difficulty in prosecuting such cases had ‘prompted calls to make it less difficult for the prosecution to show that drivers who fall asleep at the wheel or drive while fatigued meet the necessary level of culpability’.²⁶⁶

6.2.4 The report then went on to focus upon the ‘perceived lack of recognition of falling asleep at the wheel’ and asked the question whether it should be included as a separate head of culpable driving causing death.²⁶⁷ There then followed discussion about whether such a head of liability should be strict, or whether a fault element ought to be specified.²⁶⁸ Having already acknowledged that falling asleep at the wheel can, in certain circumstances, amount to culpable negligence, much of the rest of this section of the paper went on to ask the question whether falling asleep at the wheel in known circumstances of fatigue ought to be considered *prima facie* evidence of recklessness or negligence.

6.2.5 Questions 16-22 of the discussion paper deal with the issue of falling asleep at the wheel. The paper sought submission in relation to the following questions:

16. Should falling asleep at the wheel be included as another strict liability form of culpable driving causing death?

17. Should the fault in falling asleep at the wheel be characterised as a form of recklessness or negligence when driving in circumstances of fatigue?

18. Should falling asleep at the wheel in known circumstances of fatigue be specified as *prima facie* evidence of recklessness or negligence?

19. Should falling asleep at the wheel in known circumstances of fatigue be identified as an example of recklessness or negligence?

20. Should the offence cover simply driving while fatigued (regardless of whether the driver actually fell asleep)?

21. Should falling asleep at the wheel or fatigued driving be explicitly included with a new dangerous driving offence?

22. If so, in what form?²⁶⁹

6.2.6 The Law Institute of Victoria responded to the paper by supporting the draft response that had been forwarded to them by the Victorian Criminal Bar Association. They responded ‘No’ to all of the above questions and noted the following:

²⁶⁴ County Court of Victoria, 27 November 2002.

²⁶⁵ Victorian Department of Justice, above n 260, 25.

²⁶⁶ *Ibid*, 25.

²⁶⁷ *Ibid*, 26.

²⁶⁸ *Ibid*.

²⁶⁹ *Ibid*, 25-29.

We consider that this aspect of the discussion paper fails to acknowledge that driving is a conscious and voluntary act. The failure to grapple with this issue has resulted in a number of questions being posed in the discussion paper that the High Court resolved in *Jiminez v R* (1992) 173 CLR 573. The basic premise of *Jiminez* is that to be punished for criminal behaviour while driving it must first be established that the driving was a conscious and voluntary act. A person without forewarning who falls asleep while driving is not performing a conscious and voluntary act and therefore cannot be held criminally liable for the consequence of the driving. However, driving in circumstances where a person is or should be aware that fatigue is setting in and falling asleep is a real possibility and in spite of that the person keeps driving is an example of driving negligently. *Jiminez* at 577, 579.²⁷⁰

6.2.7 The paper identified that the current law in Victoria did accommodate the prosecution of certain drivers who fell asleep at the wheel, but that there was a perceived problem in proving such matters. Despite this, the paper focused largely on whether driving whilst fatigued should be specified as a form of negligence, and if so, what form it should take.

6.2.8 The raft of reforms eventually introduced to the Victorian Parliament in response to the paper included an amendment to the culpable driving causing death provisions that specified driving whilst fatigued, in certain circumstances, as a form of negligence. Section 318(2)(b) of the *Crimes Act 1958* provides that ‘a person drives a motor vehicle culpably if he drives the motor vehicle... negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case’. Section 318(2A) provides that:

Without limiting sub-section (2)(b), negligence within the meaning of that sub-section may be established by proving that –

- (a) a person drove a motor vehicle when fatigued to such an extent that he or she knew, or ought to have known, that there was an appreciable risk of him or her falling asleep while driving or of losing control of the vehicle; and
- (b) by so driving the motor vehicle the person failed unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in all the circumstances of the case.

6.2.9 Under this new provision, it appears that a prosecutor would need to establish that both the driver was fatigued to the extent specified in s 318(2A)(a) as well as proving that the driving was also negligent. The provision, at best, does not appear to have altered the situation in Victoria at all, and at worst, could be said to have added an extra layer of complexity to the question of whether a driver who falls asleep at the wheel is able to be found guilty of culpable driving causing death. At the time of writing, no reported decisions were identified that examined the operation of the provision. In *Satalich*,²⁷¹ (a sentencing appeal) the accused pleaded guilty to culpable driving causing death. The Crown case reflects the wording of the new section, that is that the accused knew or ought to have known of the risk of falling asleep.

²⁷⁰ Law Institute of Victoria submission in response to the Justice Department Discussion Paper on ‘Culpable and Dangerous Driving’, https://www.liv.asn.au/members/sections/submissions/20040227_95/20040227culpabledriving.pdf (accessed 25 July 2005).

²⁷¹ [2004] VSCA 132.

6.3 Queensland

6.3.1 The Queensland Parliament's Travelsafe Committee recently conducted an inquiry into crashes involving driver and rider fatigue in the State. Its final report, *Driving on Empty: Fatigue Driving in Queensland* was tabled on 6 October 2005. Its terms of reference was to examine and report on:

- (a) The involvement of driver and rider fatigue as a factor in road crashes in Queensland;
- (b) The causes and symptoms of this fatigue; and
- (c) Legislative, enforcement, educational and other measures to reduce the incidence of fatigue related crashes.²⁷²

6.3.2 The committee looked briefly at the legislative framework for road safety initiatives aimed at reducing the incidence of fatigue related crashes. It was noted that specific legislation was largely directed at the drivers of heavy vehicles, for example citing *Transport Operations (Road Use Management - Fatigue Management) Regulations 1998* (Qld).

6.3.3 The final report did not examine the problems in relation to the current legislative framework regarding light vehicle drivers in any real detail. It did note, however that:

The committee believes that legislation relating to driving without due care and attention and dangerous operation of a vehicle is ineffective for regulating fatigue in drivers and riders of light vehicles. The committee however believes this is because the current Queensland legislation does not include fatigue as an explicit offence and does not outline what is and is not an acceptable level of fatigue.²⁷³

6.3.4 The report did not, however, make any recommendations to change the current legislation or to introduce new offences. They did, however, recommend that the New South Wales and Victorian models be monitored to assess their effectiveness before any legislative change is made in Queensland.²⁷⁴

6.4 New Jersey, USA

6.4.1 In 2004, the State of New Jersey legislature amended the New Jersey Code of Criminal Justice to specifically address the issue of driving whilst fatigued. The section relating to 'Death by auto or vessel' provides that '[c]riminal homicide constitutes vehicular homicide when it is caused by driving a vehicle or vessel recklessly'. The section further provides that 'proof that the defendant fell asleep while driving or was driving after having been without sleep for a period in excess of 24 consecutive hours may give rise to an inference that the defendant was driving recklessly.'²⁷⁵

6.4.2 The amendment appears to be aimed at capturing two types of scenarios: first, that where the driver actually falls asleep and secondly, the situation where a person's ability to drive is impaired due to lack of sleep, specifically confined to situations where the period without sleep exceeds 24 consecutive hours. The amendment specifies that such situations *may* give rise to an inference of

²⁷² Ibid, 2.

²⁷³ Parliamentary Travelsafe Committee, *Driving on Empty: Fatigue Driving in Queensland*, Report No. 43, October 2005, 44.

²⁷⁴ Ibid, recommendation 11, 45.

²⁷⁵ New Jersey Code of Criminal Justice, NJ Stat. § 2C:11-5.

driving recklessly. The provision does not address the issue of voluntariness and in particular the difficulty faced by prosecutors in proving this element beyond reasonable doubt in the face of assertions by drivers that they had no prior warning that they were going to fall asleep. The provision appears to have the advantage of specifying falling asleep and being fatigued as circumstances where the issue of recklessness may arise, but goes no way to solving the evidentiary problems such cases usually present.

Part 7

Options for reform

7.1 Option 1: No change to the law

7.1.1 The current law is set out by the High Court decision in *Jiminez*, where it was held that there must be a voluntary act of driving and the period of driving while asleep does not constitute that voluntary act. In cases where the driver has fallen asleep, the focus of the court is upon the driving which immediately precedes his falling asleep. It is necessary for the prosecution to prove that the driver was ‘affected by tiredness to an extent that, in the circumstances, his driving was objectively dangerous’.²⁷⁶ The jury is able to draw that inference from ‘a finding that the applicant went to sleep at the wheel’.²⁷⁷ However, the court also held that the liability for dangerous driving causing death was strict rather than absolute. Accordingly, the defence of honest and reasonable mistaken belief is available. The court held that ‘[if] in a case based on tiredness, there is material suggesting that the driver honestly believed on reasonable grounds that it was safe for him to drive, the jury must be instructed with respect to that issue’.²⁷⁸ If the jury accepts that there was an absence of warning of the onset of sleep, then the accused is acquitted.

7.1.2 An advantage of Option 1 is that it recognises that our current legislative framework is capable of accommodating cases where falling asleep at the wheel leads to crashes resulting in death or serious injury. It can be said to strike an appropriate balance between convictions and acquittals. If the status quo is maintained, an inevitable consequence is that some cases will result in acquittals. Acquittals will occur in cases where there is insufficient evidence that the driver had prior awareness that they were at risk of falling asleep or in cases where an undiagnosed sleeping disorder may have played a part. There is an argument that criminal liability should not attach in a case where a driver did not have prior warning of the onset of sleep. Acceptance of the status quo position brings with it acceptance that the fact that a driver has fallen asleep at the wheel may establish fault or provide a defence in certain cases. The advantage of this position is that the current law reflects long accepted legal principles requiring proof of a voluntary and intentional act. It provides a balance between the cases where people drive when they are tired or fatigued (no criminal liability attaches) and the cases where a person continues to drive when they are so fatigued that they have reached a point where they were aware or should have been aware that there was real risk of falling asleep and losing control of the vehicle (criminal liability attaches).

7.1.3 On the other hand, a disadvantage of Option 1 is that difficulties may exist for the prosecution in proving the accused had warning of sleep. This may be an area where greater use of expert evidence would assist in overcoming the evidentiary issues that arise in fall-asleep cases. Option 1 may also be contrary to evidence from sleep research which shows that healthy drivers are aware that they are sleepy before they actually fall asleep.

Question

6. Do you agree with Option 1, that there should be no change to the law? Please give reasons for your views.

²⁷⁶ *Jiminez* (1992) 173 CLR 572, 583.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*, 584.

7.2 Option 2: No change to substantive law but with the introduction of a power to suspend driving licence

7.2.1 Option 2 would make no change to the substantive law concerning the criminal liability of drivers who fall asleep and cause serious injury or death as a result of a crash. This would mean that the status quo position (*Jiminez*) would be retained in cases where the driver is charged under the *Criminal Code* or the *Traffic Act*. However, the approach of New South Wales (as detailed at 6.2.4 - 6.2.6) could be adopted. In NSW the *Road Transport (Driver Licensing) Regulations 1999*, reg 38(1A) and (1B) provide that the Roads and Traffic Authority:

(1A) (a) may suspend a person's driver licence if it appears to the Authority that, while driving a motor vehicle, the person has occasioned death or grievous bodily harm to some other person as a result of having become incapable of controlling the motor vehicle (for example, as a result of sleep or loss of consciousness), and

(b) may do so regardless of whether the circumstances in which this has occurred have given rise to the person being prosecuted for an offence.

(1B) In deciding whether to suspend a person's driver licence under subclause (1A), the Authority need not inquire into the likelihood of the person again becoming incapable of controlling a motor vehicle in similar circumstances.

In New South Wales, there is an appeal avenue provided to the local court by the *Road Transport (Driver Licensing) Regulations 1999*, reg 39(4A) against the suspension of the licence.

7.2.2 The provisions contained in the *Vehicle & Traffic (Driving Licensing & Vehicle) Regulations 2000* (NSW), reg 25 are in similar terms to the *Road Transport (Driver Licensing) Regulations 1999* (NSW), reg 38(1). It would be possible to amend the Tasmanian regulations to reflect the New South Wales provision by inserting a provision in the same terms as regulation 38(1A) and (1B). This would give the Registrar of Motor Vehicles the power to suspend a person's licence where the person has caused death or grievous bodily harm as a result of having fallen asleep while driving. An advantage of such an amendment is that it would operate to remove drivers from the roads where they have previously fallen asleep at the wheel and caused death or grievous bodily harm. However, there is a concern that a person may have their licence removed by way of administrative actions in circumstances where no criminal charges have been laid and no conviction obtained. It is then a matter for the driver to appeal the administrative decision to reinstate their licence. Considerations of fairness and transparency may weigh against this option.

7.2.3 In Tasmania, the Registrar of Motor Vehicles already has the power to suspend the driving licence of a person in certain circumstances.²⁷⁹ This includes where a person has failed or refused to submit to a medical examination or has failed any such medical examination,²⁸⁰ or where a person cannot drive a motor vehicle of the relevant class without danger to the public because of illness or incapacity or the effects of treatment for illness or incapacity.²⁸¹ In addition, a person is only eligible for a licence if they are medically fit to drive a motor vehicle.²⁸² The Registrar can require a person to submit to a medical examination to show that the person is medically fit to drive before the issue of licence²⁸³ or the renewal of a licence.²⁸⁴ These powers are relevant to medical conditions that affect a

²⁷⁹ *Vehicle and Traffic (Driving Licensing and Vehicle) Regulations 2000*, reg 25(1).

²⁸⁰ *Vehicle and Traffic (Driving Licensing and Vehicle) Regulations 2000*, reg 25(1)(a).

²⁸¹ *Vehicle and Traffic (Driving Licensing and Vehicle) Regulations 2000*, reg 25(1)(b).

²⁸² *Vehicle and Traffic (Driving Licensing and Vehicle) Regulations 2000*, reg 11(1)(c).

²⁸³ *Vehicle and Traffic (Driving Licensing and Vehicle) Regulations 2000*, reg 13(2).

²⁸⁴ *Vehicle and Traffic (Driving Licensing and Vehicle) Regulations 2000*, reg 23(2).

person's ability to driver such as sleep apnoea or narcolepsy.²⁸⁵ Currently, information about a person's medical condition is usually brought to attention of the Registrar by the driver. This occurs when a person applies for or renews their licence, as a standard question on a licence application/renewal form is whether a person suffers from sleep apnoea. There is also an obligation under the *Vehicle & Traffic (Driving Licensing & Vehicle) Regulations 2000*, reg 29(6) to notify the Registrar as soon as practicable where a person suffers from: (a) any permanent or long-term injury or illness that may impair his or her ability to drive safely; or (b) any deterioration of physical or mental condition (including a deterioration of eyesight) that may impair his or her ability to drive safely; or (c) any other factor related to physical or mental health that may impair his or her ability to drive safely. Failure to notify the Registrar is punishable by a fine of 10 penalty units (\$1,000).

7.2.4 If the Registrar of Motor Vehicles makes a decision to suspend a driving licence, this is a reviewable decision under the *Vehicle and Traffic (Review of Decisions) Regulations 2000*.²⁸⁶ The *Vehicle and Traffic (Review of Decisions) Regulations 2000* set out a procedure for internal and external review of the decisions of the Registrar. Initially, a person may apply for an internal review of a decision.²⁸⁷ If after the internal review, the person is not satisfied with the outcome, the person may apply to the Magistrates Court (Administrative Appeals Division) for a review of the finding or determination of the reviewing authority.²⁸⁸

7.2.5 The Austroads guidelines for health professionals set out the medical standards for licensing for sleep disorders.²⁸⁹ There are different standards for private and commercial drivers. The private standards (those that apply to cars, rigid light vehicles and motorcycles) provide that the criteria for an unconditional licence are not met where:

- a person has proven sleep apnoea syndrome who has at least moderately severe sleepiness and in the opinion of the treating doctor/GP represents a significant driving risk; **or** who have frequent self-reported episodes of sleepiness or drowsiness while driving, or motor vehicle crashed caused by inattention or sleepiness.
- for high-risk individuals, whose condition is untreatable or is not amenable to expeditious treatment **within 2 months** or are unwilling to accept treatment or unwilling to restrict driving until effective treatment has been instituted.²⁹⁰

Similarly, private standards are not met where a driver suffers from narcolepsy. However, for sleep apnoea and narcolepsy, a conditional licence may be granted, taking into account the opinion of the treating doctor and the nature of the driving task, and subject to periodic review.²⁹¹ In the case of sleep apnoea, there is the further requirement that the person is compliant to treatment and the response to treatment is satisfactory. The requirements for commercial standards are stricter.²⁹²

7.2.6 In Tasmania, there is no compulsory requirement for medical practitioners to notify the Registrar when a person suffers from a medical condition that may impair a person's ability to drive safely. While the general rule is that a medical practitioner will not disclose communications with a patient, Austroads guidance suggests that a medical practitioner has an obligation to disclose a patient's medical condition in certain circumstances:

²⁸⁵ Sleep apnoea is a condition which causes a person to suffer brief episodes of interrupted breathing while asleep, resulting in loss of oxygen and disrupted sleep, see 2.2.8. Sufferers of narcolepsy experience excessive daytime sleepiness and may fall asleep with little or no warning, see 2.2.10.

²⁸⁶ *Vehicle and Traffic (Review of Decisions) Regulations 2000*, reg 4 and Schedule 1 Part 1 item 6.

²⁸⁷ *Vehicle and Traffic (Review of Decisions) Regulations 2000*, reg 4.

²⁸⁸ *Vehicle and Traffic (Review of Decisions) Regulations 2000*, reg 10.

²⁸⁹ Austroads, above n 26.

²⁹⁰ *Ibid*, 89.

²⁹¹ *Ibid*, 89, 90.

²⁹² *Ibid*.

As the relationship between patient and health professional is confidential, the health professional will not normally communicate directly with the driver licensing authority. They will provide the patient with advice about their ability to drive safely as well as a letter, or report, to take to the authority...

Health professionals also have an obligation to public safety, so if a health professional believes a patient is not heeding advice to cease driving, the health professional may report directly to the driver licensing authority.

If you have questions pertaining to your legal and ethical positioning as a health professional you may wish to contact your local medical defence organisation (MDO) or seek legal advice.²⁹³

In the case of discretionary disclosure, a medical practitioner who makes a disclosure to the Registrar of Motor Vehicles without a patient's consent but in good faith is protected from civil and criminal liability.²⁹⁴

7.2.7 Compulsory disclosure in relation to medical conditions that impact on a person's ability to drive safely is required in some Australian jurisdictions. In South Australia and the Northern Territory, medical practitioners are required to report drivers who they believe to be medically unfit to drive.²⁹⁵ For example, the *Motor Vehicle Act 1959* (SA), s 148 provides:

- (1) Where a health professional has reasonable cause to believe that—
 - (a) a person whom he or she has examined holds a driver's licence or a learner's permit; and
 - (b) that person is suffering from a physical or mental illness, disability or deficiency such that, if the person drove a motor vehicle, he or she would be likely to endanger the public,

the health professional is under a duty to inform the Registrar in writing of the name and address of that person, and of the nature of the illness, disability or deficiency from which the person is believed to be suffering.

- (2) Where a health professional furnishes information to the Registrar in pursuance of subsection (1), he or she must notify the person to whom the information relates of that fact and of the nature of the information furnished.

- (3) A person incurs no civil or criminal liability in carrying out his or her duty under subsection (1).

Compulsory reporting would have the advantage of clarifying the obligations of medical practitioners. It may strengthen the existing regime by lessening reliance on self-reporting, and by ensuring that people who are treated by a medical practitioner for a sleep disorder have their driving licence conditions assessed in view of their medical condition. On the other hand, the issue of compulsory reporting applies to medical conditions more broadly than just to sleep disorders, and a mandatory reporting requirement would impose considerable obligations on medical practitioners. If mandatory reporting was imposed only for sleep disorders, this would create a 'special case'. Sleep disorders would be treated differently from other physical or mental illnesses that may impact on a person's ability to drive safely. The Institute would be interested to receive comment as to operation of the current discretionary arrangement, and whether the current approach is considered to provide sufficient protection for public safety.

²⁹³ <http://www.austroads.com.au/aftd/hp.html> (accessed 4 July 2007).

²⁹⁴ The *Vehicle and Traffic Act 1999*, s 63(1) provides that 'a person incurs no civil or criminal liability for reporting to the Registrar, in good faith, that another person may be unfit to drive a motor vehicle'. See also *Vehicle and Traffic Act 1999*, s 56 and s 63(2).

²⁹⁵ See *Motor Vehicle Act 1999* (NT), s 11(4).

Questions

7. Do you agree with Option 2, that there should be no change to the substantive law with power given to Registrar of Motor Vehicle to suspend a person's driving licence where they have fallen asleep and caused death or grievous bodily harm? Please give reasons for your views.
8. Should limits be placed on the power of the Registrar of Motor Vehicles? For example: (a) Should the power be exercised only where a person is prosecuted and/or convicted of an offence? (b) Should the Registrar have to inquire into the likelihood of the person becoming incapable of controlling a motor vehicle in similar circumstances? (c) Should the Registrar be required to obtain additional medical evidence before exercising the power to suspend a driving licence?
9. Should medical practitioners be compelled to notify the Registrar of Motor Vehicles that a person is suffering from a medical condition that is likely to affect their ability to drive safely?

7.3 Option 3: Introduction of provisions specifying that if there is an appreciable risk of falling asleep, driving when sleepy may constitute negligence or dangerousness

7.3.1 Option 3 is the introduction of a provision specifying that if there is an appreciable risk of falling asleep, driving while sleepy may constitute negligence or dangerousness in circumstances where the driver falls asleep and causes death or grievous bodily harm. Such an amendment reflects the decision of the High Court in *Jiminez*, where it was held that the fault of a driver is not found in the period of driving while asleep but in failing to stop driving when overcome by sleepiness to the extent that the person is likely to fall asleep.

7.3.2 A similar provision has been introduced in Victoria into the *Crimes Act 1958* (Vic). In Victoria, a person who causes death through the use of the motor vehicle may be charged with culpable driving causing death²⁹⁶ or the lesser offence of dangerous driving causing death.²⁹⁷ Culpable driving may be established by proof of recklessness, negligence or where the driver was under the influence of alcohol or drugs as to be incapable of the proper control of the vehicle. The standard of negligence for culpable negligence is set out in *Crimes Act 1958* (Vic), s 318(2)(b) that provides 'a person drives a motor vehicle culpably if he drives the motor vehicle... negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case'. Section 318(2A) specifically provides that culpable negligence can be established where a driver was aware or ought to have been aware of the likelihood of falling asleep:

²⁹⁶ *Crimes Act 1958*, s 318. See Appendix.

²⁹⁷ *Crimes Act 1958*, s 319. This section also creates the offence of dangerous driving causing serious injury.

Without limiting sub-section (2)(b), negligence within the meaning of that sub-section may be established by proving that –

(a) a person drove a motor vehicle when fatigued to such an extent that he or she knew, or ought to have known, that there was an appreciable risk of him or her falling asleep while driving or of losing control of the vehicle; and

(b) by so driving the motor vehicle the person failed unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in all the circumstances of the case.

As discussed above,²⁹⁸ this provision appears to add an extra level of complexity to their current legislative framework.

7.3.3 Under s 318(2A) fault can be established where the person knew or *ought* to have known that there was an appreciable risk of falling asleep. This means that the accused does not actually have to know that there was an appreciable risk of falling asleep provided it can be established that the accused ought to have known. This reflects the law as expressed in *R v Franks*,²⁹⁹ where it was held that driving a vehicle when ‘tired’ or ‘fatigued’ would only represent a ‘gross’ departure from the standards expected of the prudent driver when ‘the fatigue has reached a point where the driver is or should be aware that continuing to drive poses the risks to which I have referred [i.e., the risk of falling asleep or losing control of the vehicle]’.³⁰⁰ It should be noted that s 318(2A) does not apply to the offence of dangerous driving causing death or serious injury contained in *Crimes Act*, s 319. The law in *Jiminez* continues without the legislative gloss.

7.3.4 Option 3 would involve introducing sections to the *Traffic Act* and/or the *Criminal Code* specifying that dangerous driving and/or negligent driving can be established by proving that a driver who drives whilst sleepy to such an extent that they knew or ought to have known that there was an appreciable risk of falling asleep, and that they did in fact fall asleep at the wheel.

7.3.5 Such an amendment would have the advantage of clarifying what must be proved to establish negligence and/or dangerousness, and provide a framework for prosecuting authorities to properly particularise any charges laid. It also preserves the fundamental principle that a person is only criminally responsible if the alleged criminal act is voluntary and intentional. It does this by focusing on the period of driving when the person was feeling sleepy and had knowledge (or ought to have had knowledge) that there was a real risk of falling asleep. Further, such a provision may be seen to provide an educative function, making it clear to all drivers that failing to stop when feeling sleepy and falling asleep whilst driving is unacceptable and akin to driving at speed or under the influence of drugs or alcohol.

7.3.6 A disadvantage is that such an amendment may add greater complexity to the prosecution of falling asleep cases in cases of dangerousness and negligence. Currently, dangerousness is not established by reference to what the accused knew but by reference ‘to whether he ought to have appreciated the danger; or to put it another way, whether a reasonable person in the situation of the accused would have appreciated the danger’.³⁰¹ The introduction of the actual knowledge of the accused as a matter relevant to fault appears to blur the line between the elements of the offence and the elements relevant to the defence of honest and reasonable mistake. This is not an issue in relation to culpable negligence (to which the amendment applies in Victoria), as the test of honest and

²⁹⁸ See 6.2.9.

²⁹⁹ [1999] 1 VR 518.

³⁰⁰ *Ibid*, [23] (Winneke P).

³⁰¹ (1990) 52 A Crim R 15, 16 (King CJ).

reasonable mistake is taken to be subsumed in the standard of criminal negligence.³⁰² If the prosecution have persuaded the jury beyond reasonable doubt that the driving satisfied the standard for criminal negligence, ‘how could they entertain the possibility that the respondent held an honest *and reasonable* belief that it was safe to proceed?’³⁰³ This is not the case for dangerousness. In relation to dangerous driving it is necessary to consider whether the driving was objectively dangerous and then ask whether the prosecution has established beyond reasonable doubt that the accused did not have an honest and reasonable belief that it was safe for him to drive.

Question

10. Do you agree with Option 3, that provisions should be adopted that specify that dangerous driving or negligent driving can be established by proving that the driver drove whilst sleepy to such an extent that they knew or ought to have known that there was an appreciable risk of falling asleep, and that the driver did in fact fall asleep at the wheel? Please give reasons for your views.

7.4 Option 4: Introduction of deeming provisions to establish a rebuttable presumption that a person who fell asleep at the wheel did in fact have prior awareness that they were at risk of falling asleep.

7.4.1 Option 4 is to introduce deeming provisions to establish a rebuttable presumption that a person who fell asleep at the wheel did in fact have prior awareness that they were at risk of falling asleep. The reversal of onus would be relevant to the defence of honest and reasonable mistake of fact. A deeming provision could operate in circumstances where it is proved that a person did in fact fall asleep at the wheel. It would give rise to a presumption that the driver did also in fact have prior warning. This presumption ought to be rebuttable, thereby providing a defence to those drivers who can establish on the balance of probability that they had no prior warning of sleepiness. This would create a ‘reverse onus’ provision, in that it places the legal burden of proof on the defendant to prove that he/she did not have prior awareness that they were at risk of falling asleep. It would be an exceptional provision as ‘the general rule is that the prosecution bears the burden of proving the elements of an offence and rebutting any defences’.³⁰⁴ Currently, there needs to be a factual basis for the defence of honest and reasonable mistake and then the onus is placed on the prosecution to prove beyond reasonable doubt that the defendant did not have an honest and reasonable belief that it was safe to drive.

7.4.2 A ‘reverse onus’ amendment is not without considerable difficulties. The most significant problem is that the reversal of onus offends against the fundamental principle of the presumption of innocence. As the Model Criminal Officers Committee noted, ‘one of the most hallowed and respected statements of the law is the description in *Woolmington v DPP* [1935] AC 462 by Lord Sankey of the duty of the prosecution to prove the prisoner’s guilt as “the golden thread always to be seen throughout the web of the English Criminal Law”’.³⁰⁵ In the report of the Senate Standing Committee on Constitutional and Legal Affairs, it was stated that:

³⁰² *The Queen v Lavender* (2005) 222 CLR 67, 87 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

³⁰³ *The Queen v Lavender* (2005) 222 CLR 67, 87 (Gleeson CJ, McHugh, Gummow and Hayne JJ) (emphasis in original).

³⁰⁴ S Bronitt and B McSherry, *Principles of Criminal Law* (2001), 119.

³⁰⁵ Model Criminal Code Officers Committee, *Chapters 1 and 2 General Principles of Criminal Responsibility*, (1992), 117.

No policy considerations have been advanced which warrant an erosion of what must surely be one of the most fundamental rights of a citizen: the right not to be convicted of a crime until he [or she] has been proven guilty beyond reasonable doubt. While society has the role by means of its laws to protect itself, its institutions and the individual, the Committee is not convinced that placing a persuasive burden of proof on defendants plays an essential or irreplaceable part in that role.³⁰⁶

The Senate Scrutiny of Bills Committee has adopted this approach as general practice.³⁰⁷ Commonwealth guidelines suggest that the fact that an offence is difficult for the prosecution to prove does not provide a justification for reversing the onus of proof.³⁰⁸ In a fall-asleep case, the sort of factors that operate to make it difficult for the prosecution to establish that a driver knew they were at risk of falling asleep, also present difficulties to a defendant. Often drivers involved in serious crashes have no memory of the crash as a result of injury. And, while the approach at the Commonwealth level is that 'where legislation provides that a particular state of belief is to constitute an excuse for carrying out an action which would otherwise be crime ... [to] more readily accept the onus of proof being placed on him or her to prove that excuse',³⁰⁹ such a reversal is exceptional.

7.4.3 In addition, while support for such an approach may be found in the findings of sleep researchers that healthy drivers who fall asleep at the wheel do have prior warning that they are sleepy and that some drivers are not good at predicting how close to falling asleep they are, sleep research in the area of driving is based on small numbers of healthy participants in artificial driving environments. The research involves asking the participants to respond to questions about their level of fatigue at regular intervals, which in turn may prompt awareness of fatigue symptoms that may not be present in a typical fatigued driving scenario. Further, there is the difficulty for the prosecution of proving that the driver actually fell asleep (absent an admission to this effect).

7.4.4 Against these difficulties, such an amendment would overcome the evidentiary difficulties that prosecutors have in establishing that a driver knew they were at risk of falling asleep. It would also allow those drivers who are suffering from undiagnosed sleeping disorders an opportunity to successfully defend a charge where it is probable that they had no awareness that they were at risk of falling asleep.

Question

11. Do you agree with Option 4, that deeming provisions should be introduced to establish a rebuttable presumption that a person who fell asleep at the wheel did in fact have prior awareness that they were at risk of falling asleep? Please give reasons for your views.

³⁰⁶ Senate Standing Committee on Constitutional and Legal Affairs, *The burden of proof in criminal proceedings* (1982) cited in Senate Scrutiny of Bills Committee, *The Work of the Committee during the 39th Parliament November 1998 – October 2001*, 2.81.

³⁰⁷ Senate Scrutiny of Bills Committee, *The Work of the Committee during the 39th Parliament November 1998 – October 2001*, 2.81.

³⁰⁸ Minister for Justice and Customs, *Framing Commonwealth offences, civil penalties and enforcement powers* (2004).

³⁰⁹ Senate Scrutiny of Bills Committee, *The Work of the Committee during the 39th Parliament November 1998 – October 2001*, 2.81 cited in Minister for Justice and Customs, *Framing Commonwealth offences, civil penalties and enforcement powers* (2004).

7.5 Option 5: Amend current legislation to specifically exclude falling asleep at the wheel from being relied on in relation to driving offences under the *Criminal Code* and the *Traffic Act*

7.5.1 Option 5 is to amend current legislation to specifically exclude falling asleep at the wheel from being relied upon by an accused in relation to driving offences under the *Criminal Code* and the *Traffic Act*. A proposal to specifically exclude falling asleep at the wheel from being relied upon as a defence was not supported by the NSW STAYS SAFE committee, who referred it to the Attorney-General for further consideration.³¹⁰

7.5.2 This approach would be an extreme position, and would see falling asleep at the wheel being treated differently from any other form of driver behaviour. For example, driving in excess of the speed limit or after drinking or taking drugs does not automatically result in a finding of negligence or dangerousness. It does not take account of circumstances where a person may have no warning that they were going to fall asleep, such as an undiagnosed sleep disorder. It also offends against the fundamental principles of criminal responsibility that an accused's conduct must be voluntary and intentional.

7.5.3 Option 5 would also pose a problem for judges when directing a jury in a case where a defendant has fallen asleep at the wheel and caused death or serious injury. If legislation were enacted to provide that a person who is asleep is to be treated as if they were awake, the judge would be placed in the undesirable position of being required to tell the jury that they need to pretend that the defendant was awake at the time of the crash, even though the jury may have irrefutable evidence that the defendant was in fact asleep. It is irrational and undesirable for a judge to be required to direct a jury to make artificial assumptions about the facts.

Questions

12. Do you agree with Option 5, that current legislation should be amended to specifically exclude falling asleep at the wheel from being relied upon in relation to driving offences under the *Criminal Code* and the *Traffic Act*?
13. Do you have any other suggestions/comments concerning the criminal liability of a driver who fall asleep and causes death or serious injury?

³¹⁰ See discussion at 6.1.

Part 8

Related issues

8.1.1 While considering the issue of criminal liability of drivers who fall asleep causing motor vehicle crashes resulting in death or other serious injury, the Institute identified several related issues in relation to liability for motor vehicle crashes generally.

8.2 Alternative verdicts

8.2.1 As can be seen from the above discussion, the *Criminal Code* provides for alternative convictions where certain crimes are charged. Alternative convictions are specified for charges of manslaughter (namely causing death by dangerous driving and dangerous driving)³¹¹ and dangerous driving causing grievous bodily harm (namely dangerous driving).³¹² However, there are no alternatives verdict specified for causing death by dangerous driving. There is a general provision in the *Criminal Code*, s 341 that allows an accused to be convicted of an alternative crime. Section 341 provides that:

Every count in an indictment shall be deemed to be divisible, and if the commission of the crime charged, as described in the enactment creating that crime or as charged in the count, involves the commission of any other crime, the person accused may, on that indictment, be convicted of that other crime.

A crime is defined as ‘an offence punishable by indictment’.³¹³ Accordingly, this provision would not allow an accused charged with causing death by dangerous driving to be convicted of a driving offence under the *Traffic Act 1925*, such as dangerous driving or negligent driving causing death as these are summary offences (and not punishable on indictment).

8.2.2 Since the introduction of the offences of causing death by negligent driving and causing grievous bodily harm by negligent driving, it could be argued that such offences should be specified as alternative convictions for the crimes of causing death by dangerous driving and causing grievous bodily harm by dangerous driving respectively. The difference between the offences with dangerous driving as an element as opposed to negligent driving is a matter of degree. A person involved in a motor vehicle crash resulting in death or serious injury may find themselves charged with a number of different offences on separate complaints. A clarification of the alternative verdicts situation would acknowledge the varying degrees of culpability and simplify the charging process.

Question

14. Should the alternative verdicts provisions be changed to reflect the full range of offences applicable where motor vehicle crashes result in either death or serious injury?

³¹¹ *Criminal Code*, s 334.

³¹² *Criminal Code*, s 334B

³¹³ *Criminal Code*, s 1.

8.3 Young offenders

8.3.1 The prosecution and sentencing of young people less than 18 years of age is governed by the operation of the *Youth Justice Act 1997*. As a general rule, a youth who is charged with any offence, be it summary or indictable is prosecuted within the Magistrates Court (Youth Justice Division) which is a closed court presided over by a Magistrate.³¹⁴ Children dealt with in the Youth Justice Division face penalties under the *Youth Justice Act 1997* as opposed to the *Sentencing Act 1997*.

8.3.2 There are, however, a number of offences which are defined as prescribed offences.³¹⁵ A youth who is charged with a prescribed offence is dealt with as an adult.³¹⁶ Where the relevant prescribed offence is a crime, such matters will be heard and determined in the Supreme Court. Where the prescribed offence is a summary offence, a youth is dealt with as an adult in the Magistrates Court. The offence of manslaughter is a prescribed offence in respect of all youths. For a youth aged 17 or over all offences under the *Vehicle and Traffic Act 1999*, *Traffic Act 1925* or *Road Safety (Alcohol and Drugs) Act 1970* are also prescribed 'except where proceedings for that offence are, or are to be determined in conjunction with proceedings for an offence that is not a prescribed offence'.³¹⁷ No doubt this is in recognition of the fact that 17 year olds may legitimately hold a provisional driver's licence and should be subject to the same laws and penalties as those drivers who are 18 years or older.

8.3.3 Causing death and grievous bodily harm by negligent driving under the *Traffic Act 1925* s 32(2A) and s 32(2B) are, therefore, prescribed offences for youths aged 17 years. This means that a 17 year old charged with either causing death or grievous bodily harm by negligent driving would be charged and dealt with as an adult in the Magistrates Court, provided no other charges are being dealt with at the same time which are not prescribed. He or she would be dealt with in open court and sentenced under the *Sentencing Act 1997* as an adult.

8.3.4 On the other hand, the indictable offences of causing death by dangerous driving and dangerous driving causing grievous bodily harm are not prescribed. A 17 year old charged with either of these crimes could be dealt with in the Magistrates Court (Youth Justice Division). They would also face penalties set out in the *Youth Justice Act 1997*.

Question

15. Do you think it is appropriate that a 17 year old charged with dangerous driving causing death or grievous bodily harm is dealt with by the courts as a youth when they would be dealt with by the courts as an adult if they are charged with the lesser offences of negligent driving causing death or grievous bodily harm?

³¹⁴ *Youth Justice Act 1997*, s 161(1)(a).

³¹⁵ *Youth Justice Act 1997*, s 3.

³¹⁶ *Youth Justice Act 1997*, s 3 definition of 'offence' in conjunction with s 161(1)(a).

³¹⁷ *Youth Justice Act 1997*, s 3 definition of a 'prescribed offence'.

Appendix

Below is a table setting out the range of offences available in other jurisdictions where death or serious injury results from a car crash. The table does not include offences where driving is not an element of the offence. Similarly, the table only deals with offences where the causing of death or serious injury is an element of the offence.

Jurisdiction	Offences and Maximum penalties
NSW	<ul style="list-style-type: none"> • Dangerous driving occasioning death (s 52A(1) <i>Crimes Act 1900</i>) – 10 years imprisonment; • Aggravated dangerous driving occasioning death (s 52A(2) <i>Crimes Act 1900</i>) – 14 years imprisonment; • Dangerous driving occasioning grievous bodily harm, (s 52A(3) <i>Crimes Act 1900</i>) – 7 years imprisonment; • Aggravated dangerous driving occasioning grievous bodily harm (s 52A(4) <i>Crimes Act 1900</i>) – 11 years imprisonment; • Wanton or furious driving causing bodily harm (s 53 <i>Crimes Act 1900</i>) – 2 years imprisonment; • Negligent driving causing death (s 42(1)(a) <i>Road Transport (Safety and Traffic Management) Act 1999</i>) – 30 penalty units and/or 18 months imprisonment (1st offence) or 50 penalty units and/or 2 years imprisonment (second or subsequent offence); • Negligent driving causing grievous bodily harm (s 42(1)(b) <i>Road Transport (Safety and Traffic Management) Act 1999</i>) – 20 penalty units and/or 9 months imprisonment (1st offence) or 30 penalty units and/or 12 months imprisonment (2nd or subsequent offence).
Victoria	<ul style="list-style-type: none"> • Culpable driving causing death (s 318 <i>Crimes Act 1958</i>) – Level 3 imprisonment (maximum 20 years) and/or a level 3 fine; • Dangerous driving causing death or serious injury (s 319 <i>Crimes Act 1958</i>) – level 6 imprisonment (5 years maximum).
Queensland	<ul style="list-style-type: none"> • Dangerous operation of a vehicle causing death or grievous bodily harm (s 328A(4) <i>Criminal Code Act 1899</i>) – 7 years imprisonment or 10 years imprisonment (where offender adversely affected by an intoxicating substance) or 14 years (where the intoxicating substance is alcohol and he concentration of alcohol exceeds .150).
South Australia	<ul style="list-style-type: none"> • Death caused by reckless, dangerous or culpably negligent driving (s 19A(1) <i>Criminal Law Consolidation Act 1935</i>) – 15 years imprisonment and disqualification for 10 years or such longer period as the court orders (1st offence) or life imprisonment and disqualification for 10 years or such longer period as the court orders for subsequent offences or a first offence that is aggravated;

	<ul style="list-style-type: none"> • Bodily harm caused by reckless, dangerous or culpably negligent driving (s19A(3) Criminal Law Consolidation Act 1935) – 15 years imprisonment and disqualification for 10 years or such longer period as the court determines (1st offence where grievous bodily harm caused) or life imprisonment and 10 years disqualification or such longer period as the court orders (subsequent offence where grievous bodily harm caused) or 5 years imprisonment and disqualification for 1 year or such longer period as the court orders (1st offence where grievous bodily harm is not caused) or 7 years imprisonment and disqualification for 3 years or such longer period as the court orders (subsequent offence where grievous bodily harm is not caused).
Western Australia	<ul style="list-style-type: none"> • Dangerous driving causing death or grievous bodily harm (s 59(1) Road Traffic Act 1974) – 20 years imprisonment (where motor vehicle being driven without consent of the owner and death is caused) or 14 years (where motor vehicle being driven without consent of the owner and grievous bodily harm is caused) or 4 years imprisonment or 400 penalty units (if convicted upon indictment in any other circumstances) or 18 months imprisonment or 160 penalty units (if convicted summarily); • Dangerous driving causing bodily harm (s 59A(1) Road Traffic Act 1924) – 6 months imprisonment or 80 penalty units (1st offence) or 18 months imprisonment or 160 penalty units (2nd or subsequent offence).
ACT	<ul style="list-style-type: none"> • Culpable driving causing death (s 29(2) Crimes Act 1900) – 7 years imprisonment. Aggravated offences under s 29(2) attract a maximum penalty of 9 years imprisonment (s 29(3)); • Culpable driving causing grievous bodily harm (s 29(4) Crimes Act 1900) – 4 years imprisonment. Aggravated offences under s 29(4) attract a maximum penalty of 5 years imprisonment; • Negligent driving causing death (s 6(1)(a) Road Transport (Safety and Traffic Management) Act 1999) – 24 months imprisonment and/or 200 penalty units; • Negligent driving causing grievous bodily harm (s 6(1)(b) Road Transport (Safety and Traffic Management) Act 1999) – 12 months imprisonment and/or 100 penalty units.
Northern Territory	<ul style="list-style-type: none"> • Driving motor vehicle causing death (s 174F(1) Criminal Code Act) – 10 years imprisonment. • Driving motor vehicle causing serious harm (s174F(2) Criminal Code Act) – 7 years imprisonment.