TASMANIA
LAW REFORM
INSTITUTE

Criminal Liability of Drivers Who Fall Asleep Causing Motor Vehicle Crashes Resulting in Death or Other Serious Injury: *Jiminez*

FINAL REPORT NO 13

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CONTENTS

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 Margaret Otlowski (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), Mr Craig Mackie (nominated by the Tasmanian Bar Association) and Ms Ann Hughes (community representative).

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This Final Report 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

This Report was prepared by Dr Rebecca Bradfield and Kate Cuthbertson, under the direction of the Board.

The Institute would like to acknowledge and thank the following people for their assistance in the preparation of this Final Report: Frank Neasey; Cees Van Meer; Sergeant Mike Davis; Paul Huxtable; Tim Ellis SC, Director of Public Prosecutions (Tas); Tasmania Police; Nicholas R Cowdrey AM QC, Director of Public Prosecutions (NSW); Manager, Roads Administration, Roads and Transport Authority (NSW); the Law Institute of Victoria; Jim Connolly; David House; the Magistrates Court (Tas); Richard McCredie, former Commissioner of Police (Tasmania); Rex Wild QC, Director of Public Prosecutions (NT); Robert Cook QC, Director of Public Prosecutions (WA); Tom Gyorffy, Office of the Director of Public Prosecutions (Vic).

Background to this Report

The topic for this project was suggested by the Attorney-General in September 2003. The Board of the Tasmania Law Reform Institute approved the project on 14 October 2003.

The publication of this Final Report is made following consultation with the public and participants in the criminal justice system. The consultation was performed by the release of an Issues Paper on this topic in August 2007. The Issues Paper examined 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. Several options for reform were discussed in the Issues Paper:

- Option 1: No change to the law;
- Option 2: No change to substantive law with power to suspend driving licence;
- Option 3: 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;
- 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;
- Option 5: Amendment of current legislation to 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 1925*.

Responses to the Issues Paper were received from:

1. Sandra Taglieri, President, Tasmanian Branch, Australian Lawyers Alliance
2. Carol and Conley Whayman
3. Royce Close
4. N R Cowdrey AM QC, Director of Public Prosecutions, New South Wales
5. T J Ellis SC, Director of Public Prosecutions, Tasmania
6. P J Roche, Chief Executive Officer, MAIB
7. Mike Jones
8. David Hillman, President, Australasian Sleep Association
9. Dr Murray Johns, Director and Chief Scientist, Sleep Diagnostics Pty Ltd
10. Department of Premier and Cabinet (which comprised a joint submission from the Department of Infrastructure, Energy and Resources and the Department of Police and Emergency Management)
11. Safety & Policy Analysis International

In developing its recommendations the Tasmania Law Reform Institute has given detailed consideration to all the responses it received on this matter.

We thank those people for taking the time and effort to respond. In particular, the Institute acknowledges the contributions made by those respondents who have lost a family member as a result of a motor vehicle crash.

Recommendations

Recommendation 1
The Tasmanian Road Safety Council and the Road Safety Task Force consult with experts in the field of sleep medicine/research and review the current community education programs in relation to drowsiness/sleepiness and driving.

Recommendation 2
Option 3 of the Issues Paper not be adopted, that is there be no provision that specifies that if there is an appreciable risk of falling asleep, driving when sleepy may constitute negligence or dangerousness.

Recommendation 3
Option 4 of the Issues Paper not be adopted, that is there be no deeming provision 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.

Recommendation 4
Option 5 of the Issues Paper not be adopted, that is there be no amendment to exclude falling asleep at the wheel from being relied on in relation to driving offences under the *Criminal Code* and the *Traffic Act*.

Recommendation 5
Option 1 of the Issues Paper be adopted, that is there be no change to the law in relation to the requirement for a voluntary and intentional act.

Recommendation 6
That the Department of Infrastructure, Energy and Resources consult with medical practitioners in relation to the introduction of legislative amendments that would require health professionals to have regard to the Austroads *Assessing Fitness to Drive Guidelines* when considering the issue of fitness to drive.

Recommendation 7
Police policy and procedure reflect the need for:

- the investigation of crashes to be conducted by members of the Tasmania Police with training in the legal principles set out in *Jiminez*;
- the interview of drivers that may be 'fall asleep' cases be conducted by members of the Tasmania Police with training in the legal principles set out in *Jiminez*.

Recommendation 8
Police prosecutors, with guidance from the Office of the Director of Prosecutions, prepare a precedent for the particularalisation of negligence where it is alleged that the driver has fallen asleep.

Recommendation 9
That negligent driving causing death (*Traffic Act 1925*, s 32(2A)) or grievous bodily harm (*Traffic Act 1925*, s 32(2B)) should be specified as alternatives to dangerous driving causing death (*Criminal Code*, s 167A) or grievous bodily harm (*Criminal Code*, s 167B)).

Recommendation 10
Dangerous driving causing death (*Criminal Code*, s 167A) and dangerous driving causing grievous bodily harm (*Criminal code*, s 167B) should be prescribed offences for a youth who is 17 years old under the definition contained in *Youth Justice Act*, s 3(c)(ii).

Part 1

Introduction

1.1 Background

1.1.1 This Report makes recommendations in relation to 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 that 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 while 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]

1.1.4 In other words, there must be a voluntary act of driving and a period of driving while asleep does not constitute a voluntary act. In cases where a 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]

1.1.5 The Court also held that the liability for dangerous driving causing death is 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]

1.1.6 In the Issues Paper, the application of the principles articulated in these cases to the legislative framework currently in place in Tasmania was examined. This Report makes no recommendation for any change to the substantive law. However, it makes recommendations in relation to public education and police practice.

1.1.7 The issue became 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. In each case, the crash that

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1 (1992) 173 CLR 572.

2 (1991) 52 A Crim R 15.

3 (1992) 173 CLR 572, 577.

4 Ibid, 583.

5 Ibid, 584.

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 turned on whether the relevant acts of driving were voluntary and intentional. Both of these cases are examined in this Report 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.

1.1.8 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 deceased 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]

1.1.9 The currency of this issue was highlighted in the 2007 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 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.

1.1.10 In the 2009 coroner's investigation into the death of Yunshen Qu, it was observed that the evidence suggested that the driver of the vehicle had fallen asleep at the time of the crash. The coroner noted that:

> A review of the investigation file was undertaken by the Assistant Director of Public Prosecutions who has advised that Mr Forrest should not be charged with any offence arising from the crash. This is because, in the opinion of the Assistant Director, *'it cannot be proved that the accident was caused by Mr Forrest's negligence or inattention'*. He points out that the evidence suggests that at the time of the crash Mr Forrest was most likely asleep and that his driving was an involuntary act on his part. This accords with the evidence of the Nissan's sudden acceleration and the absence of any corrective measures. There is no evidence that Mr Forrest should have known or anticipated the imminent onset of sleep.[8]

1.1.11 Since the Issues Paper was released, the Institute has identified a further five Tasmanian cases where it was found that the driver had fallen asleep killing another person[9] or themselves.[10] The attention of the Institute was also drawn to another motor vehicle crash where three people (including Mr Hoye who was the driver of the vehicle that crossed the centre line of the Highway) were killed. In this case, evidence was lead at the coronial hearing that Mr Hoye was suffering from sleep apnoea. The Coroner found that sleep apnoea was a possibility but he did not consider that there was enough

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6 ABC Television, 'Family outraged at law regarding falling asleep at the wheel', *The 7:30 Report*, (6 May 2002) <http://www.abc.net.au/7.30/s5498084.htm>.

7 Yamakda, Kiyoko [2007] TASCD 063.

8 Qu, Yunshen [2009] TASCD 150 (italics in original).

9 *M*, Complaint no 32830/09; *B1*, Complaint no 64163/02; *B2*, Complaint no 40643/07.

10 *Hankey*, 28 April 2008; *Waxman*, 12 March 2008. In both cases, the drivers also had high blood alcohol readings.

evidence to make a finding that Mr Hoye did in fact suffer from sleep apnoea.[11] In his findings, the Coroner observed that studies had shown that 'the rate of traffic accidents among people with sleep apnoea is 3 to 4 times the rate amongst persons without it'. Further, the Coroner remarked that:

> Bearing in mind the statistics … I would certainly urge that some form of education program be put out to alert people to the risk of this effectively hidden disease because maybe many people wouldn't contemplate that there is any degree of link between their sleeping disorder and the possibility of traffic accidents.

1.1.12 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. The MAIB, in its submission, noted that:

> The Board operates a combined no-fault and common law scheme and has invested heavily in road safety over the past decade. This investment has proven to be successful with claim numbers reducing significantly despite a sustained increase in the number of vehicles on Tasmanian roads.

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 Report 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 Report.

1.1.13 As has been noted in a Road Safety Research Report from the Australian Transport Safety Bureau:

> Fatigue 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.[12]

There have been attempts by government to take preventative action, for example by placing audible edge lines on the sides of highways. There have also been significant changes to the regulation of heavy vehicles with the implementation of the new national heavy vehicle driver fatigue laws.[13] These laws have applied since September 2008 in most mainland states and Tasmania plans to introduce the reforms in the near future.[14]

1.1.14 An examination of the legal consequences of crashes caused by drivers who fall asleep 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, the community is becoming increasingly aware of the dangers posed by drivers affected by tiredness or some other medical condition which may result in diminution 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. For example, Mr and Mrs Whayman write that 'we have strong

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[11] *Whayman*, file no 42/2000; *Hoye*, file no 41/2000; *Cusick*, file no 43/2000.

[12] 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.

[13] For more detail on the new fatigue laws see, National Transport Commission, Safety and Compliance, *Heavy Vehicle Driver Fatigue* (2009) <http://www.ntc.gov.au/viewpage.aspx?documentid=1409>.

[14] See Department of Infrastructure, Energy and Resources, Transport, *Heavy Vehicles Driver Fatigue Laws from 29 September 2008* (2008) <http://www.transport.tas.gov.au/safety/heavy_vehicles_driver_fatigue_laws>.

comments concerning the liability of a driver whom causes death or disability, should be dangerous and culpable driving, like especially if there is a previous history of falling asleep behind the wheel' and that there should be 'zero tolerance on all. Otherwise this situation will never be corrected'. The requirement for a voluntary and intentional act is also difficult for the community to understand, as Mr Close noted:

> I have always been under the impression that when I applied for a drivers licence and passed the necessary test, the State in granting me this licence gave me the responsibility that when I drove this vehicle I would abide with the Traffic Code. Therefore if I was to cross the road or highway for any reason and collided with an oncoming vehicle causing injury or death through my negligence I am guilty! I fail to see what the reason for going the wrong way in the opposite lane has to do with it, the mere fact that I am in it surely makes me liable.

1.1.15 The Department of Police and Emergency Management's (DPEM) view was that legislative change is necessary to meet community expectations:

> It is the opinion of the DPEM [that] no change to the law in relation to the criminal liability of drivers who fall asleep and cause death or serious injury will continue to bring criticism from members of the community, in particular family members of victims involved in fatal and serious crashes who have understandable difficulties accepting the nuances of *Jiminez* and the principles of voluntary and intentional actions.

1.1.16 Such community sentiment is understandable and this point is well summed up by the Director of Public Prosecutions (Tas):

> When a driver is acquitted (or convicted only of a minor charge which carries no risk of imprisonment) having caused a death after falling asleep, there is understandable community consternation. This is fanned by a media which highlights the disappointment and sometimes anger the surviving family of the deceased feel with 'the system's' failure to deliver a measure of atonement to the person who has caused their loss.

However, as the Director of Public Prosecutions (Tas) also observes, law reform should not be driven by the media reporting in such cases.

1.1.17 This Report makes recommendations in relation to whether these opposing considerations are being adequately dealt with under the current legislative and procedural framework.

1.2 Outline of Report

1.2.1 Part 2 of this Report looks at the relationship between driver drowsiness and motor vehicle crashes. It provides background to the Report by examining literature concerning the cause of drowsiness, the impact of drowsiness on driving and a driver's awareness of drowsiness. In this part of the paper, the Institute has relied on submissions received from the Australasian Sleep Association (ASA) which is the peak scientific body of Australian and New Zealand clinicians, scientists and researchers involved in investigation into sleep and its disorders, and the submission received from Dr Murray Johns, Director and Chief Scientist, Sleep Diagnostics Pty Ltd. It also considers the role of community education.

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 sleepiness/drowsiness related crashes.

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

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

1.2.6 Part 7 makes recommendations in relation to the possible options for reform outlined in the Issues Paper. These include:

- Introduction of provisions specifying that if there is an appreciable risk of falling asleep, driving when sleepy/drowsy 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 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*;
- No change to the law;
- No change to substantive law with power to suspend driving licence.

Part 2

Sleepiness/Drowsiness and Motor Vehicle Crashes

2.1.1 This Part examines the relationship between driver sleepiness/drowsiness and motor vehicle crashes. It provides background to the Report by examining literature concerning the cause of sleepiness/drowsiness, the impact of sleepiness/drowsiness on driving and a driver's awareness of sleepiness/drowsiness. 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.

2.1.2 In the Issues Paper, the Institute referred to the relationship between fatigue and motor vehicle crashes. This followed the trend of much of the literature that has examined the relationship between motor vehicle crashes and drivers who fall asleep. During the consultation process, the Institute's attention was drawn to the distinction between the concept of fatigue and the concepts of drowsiness or sleepiness. The ASA wrote 'whilst the term "fatigue" is commonly used in relation to road crashes, the majority of the effects attributed to fatigue are due to the effects of sleepiness on the brain'. The ASA wrote that:

> Sleepiness initially results in impaired cognitive performance, including slowing of reaction time, increased variation in lane position whilst driving, lapses in attention and impaired judgement and visual function. Increasing and severe sleepiness lead to brief sleep periods, or 'microsleeps', and then falling asleep. Increased crash risk occurs at moderate levels of sleepiness that are likely to impair cognitive function and attention and result in 'microsleeps' prior to actually falling asleep. The importance of this is that people may drive whilst impaired as a result of sleepiness, without actually falling asleep.

2.1.3 In his submission, Dr Johns also highlighted the 'widespread misunderstanding that the states of fatigue and drowsiness are the same'. Dr Johns writes that 'drowsiness is the intermediate state between alert wakefulness and sleep'. In contrast, 'fatigue is a subjective state of weariness, often with muscle aches or discomfort, emotional irritability and a disinclination to continue activities'. Further, that,

> fatigue is relieved by rest, whereas drowsiness is relieved by sleep, not by rest in the waking state … Many drivers will feel fatigued after driving for several hours, but that does not necessarily mean that they will be drowsy. However, they can be both drowsy and fatigued at the same time, and this may often be the case.

2.1.4 The Institute has found the submissions by the sleep experts to be helpful and appreciates that there is a distinction between the concepts of sleepiness/drowsiness and fatigue/tiredness. In this Report, the Institute will endeavour to observe the distinction as far as is possible. However, the term 'fatigue' is used in much of the relevant literature, policy and legislation in relation to drivers who fall asleep and will be used in this Report where it was used in the source document. Further, this Report is concerned with the criminal liability of drivers who fall asleep at the wheel and cause death or serious injury.

2.2 The relationship between sleepiness/drowsiness and motor vehicle crashes

Sleepiness/drowsiness as a cause of motor vehicle crashes

2.2.1 *The Mercury* newspaper 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.[15] 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. In an Australia wide survey of drivers conducted by insurer AAMI, 26% of drivers admitted to having fallen asleep while driving and 31% said that they would not stop for a power nap, even if they were tired.[16] AAMI found that 12% of drivers in Tasmania said that fatigue was a factor in their motor vehicle accident.[17] Australian research into community attitudes to road safety conducted in 2008 for the Australian Transport Commission found that 15% of Tasmanian drivers reported falling asleep at the wheel.[18]

2.2.2 The Department of Infrastructure, Energy and Resources' (DIER) figures show that in 2008 'asleep-fatigue' was identified as a crash factor in 15 crashes involving fatal or serious injury (total 316 crashes).[19] This means that it was a crash factor for 4.7% of crashes involving fatal or serious injury. This is a reduction from the figures for the years 2007 and 2006. In 2007, 'asleep-fatigue' was identified as a crash factor in 42 crashes involving fatal or serious injury out of 372 crashes (11.3%). [20] In 2006, 'asleep-fatigue' was identified in 30 crashes involving fatal and serious injury out of 372 crashes (8.1%).[21] These figures are 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.

2.2.3 Higher estimates of driver fatigue as a cause of motor vehicle crashes are found in other 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.[22]

In 2007, in NSW, 20% of fatal crashes were identified as involving fatigue.[23] The Transport Accident Commission Victoria also estimates that 20% of fatal road crashes involved fatigue.[24] Similarly, in Western Australia, fatigue is considered a factor in up to 30% of fatal crashes.[25]

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15 'Sleepy heads risking lives', *The Mercury* (Hobart), 27 January 2004.

16 AAMI, *AAMI Crash Index 2007*, 2.

17 AAMI, *AAMI Crash Index 2008*, 2.

18 D Pennay, *Community Attitudes to Road Safety – 2008 Survey Report* (2008) 57.

19 Department of Infrastructure, Energy and Resources, *2008 Tasmanian Crash Statistics: Serious Injuries and Fatalities*, Source: Crash Data Manager as at 24 February 2009.

20 Department of Infrastructure, Energy and Resources (DIER), *Annual Report 2007–2008*, 21.

21 Ibid.

22 K Dobbie, above n 12, 8.

23 New South Wales Centre for Road Safety, *Road Traffic Crashes in New South Wales* (2007) 7.

2.2.4 Fatigue or sleepiness/drowsiness are also recognised in other countries as a 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.[26]

The National Sleep Foundation's, *Sleep in America Poll* found that 60% of Americans reported that they had driven while feeling sleepy and 37% said that they had fallen asleep while driving.[27] The National Highway Traffic Safety Administration conducted a survey of crashes over a span of time blocks between January 2005 and December 2007. The survey found that in 3.1% of the crashes studied the main reason for the critical pre-crash event attributed to drivers was driver sleep/actually asleep.[28] In a 1995 United Kingdom study, it was estimated that driver fatigue accounts for approximately 20% of motor vehicle crashes.[29] In a 2006 study, it was reported that:

> From analyses of road crash investigation reports on a total of over 2,000 road-traffic collision (RTC) files obtained from UK police forces, we have found that sleepiness is a major cause of serious accidents on monotonous roads in Great Britain, especially motorways. Moreover, compared with RTCs as a whole, we have found that sleep-related crashes are more likely to result in death or serious injury.[30]

In New Zealand, between 2006 and 2008, fatigue was identified as a contributing factor in approximately 12% of fatal crashes.[31]

2.2.5 The under-reporting of the incidence of fatigue/sleepiness/drowsiness-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:

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[24] See, Transport Accident Commission Victoria, *Fatigue Statistics* (2010) <http://www.tacsafety.com.au/jsp/content/NavigationController.do?areaID=12&tierID=1&navID=7334018F&navLink=null&pageID=203>.

[25] Government of Western Australia, Office of Road Safety, *Fatigue* (1 July 2010) <http://www.ors.wa.gov.au/TopicsRoadSafety/Pages/Fatigue.aspx>.

[26] 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.

[27] National Sleep Foundation, *Drowsy Driving* (2010) <http://www.sleepfoundation.org/article/sleep-topics/drowsy-driving>. The *National Survey of Distracted & Drowsy Driving Attitudes and Behaviours* reported that 37% of drivers surveyed had nodded off for at least a moment or fallen asleep at some stage in their history of driving a car and 29% of these drivers said that this had occurred in the past year: see D Royal, *National Survey of Distracted & Drowsy Driving Attitudes and Behaviours*, Report for the National Highway Traffic Safety Administration (2002) 42.

[28] National Highway Traffic Safety Administration, *Traffic Safety Facts*, Research Note (2008) 6. It is important to note that the study only included crashes that occurred between 6am and midnight.

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

[30] L Reyner et al, *Effectiveness of Motorway service areas in reducing fatigue-related and other accidents*, Department of Transport (2006) 11.

[31] Ministry of Transport, *Fatigue* (2009) <http://www.transport.govt.nz/research/Documents/Fatigue_09.pdf>.

- 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;[32]
- The lack of universally accepted definitions of fatigue;[33]
- The absence of methods to objectively assess sleepiness at a crash site;[34]
- 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;[35]
- 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;[36]
- 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.[37]

2.2.6 A recent Australian study has highlighted the continued underestimation of the contribution of sleepiness to collision risk. In a study of 40 drivers, Crummy et al found that almost half of the drivers in their study involved in a collision 'had at least one risk factor for a sleep-related MVC [motor vehicle crash]. In addition, 20% of these drivers had more than one sleep-related factor contributing to the MVC'.[38] Crummy et al noted that 'of the drivers deemed by clinicians to have been at risk of a sleep-related MVC, only 25% met the [Australian Transport Safety Bureau] ATSB criteria'. This led the authors to suggest that 'the ATSB definition may well be too conservative in identifying the important contribution of driver sleepiness to collision risk'.[39]

What causes fatigue/sleepiness/drowsiness?

2.2.7 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

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32 K Dobbie, above n 12, 8.

33 Ibid, 5. See also NCSDR/NHTSA, above n 26, 2.

34 NCSDR/NHTSA, above n 26, 2.

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

36 K Dobbie, above n 12, 6.

37 Ibid.

38 F Crummy et al, 'Prevalence of sleepiness in surviving drivers of motor vehicle collisions' 38 *Internal Medicine Journal* 769, 772. Sleep related factors were defined as: (i) the crash occurred at a time of biological propensity to sleep (namely 00.00 hours to 06.00 hours or 14.00 hours to 16.00 hours), (ii) driver reported KSS > 5, ESS > 10, (iii) driver reported being a regular shift worker or having <6 h sleep the previous night, (iv) driver reported having driven continuously for >2 h before the crash, (v) driver was taking medication known to cause sleepiness and (vi) driver had prior physician diagnosis of medical disorder, 771.

39 Ibid, 774.

reaction times, cognitive functioning, memory, mood, alertness and performance on attention-based tasks.[40]

In its submission, the ASA reported that 'cognitive and driving performance after staying awake for 17 hours is approximately equivalent to that at a blood alcohol concentration [BAC] of 0.05% and after 24 hours it is equivalent to a BAC of 0.08-0.10%'. The submission also highlights the dangers of chronic inadequate sleep: 'after a week of restricted sleep to four hours per day or 12 days of restricting sleep to six hours a day performance is equivalent to having had 24 hours with no sleep at all'. The ASA writes that 'driving after having less than 5 hours of sleep on one occasion is associated with a threefold increase in crash risk'.

In his submission, Dr Johns notes that it is possible to objectively measure the risks of road crashes due to the level of drowsiness and that 'the risk of a crash are approximately the same after a night without sleep as with a blood alcohol concentration of 0.1%'.

- *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.[41]

  The ASA wrote that:

  > Driving performance is worse at night, with brief periods of sleep, 'microsleeps' evident during night driving in studies of professional drivers. There is a progressive increase in the risk of fall asleep crashes after midnight, increasing up until 07:00 am. A smaller peak in the afternoon coincides with a slight increase in propensity to fall asleep during the early afternoon (siesta time). A 5-fold increase in crash risk has been reported as a result of driving between 2-5am.

- *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.[42]

2.2.8 Other factors such as alcohol consumption, use of sedating medication and the existence of sleep disorders can also increase the incidence of fatigue.[43] Individual vulnerability and the environment as factors that may also contribute to increasing sleepiness or fatigue.[44] The ASA also observed that shift work is a factor associated with an increased risk of accidents and injuries:

> Shift work disorder describes extreme difficulty maintaining adequate sleep-wake function while engaged in shift work. The diagnostic criteria refer to a primary symptom of either insomnia or excessive sleepiness that is temporally associated with a work period that occurs during the habitual sleep time. The safety and health consequences of shiftwork, including the increased risk of accidents and injuries, have been extensively studied. For example, the Harvard Work Hours, Health and Safety Group recently reported that, for medical interns, the odds ratios for reporting a motor vehicle crash and for reporting a near-miss incidents after an extended work shift (>or= 24 hours), as compared with a shift that was not of extended duration, were 2.3 and 5.9 respectively.

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40 K Dobbie, above n 12, 5.

41 Ibid.

42 Ibid, 6.

43 Ibid, 5; NCSDR/NHTSA, above n 26, vii.

44 Australian Sleep Association submission (references omitted).

Sleep disorders

2.2.9 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.

2.2.10 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.[45] 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.[46]

2.2.11 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.[47] 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 breathe 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.[48]

2.2.12 In its submission, the ASA wrote that obstructive sleep apnoea is 'associated with an increased rate of motor vehicle accidents, of between 2 to 7 times that of control subjects, which appears to be more significant in those with severe sleep apnoea'. Other studies have shown that those suffering from sleep apnoea are between 2 and 4 times more likely to be involved in motor vehicle crashes.[49]

2.2.13 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.[50] Around .051% of the population suffers from narcolepsy.[51] The ASA reports that those 'with narcolepsy perform worse on simulated driving tasks and are more likely to have accidents than control subjects.'

2.2.14 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

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

46 Newcastle Sleep Disorders Centre, Pamphlets, *Sleep Apnoea* (17 July 2007) <http://www.newcastle.edu.au/centre/nsdc/pamphlets.html>.

47 Austroads, above n 45, 87.

48 *Newcastle Sleep Disorders Centre,* above n 46.

49 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.

50 Austroads, above n 45, 88; NCSDR/NHTSA, above n 26, 13.

51 Austroads, above n 45, 88.

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'.[52]

Characteristics of fatigue-related crashes

2.2.15 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.[53]

2.2.16 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 factors, researchers and investigators hope to better identify fatigue-related crashes.[54] Forms of surrogate measures are used in New South Wales, Queensland and Western Australia to analyse motor vehicle crashes.[55] 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% of fatal crashes and 19.6% of fatalities in Australia were identified as fatigue related.[56]

Sleep research and driving

2.2.17 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.[57] 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).

2.2.18 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.[58]

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52 NCSDR/NHTSA, above n 26, 18.

53 K Dobbie, above n 12, 7.

54 Ibid, 1, 6.

55 Ibid, 7.

56 Ibid, 11.

57 See discussion in Part 4.

58 Horne and Reyner, above n 49, 290.

- 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.[59]
- 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 that 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.[60]
- While drivers may not recall having fallen asleep 'it is very likely that they were aware of the precursory feeling of sleepiness'.[61] 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 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'.[62] 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'.[63] Reyner and Horne 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. Reyner and Horne found that the drivers in their study 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.[64] They also found, however, that 'some subjects failed to appreciate that extreme sleepiness is accompanied by a high likelihood of falling asleep.'[65]
- 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

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59 Ibid.

60 Ibid, 291.

61 Ibid.

62 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.

63 Ibid, 450.

64 Reyner and Horne, above n 35, 122.

65 Ibid, 120.

> grogginess and can therefore be counterproductive.[66] 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.'[67] They advocate campaigns to better educate drivers that sleepiness portends sleep, and that sleep can come on more rapidly than a driver may realise.[68] Similarly, the ASA recommended that there needs to be 'focused education campaigns … to target specific demographic groups (eg young males, young females) to explain the causes, consequences and countermeasures for the problem in way that is beneficial and relevant to that group'. The ASA recommended that 'a panel of experts in the field of sleep research be convened to review and make recommendations concerning methods to measure driver impairment by lack of sleep or sleep disorders'.

2.2.19 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.[69] 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 unforewarned "sleep attacks"'.[70] This finding appears to be consistent with other research.[71]

2.2.20 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'.[72]

2.2.21 In a 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'.[73] 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'.[74]

2.2.22 In his original submission, Dr Johns states that a conclusion that can be arrived at from his own and other experiments is that 'a driver's own reports of drowsiness may be underestimates of objectively measured drowsiness, particularly at high levels, and this may distort their subjective awareness of risks associated with 'drowsy driving'. In supplementary comments received in August 2009, Dr Johns states that:

> If a driver's culpability for drowsy driving depends on the driver's self-awareness of what he is doing, then awareness of fatigue is much greater than for drowsiness. But we have little evidence to suggest that fatigue causes crashes in the way that drowsiness does. Drowsiness fluctuates rapidly, over periods of seconds, and awareness of its presence and of its danger also fluctuates. A driver is more likely to be aware of his intermittent periods

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66 Horne and Reyner, above n 49, 292–293.

67 Ibid, 293.

68 Ibid.

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

70 Ibid, 161.

71 See Lisper, et al, above n 62; 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).

72 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.

73 Nabi, et al, above n 71, 3.

74 Ibid, 4.

> of alertness, when he may think he is fit to continue driving, [than of his] intermittent periods of drowsiness, when he is not fit to drive. Awareness of drowsiness is mainly retrospective over periods of seconds to minutes and arrived at when the driver realises that he/she [has] just roused from a drowsy few sections in which there was no self-awareness. If a driver does not feel fatigued at the time, he may have a reduced awareness of the risk he faces due to his intermittent drowsiness that may arise because of previous sleep deprivation etc. Nevertheless, he would be aware of being sleep-deprived.

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

2.2.23 Studies that examine awareness of sleepiness have significance to the legal issues surrounding falling asleep at the wheel. Some studies suggest that 'sleep does not occur spontaneously without warning.'[75] However, in their application to criminal trials involving fall-asleep crashes, the limits of the research findings need to be recognised and caution is needed. This has implications for the acceptance of options for reform that would create a rebuttable presumption that a person who fell asleep at the wheel had prior awareness[76] or the exclusion of falling asleep at the wheel as a defence in relation to driving offences under the *Criminal Code* and the *Traffic Act*.[77]

2.2.24 In the Issues Paper, consideration was given to 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'.[78] 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'.[79] In other words, their 'findings suggest that the participants had a reasonably accurate perception of when their driving ability had meaningfully declined'.[80]

2.2.25 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*.[81] 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.[82] 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.[83]

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75 Horne and Reyner, above n 49, 289.

76 See further at 7.3.

77 See further at 7.4.

78 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.

79 Jones, et al, above n 72, 1261.

80 Ibid, 1260. See also S Baulk, et al, *Managing Driver Fatigue: Quantifying Real Work Performance Impairment*, Centre for Sleep Research, University of South Australia (2006).

81 (1999) VSCA 39.

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

83 C Jones, et al, 'Fatigue and the Criminal Law' 43 (2005) *Industrial Health* 63, 66.

2.2.26 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 unforewarned 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.[84]

2.2.27 Dr Johns, in his submission, says that the Horne and Baulk study raises many questions:

> Were the drivers sufficiently drowsy for them to have stopped driving in real-life driving situations? Subjective ratings of drowsiness may not be very accurate reflections of objectively measured drowsiness, especially when differences between subjects are taken into account. For example, several lane departure incidents occurred with KSS scores in the relatively alert range, less than 6. To what extent did the experimenter's intervention enable the subjects to rouse briefly after they had been prompted and then form an estimate of their behavioural state that they may not have been aware of otherwise? While acute sleep deprivation (eg missing a night's sleep) is commonly associated with 'drowsy driving' crashes, especially in young adults, the question arises whether other people who have a chronic sleep disorder, and who are continually drowsy as a result, perceive their drowsiness in the same way. Much more research is required before these questions can be answered definitively (references omitted).

2.2.28 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'.[85] Against this, they assert that the sleepier driver would still be responsible for any crash caused as that person drove while aware of their inadequate sleep, even if they had less forewarning of the onset of sleep.

2.2.29 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.[86] There is certainly a danger in attributing legal liability on the basis of the driver having had a particular amount of sleep deprivation in the time preceding the crash as it appears that there is a high degree of variation between individuals.[87] Rajarantam also discusses the limitations of sleep research if a high degree of variation is shown to exist between individuals.[88] 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. Dr Johns, in his submission also observed that 'the

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84 Horne and Baulk, above n 69, 164.

85 Ibid.

86 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 also below at 6.4.

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

88 Rajaratnam, above n 82, 109.

relationship between the duration of prior wakefulness and sleep propensity is very variable between different people'.

2.2.30 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 and 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.[89]

2.2.31 Concern about the limits of the current state of the scientific research was also expressed in submissions received by the Institute. The ASA, it its submission, writes that:

> While research shows that individuals are aware of increasing sleepiness and that the increasing sleepiness will, except in the case of a medical disorder such as narcolepsy, always precede a serious performance error, there is also data to support the idea that individuals become less able to judge performance when sleepy. In addition, while laboratory tests of driving performance under conditions of sleep deprivation or sleep restriction, ask subjects to self rate sleepiness as well as performance, it is not safe to assume that the general public is able to do this or is even likely to.
>
> Therefore while research may suggest that individuals are able to monitor their own sleepiness and/or performance in some effort to guard against performance deficits (ie having an accident), we cannot assume that
>
> a) individuals are aware of the high risks associated with driving when sleepy;
>
> b) individuals are aware of the factors which combine to increase risk in this area;
>
> c) individuals are aware of methods/scales with which to self-monitor sleepiness/performance;
>
> d) individuals are aware that sleepiness may lead to an accident;
>
> e) individuals are fully aware of the consequences of a sleepiness related accident; and
>
> f) individuals are aware of the prevalence of sleepiness related accidents.
>
> Just as indeed we cannot assume that the general public is aware of the symptoms, diagnosis or treatment of sleep disorders such as sleep apnoea.

2.2.32 The ASA writes that 'we do not agree at present that a person who fell asleep can be presumed to have prior awareness that they were at risk of this happening based on their prior feelings of sleepiness'. Further, that 'people often appear to be poor at predicting that they are likely to fall asleep'. Dr Johns, in his submission, suggests that it may be difficult 'for drivers to anticipate their first dozing episode while driving at a particular time'. In his supplementary submission, Dr Johns suggests that awareness of drowsiness is often retrospective, that is that a person is aware of their state of drowsiness after it has occurred. However, a person is aware of the amount of sleep that they have had.

2.3 Sleep research and public education

2.3.1 Education remains a key strategy to reduce motor vehicle crashes that result from driver sleepiness/drowsiness. The Tasmanian Road Safety Strategy observed that 'continued targeted public education plays an important role in raising awareness, changing community attitudes, influencing behaviour and preventing complacency about familiar road safety issues'.[90] Fatigue was identified as

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[89] A Desai, et al, 'Fatal distraction: a case series of fatal fall asleep road accidents and their medicolegal outcomes' (2003) 178 *Medical Journal of Australia* 396, 399.

[90] Department of Infrastructure, Energy and Resources, *Tasmanian Road Safety Strategy 2007 – 2016* (2007) 13.

one of the areas targeted by the public education campaign (other areas were speed; drink/drug driving; inattention/distraction; and seatbelt compliance). The Strategy said that the 'target areas [were] consistent with key road safety problem areas identified in Tasmania's crash data'.[91] In some regions in Tasmania, Drowsy Driver Free Coffee Initiatives have been developed to encourage drivers to take a break and to provide advice about the risks of driver fatigue.[92] Fatigue is discussed on the Road Safety Task Force website where an overview of the danger signs of fatigue, the risk factors for fatigue driving and tips to avoid fatigue is provided.[93]

2.3.2 The need for greater public education about the dangers of driving while sleepy was raised in the submission of the ASA who recommended that:

> The Institute carefully consider the initiation of an education campaign aimed at informing the public about the risks of drowsy driving, in particular the circumstances in which the risk is greatest (eg driving between 2 – 5 am, driving with untreated sleep disorders). A panel of experts in the field of sleep medicine/research should be convened to inform such a campaign.

2.3.3 The Institute agrees that driver education is essential as the best outcome is the prevention of crashes (and injuries) caused by driver sleepiness/drowsiness. While the Road Safety Task Force has provided information on its website and driver initiatives are in place (as discussed above), the Institute's view is that greater community education is required about the risks of driving while drowsy and the effective remedy for drowsiness, that is sleep.[94] This needs to be informed by scientific evidence.

Recommendation 1

The Tasmanian Road Safety Council and the Road Safety Task Force consult with experts in the field of sleep medicine/research and review the current community education programs in relation to drowsiness/sleepiness and driving.

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91 Ibid.

92 Ibid, 21 notes the initiatives of the Glamorgan Spring Bay and Break O'Day CRSP Committees.

93 See Road Safety Task Force, *Fatigue* (2010) <http://www.rstf.tas.gov.au/campaigns/fatigue>.

94 See 2.2.18.

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 an offence arising from a contravention of a provision of an Act may be prosecuted on indictment or summarily by complaint and summons. This distinction 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.[95] 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*.[96]

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 of the use of a motor vehicle and would only be applicable in cases where the vehicle was used as a weapon.[97] 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.[98] 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'.[99]

Elements of the offence

3.2.3 Indictments for motor vehicle 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:

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95 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).

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

97 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).

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

99 Ibid, 1–2 (Wright J).

(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.[100]

(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*.[101]

(c) *that the omission amounted to culpable negligence* – this is a question of fact to be decided on the circumstances of each case.[102] 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.[103]

This approach has been adopted in Tasmania.[104] 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'.[105] 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*.

3.2.4 While the application of section 150 to a driver who has fallen asleep at the wheel has not been tested in Tasmania, the Institute's view is that falling asleep would be clearly relevant to criminal responsibility. The requirement that the prosecution establish that the accused was 'in charge' of the motor vehicle connotes a degree of control that may be lacking if the accused is asleep or unconsciousness.[106] In addition, an accused's warning of sleepiness and/or the existence of circumstances such the adequacy of sleep and the duration of driving would be relevant to whether there was a clear or gross departure from expected standards of driving.[107]

3.2.5 It is unlikely that the requirement for a voluntary and intentional act of driving (from s 13(1) of the *Code*) applies where the Crown case is based on manslaughter by culpable negligence. In considering the application of s 150 to the offences of wounding and causing grievous bodily harm, the Supreme Court has accepted that these offences can be committed by culpable negligence and that

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[100] 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].

[101] See discussion of requirements for manslaughter under s 156(2)(b) in J Blackwood and K Warner, *Tasmanian Criminal Law: Text and Cases* (University of Tasmania Law Press, 2006) 610–634.

[102] *Criminal Code*, s 156(3).

[103] (1925) 19 Cr App R 8, 11.

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

[105] Ibid, 2.

[106] It may be that the requirement that the accused is in 'charge of the vehicle' may be broader than the requirement for a voluntary and intentional act of driving as there is authority to support the proposition that a person asleep at the wheel had 'charge' of the vehicle, *Smith v Westell* [1948] Tas SR 97.

[107] See *R v Scarth* [1945] ST R Qd 38, 42 (Macrossan SPJ).

there is no need for the omission of the accused to be intentional.[108] In *R v McDonald*,[109] the accused was charged with unlawful wounding and, for the offence of unlawful wounding, the act of the accused which must be proved to be voluntary and intentional for the purpose of s 13(1) is the act of discharging a loaded gun.[110] In this case, she argued that when she pulled the trigger she did not mean to shoot her husband because she believed the gun was unloaded, and so there was not a voluntary and intentional act. However, it was accepted that the accused would be convicted of wounding by culpable negligence, as Burbury CJ 'held that s 13(1) and (2) have no application'.[111] Applying the principle from wounding cases to driving cases committed by culpable negligence, there would be no need for the prosecution to prove a voluntary and intentional act of driving (under s 13(1) of the *Code*). Support for this view is also found in other Code jurisdictions, where it has been held that the equivalent of section 13(1) does not apply to manslaughter on the basis of culpable negligence in the management of dangerous things.[112]

The defence of honest and reasonable mistake

3.2.6 The defence of honest and reasonable mistake of fact is contained in s 14 of the *Code* which provides:

> Whether criminal responsibility is entailed by an act or omission done or made under an honest and reasonable, but mistaken, belief in the existence of any state of facts the existence of which would excuse such an act or omission is a question of law, to be determined on the construction of the statute constituting the offence.

Mistake of fact is also a defence at common law. In order for an accused to rely on mistake, there must be: (1) evidence of a positive act of making a mistake (as opposed to not thinking about the matter at all); (2) the mistake must be one of fact and not law; (3) the mistake must be honestly held, and it must also be based on reasonable grounds; (4) the mistake must render the accused's act innocent.[113] The accused has an evidentiary burden and must provide evidence of mistake or point to evidence in the Crown's case to support the defence of mistake.[114] The Crown has 'the legal burden of disproving mistake'.[115]

3.2.7 The defence of honest and reasonable mistake of fact does not apply to manslaughter on the basis of culpable negligence. As accepted by the High Court in *the Queen v Lavender*,[116] the issue of an accused's honest and reasonable belief is subsumed within the concept of criminal negligence.[117]

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[108] In *R v Brown,* 4 May 1965, Crawford J stated that 'even if the accused did not intentionally pull the trigger he would be guilty if he wounded Schultz by criminal negligence'. See also *R v McDonald* [1966] Tas SR 263 and *Tasmania v Nelligan* [2005] TASSC 94.

[109] [1966] Tas SR 263.

[110] Ibid, 264 per Burbury CJ.

[111] Ibid, 269.

[112] *Callaghan v R* (1952) 87 CLR 115, 119 (the Court); *Evgenious v R* (1964) 37 ALJR 508. Note *R v Scarth* [1945] ST R Qd 38. This case is discussed further at 4.3.9.

[113] S Bronitt and B McSherry, *Principles of Criminal Law* (Law Book Company, 2nd ed, 2005) 190–194.

[114] Ibid, 194; *He Kaw Teh v The Queen* (1985) 157 CLR 523.

[115] Bronitt and McSherry, above n 113, 194; *Attorney-General's ref No 1 of 1989, Re Brown* [1990] Tas R 46.

[116] (2005) 222 CLR 67.

[117] Ibid, 87 (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *Lavender* [2004] NSWCCA 120 [83]–[85] (Giles JA), [267] (Hulme J) and [344]–[345] (Adams J) discussed in S Yeo, 'Case and Comment: *Lavender*' (2004) 28 *Criminal Law Journal* 307; *R v Osip* (2000) 2 VR 569, discussed in R Evans, 'Case and Comment: *Osip*' (2002) 26 *Criminal Law Journal* 56.

An offence satisfied by negligence (an objective fault element) is distinct from an offence of strict liability to which the defence of honest and reasonable mistake applies.[118]

Procedure and sentencing

3.2.8 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.[119]

3.2.9 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.[120]

Causing death by dangerous driving

3.2.10 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.[121]

3.2.11 In a survey of Tasmanian sentencing cases between 1997 and June 2010,[122] convictions for manslaughter arising out the use of a motor vehicle and convictions for causing death by dangerous driving were both predominately associated with excessive speed and/or high blood alcohol readings/drug use.[123] It appears that the difference between manslaughter arising out the use of a motor

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[118] See I Leader-Elliott, 'Cases in the High Court: *Jiminez*' (1993) 17 *Criminal Law Journal* 61, who observes that the 'distinction between an offence requiring proof of negligence and an offence of strict liability, to which reasonable mistake is a defence, may be tenuous on occasion ... The distinction is real, however', at 65.

[119] *Criminal Code*, s 389(3).

[120] Ibid, s 334.

[121] 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).

[122] The cases were obtained by a search of Tasinlaw to the end of 2007. The sentences for 2008–2010 were obtained from the sentencing database available at: <http://catalogues.lawlibrary.tas.gov.au/textbase/SentSearch.htm>.

[123] Manslaughter – *Doddridge*, Tas Supreme Court, 5/8/09; *Redshaw*, Tas Supreme Court, 11/12/08; *Harris*, Tas Supreme Court, 19/11/08; *Anderson*, Tas Supreme Court, 18/06/08; *Hanson*, Tas Supreme Court, 26/3/07; *Bird*, Tasmania Supreme Court, 17/9/07; *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 – *Marshall-Reeves*, Tas Supreme Court, 20/5/10; *Moeakiola*, Tas Supreme Court, 9/11/09; *Gallagher*, Tas Supreme Court, 18/6/08; *Jarvis*, Tas Supreme Court, 6/3/08; *Stonehouse*, Tas Supreme Court, 1/8/08; *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; *Bowman*, Tas Supreme Court, 12/4/00.

vehicle and causing death by dangerous driving is one of degree.[124] The required fault for dangerous driving involves 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 (absent other factors such as alcohol).[125]

Elements of the offence

3.2.12 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*[126] 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'.[127] In 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.[128]

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

3.2.13 This decision was later confirmed by the High Court in *Jiminez v The Queen*.[129] 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:

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[124] 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'.

[125] For example in *Tasmania v Bird*, 17/9/07, the accused pleaded guilty to manslaughter in a case where the accused had been drinking excessively and subsequently fell asleep at the wheel.

[126] (1966) 115 CLR 44.

[127] Ibid, 49.

[128] Ibid, 49–50.

[129] (1992) 173 CLR 572. See also *Wynwood v Williams* [2000] TASSC 28.

> 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.[130]

3.2.14 Following 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 as to render the resultant driving objectively dangerous. Evidence that a person continued to drive whilst 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'.[131]

The defence of honest and reasonable mistake

3.2.15 Following the decision of the High Court in *Jiminez*, it is clear that the defence of honest and reasonable mistake applies to dangerous driving causing death.[132] This means that if the defendant can raise the possibility that he or she had an honest and reasonable belief that the driving was not dangerous, the burden falls on the prosecution to prove beyond reasonable doubt that the defendant did not have this belief.

Procedure and sentencing

3.2.16 This crime is also tried in the Supreme Court and prosecuted by the Office of Director of Public Prosecutions. A conviction for this crime carries with it a maximum penalty of 21 years imprisonment.[133] Between 2001 and June 2010, the sentencing range for dangerous driving causing death was a medium term of 12 months imprisonment with a minimum of 8 months and a maximum of 48 months.[134] There are no alternative verdicts specified for the offence of causing death by dangerous driving.

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130 *Jiminez v The Queen* (1992) 173 CLR 572, 579 (references omitted).

131 Blackwood and Warner, above n 101, 778.

132 See 3.2.6 and 4.4.8.

133 *Criminal Code*, s 389(3).

134 This statistic is based on 14 cases. It needs to be read in light of the comments of the Court of Criminal Appeal in *Shipton* [2003] TASSC 23 and *Watson* [2004] TASSC 54 that courts are required to impose considerably heavier penalties for cases involving dangerous driving than in the past.

Negligent driving causing death

3.2.17 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.[135] It is a summary offence and common law principles of criminal responsibility apply.

3.2.18 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.[136]

Elements of the offence

3.2.19 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:

> Negligence 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.[137]

3.2.20 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'.[138] 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.[139]

3.2.21 The test of negligent driving was set out by the Tasmanian Supreme Court in *Fehlberg* v *Gallahar*[140] by Burbury CJ as: '[t]he enquiry is whether having regards to the matters mentioned in s 32, the tribunal of fact is satisfied beyond reasonable doubt that the defendant has driven carelessly.'[141] Burbury CJ reconsidered this in *Price v Fletcher*[142] and Crawford J affirmed the authority of these judgments in *Filz v Knox*.[143]

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135 *Traffic Act 1925*, s 32(2C).

136 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).

137 [1932] SASR 60, 63.

138 Ibid, 64.

139 Ibid, 65.

140 [1957] Tas SR 286.

141 Ibid, 289.

142 [1972] Tas SR 35.

143 [2002] Tas SC 2002. This was the view expressed by Underwood J in Complaint no 64163/02.

3.2.22 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.[144]

3.2.23 Similarly, the civil maxim *res ipsa loquitur* (that is, 'the event speaks for itself')[145] 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 may give rise to an 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'.[146] If a 'defendant offers an "explanation" in the sense of establishing that there is no explanation within his present knowledge, the prosecution case does not go unanswered'[147] and where 'there is no explanation offered, the court must consider all reasonable possibilities'.[148]

The defence of honest and reasonable mistake

3.2.24 As with manslaughter by criminal negligence, the defence of honest and mistake does not apply to negligent driving causing death.[149]

Procedure and sentencing

3.2.25 This is a summary offence. A police prosecutor prosecutes this offence in the Magistrates Court. 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 1 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 Offences 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.[150]

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)[151] or simply assault.[152] Several people have been convicted in the Supreme Court for assault committed with a car.[153]

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

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

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

147 *Langan v White* [2006] TASSC 83, 3 (Underwood CJ) citing *Sanders v Hill* [1964] SASR 327.

148 Ibid (Underwood CJ) citing *Sanders v Hill* [1964] SASR 327 and *Police v Chappell* [1974] 1 NZLR 225.

149 See 3.2.7.

150 These offences are discussed below.

151 *Criminal Code*, s 170(1)(a).

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.[154] In *Tasmania v Carlisle*,[155] the accused pleaded guilty to causing grievous bodily harm when he drove at another person who suffered a broken leg, broken collarbone and cuts and abrasions.

3.3.5 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.[156] For example, in *Lovell*,[157] 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 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.[158] Similarly, in *Tasmania v Redshaw*,[159] the accused pleaded guilty to a charge of manslaughter and of causing grievous bodily harm. The accused had a blood alcohol reading of 0.15 and was driving at very high speed when the vehicle he was driving collided with a pole.

Dangerous driving causing grievous bodily harm

3.3.6 The offence of dangerous driving causing grievous bodily harm is contained in s 167B of the *Criminal Code*. It was 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.[160]

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[152] Ibid, s 184.

[153] *Tasmania v Le Rossingnol*, 11 August 2008; *Tasmania v Kettle*, 7 May 2008; *Tasmania v Butt*, 26 February 2008; *R v Mark Andrew Wright*, 11 February 2004, Evans J.

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

[155] 20 April 2009 (Tennent J).

[156] *Nelligan* [2005] TASSC 94.

[157] Tas Supreme Court, 1/5/91.

[158] *R v Todd Burnett*, 1 August 1996 (Crawford J).

[159] 11 December 2008 (Blow J).

[160] *Parliamentary Debates*, above n 136.

3.3.7 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*,[161] the offence of dangerous driving causing grievous bodily harm requires proof of a lesser standard of negligence.

Elements of the offence

3.3.8 The elements of this offence are identical to those of dangerous driving and dangerous driving causing death,[162] 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'.[163] In *Tasmania v Moyle*,[164] the accused was found guilty of causing grievous bodily harm by dangerous driving when he crashed the motor vehicle he was driving as a result of a combination of alcohol, inattention, speed and failure to approach a corner in a safe manner.

The defence of honest and reasonable mistake of fact

3.3.9 The defence of honest and reasonable mistake of fact is available where an accused is charged with dangerous driving causing grievous bodily harm.[165]

Procedure and sentencing

3.3.10 This crime is tried in the 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.[166] Between 2001 and June 2010 four cases were decided, resulting in a custodial sentence of two years and three months in one case, custodial sentences of nine months in two cases and three months in the other case.

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.[167] This intermediate offence was introduced in recognition of the fact that motor vehicle crashes cause serious injury and suffering to persons.[168] This is a summary offence and common law principles of criminal responsibility apply.

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

[162] See 3.2.10 ff.

[163] At 237.

[164] 19 November 2008 (Slicer J).

[165] See 3.2.6 and 4.4.8.

[166] *Criminal Code*, s 389(3).

[167] See s 32(2) *Traffic Act 1925*.

[168] *Parliamentary Debates*, above n 136.

Elements of the offence

3.3.11 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,[169] 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'.[170]

The defence of honest and reasonable mistake

3.3.12 The defence of honest and reasonable mistake does not apply to negligent driving causing grievous bodily harm.[171]

Procedure and sentencing

3.3.13 This offence is prosecuted in the Magistrates Court by a police prosecutor. The penalty for a first offence is a fine not exceeding 10 penalty units, imprisonment for a term not exceeding six months and disqualification.[172] The penalties double for any subsequent offence.[173]

Wanton or furious driving

3.3.14 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.[174] An almost identical provision exists in NSW in s 53 of the *Crimes Act 1900*. It is also an offence in the United Kingdom,[175] 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'.[176] 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.[177]

Elements of the offence

3.3.15 In *R v Barnard*,[178] 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'.[179] He further stated that the standard of negligent driving that needed to be

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169 See 3.2.17 ff.

170 Bronitt and McSherry, above n 113, 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.

171 See 3.2.7.

172 *Traffic Act 1925*, s 32(2B)(a).

173 Ibid, s 32 (2B)(b).

174 D Brown, *Traffic Offences and Accidents* (Butterworths, 3rd ed, 1996).

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

176 K Swift, *Wilkinson's Road Traffic Offences* (Sweet & Maxwell, 22nd ed, 2005) 5.94.

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

178 [1956] Tas SR 19.

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

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.[180] 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.'[181]

3.3.16 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 may also 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).

Procedure and sentencing

3.3.17 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.[182] Where the offence is dealt with summarily, the maximum penalty available is two years imprisonment.[183] Where the person is charged on indictment, the maximum penalty available to the court is 21 years imprisonment.[184]

[180] Ibid, 28, 29.

[181] D Brown, above n 174, 99.

[182] *Police Offences Act 1935*, s 36(2).

[183] Ibid, s 36(1A).

[184] *Criminal Code*, s 389(3).

Part 4

The Voluntary Act of Driving as it Applies to Sleepiness/Drowsiness-Related Crashes

4.1.1 In the previous chapter, this Report 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 the 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 The law has generally been regarded as well settled, that the offences of dangerous driving causing death or grievous bodily harm under ss 167A and 167B of the *Criminal Code* 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.[185] In *Jiminez v The Queen*, which considered the analogous offence of culpable driving under s 52A of the *Crimes Act 1900* (NSW), the High Court quoted from its earlier decision in *Reg v Coventry*:[186]

> The expression "driving at a speed, or in a manner, which is dangerous to the public" describes the actual behaviour of the driver and does not require any given state of mind as an essential element of the offence.[187]

In *Jiminez*, the Court also discussed the approach of the courts in England where the defence of honest and reasonable mistake is not available and the decision of the Court of Appeal in *R v Gosney*, where it was held that 'fault' on the part of the driver was an element of the offence of driving in a dangerous manner. The High Court stated that:

> To our eyes what the appellant was attempting to do in *Gosney* was to establish an honest and reasonable mistake, a defence which, in this county, makes it unnecessary to introduce fault as an element of that offence. Driving 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.[188]

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[185] However, the Victorian Court of Appeal in *R v De Montero* [2009] VSCA 255, under the heading '*Jiminez* misunderstood' expressed the view that it was to misconceive the decision of the High Court in *Jiminez* to argue that the offence of dangerous driving was an offence of strict liability containing no fault element. It is the view of the Institute that the decision in *De Montero* is contrary to the High Court's clear view in *Jiminez* as expressed in 4.1.2. The decision in *De Montero* was applied by the Victorian Court of Appeal in *Guthridge v R* [2010] VSCA 132 and the Director of Public Prosecutions (Vic) has applied for special leave to appeal this decision to the High Court.

[186] (1938) 59 CLR 633.

[187] Ibid, 638.

[188] (1992) 173 CLR 572, 583.

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'.[189] Voluntariness is also a requirement for negligent driving causing death or grievous bodily harm under ss 32(2A) and (2B) of the *Traffic Act 1925.*

4.2 A voluntary act of driving

4.2.1 Except in the case of manslaughter on the basis of culpable negligence, for 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'.[190] 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'.[191] Under the *Criminal Code*, the Crown must prove beyond reasonable doubt that the accused's act was voluntary and intentional.[192] This means that the physical act of the accused must be the conscious product of a freely operating will.[193] As a practical matter, it can be seen that the requirements of voluntariness at common law and under the *Criminal Code* are essentially the same.

4.2.2 As discussed at 3.2.5, it is unlikely that the requirement for a voluntary and intentional act (as contained in section 13(1) of the *Code*) applies to manslaughter on the basis of culpable negligence.[194] The Crown will need to establish that the accused was in 'charge' of the motor vehicle.[195]

4.2.3 An act may be involuntary for three reasons:

- the relevant act was accidental;
- the relevant act was caused by reflex action; or
- the conduct was performed whilst the accused was in a state of impaired consciousness (the accused is said to operate in state of 'automatism').[196]

4.2.4 In driving cases, a person may argue that their driving was involuntary because it was a reflex action, such as where a person, while conscious, collides with another vehicle while being attacked by a swarm of bees.[197] 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:

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189 Ibid, 577.

190 Ibid.

191 Bronitt and McSherry, above n 113, 163.

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

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

194 The elements of manslaughter by culpable negligence are set out at 3.2.3. These are that (a) the driver owed a duty to the victim to preserve life; (b) the duty was breached by an omission to perform that duty; (c) the omission amounted to culpable negligence; and (d) that the omission caused the death of the victim.

195 See 3.2.4.

196 This summary is taken from Bronitt and McSherry, above n 113, 163.

197 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.

> 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.[198]

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.[199]

4.2.5 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 the law can be regarded as well settled in Australia following the decision of the High Court in *Jiminez v The Queen*.

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 the court held there was insufficient evidence to displace the presumption of voluntariness; and
3. Decisions where the issue of voluntariness was considered in 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*[200] 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.[201] 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

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198 A Ashworth, *Principles of Criminal Law* (Oxford University Press, 4th ed, 2003) 99.

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

200 [1939] SASR 294.

201 Ibid, 297.

behave in this way if the driver is exercising due care.'[202] Further, he stated that the respondent's explanation that he fell asleep 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.[203]

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.[204] No consideration was given to 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 reasoning appear in *Kay v Butterworth*,[205] *Hill v Baxter*[206] and *State v Olsen*[207] where a number of other authorities are cited.

4.3.5 In *Kay v Butterworth*[208] and *Hill v Baxter*,[209] 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'.[210] 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.'[211] 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'.[212] 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.[213]

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[202] Ibid, 296.

[203] Ibid, 297.

[204] Ibid.

[205] (1945) 61 TLR 452.

[206] [1958] 1 QB 277, 286.

[207] 160 P 2d 427, 428-429.

[208] (1945) 61 TLR 452.

[209] [1958] 1 QB 277, 286.

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

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

[212] Ibid, 282.

[213] Ibid, 286.

4.3.6 In considering the United Kingdom position, it should be noted that (1) the term 'strict liability' is used in the United Kingdom but it does not have the same meaning as in Australia;[214] and (2) the defence of honest and reasonable mistake of fact is not available in the United Kingdom. In the context of driving offences with objective fault elements, a defendant has two options: (1) to attempt to rely on involuntariness (automatism) and/or (2) to argue that the driving was not objectively dangerous. While one of the clearest cases of involuntariness might be 'thought to be those where D is unconscious … or for example, asleep',[215] arguments that a defendant fell asleep at the wheel have generally been unsuccessful as evidenced in the cases of *Kay v Butterworth* and *Hill v Baxter*. 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.[216]

One of the limits to the operation of automatism is the doctrine of prior fault which aims to 'prevent [the] defendant taking advantage of a condition if it arose through [the] defendant's own fault'.[217] It 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'.[218] 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.

2. Decisions where court held there was insufficient evidence to displace the presumption of voluntariness

4.3.7 In the Tasmanian case of *R v Ives*[219] 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 so to 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.[220]

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

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[214] *B v DPP* [2000] 2 AC 428. Brown, et al have commented 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* (Federation Press, 2006) 380. This was also noted by the High Court in *Jiminez* (1992) 173 CLR 572, 582.

[215] D Ormerod, *Smith and Hogan Criminal Law* (Oxford University Press, 12th ed, 2008) 52.

[216] Ashworth, above n 198, 99.

[217] Ibid, 104.

[218] Ormerod, above n 215, 54.

[219] Tas Unreported Serial No 77/1966.

[220] Ibid.

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

4.3.8 In *Dennis v Watt*,[221] 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:

> 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.[222]

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.[223]

4.3.9 In *R v Scarth*,[224] 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.[225] 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. Its primary intention is to secure, by the opening phrase, that in charges based on negligence criminal responsibility is not ousted by the mere existence of involuntariness or accident: but it does not intend that such matters are not to be considered in charges of negligence.[226]

All three judges agreed that being asleep at the time of a crash did not of itself amount to a defence.[227] 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".[228]

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[221] (1942) 43 SR (NSW) 32.

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

[223] Ibid, 34, 36.

[224] [1945] St R Qld 38.

[225] Ibid, 51.

[226] Ibid.

[227] Ibid, 42, 54.

[228] Ibid, 55 (Stanley AJ).

4.3.10 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.[229] 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.'[230] Importantly, he noted that:

> 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 exhause [sic] fumes or complete physical exhaustion, it is not probable that sleep would overtake the driver without him having home [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.[231]

4.3.11 In the Tasmanian case of *Robertson v Watts*[232] 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'.[233] 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'.[234]

4.3.12 In *Kroon v The Queen*,[235] 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'.[236] King CJ stated that while the standard of driving to be applied when assessing

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[229] *State v Olsen* (1945) 160 P 2d 427, 429.

[230] Ibid, 430.

[231] Ibid.

[232] Serial No 51/1964.

[233] Ibid, 2.

[234] Ibid, 20.

[235] (1990) 52 A Crim R 15.

[236] *Kroon* (1990) 52 A Crim R 15, 16.

dangerousness is an objective one 'it is applicable only to a voluntary act of driving'.[237] 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.[238]

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.

4.3.13 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.[239]

4.3.14 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

[237] Ibid.

[238] Ibid, 17.

[239] Ibid, 18–19.

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.'[240] 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.[241] Jiminez was found guilty and sentenced to 6 months periodic detention and disqualified for 5 years.

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.[242]

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.[243]

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

[240] *The Queen v Jiminez* (1991) 23 NSWLR 394, 411.

[241] Ibid, 410.

[242] *Jiminez v The Queen* (1992) 173 CLR 572, 577.

[243] Ibid, 578–579.

> 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.[244]

4.4.6 The Court then went on to examine the decision of Lord Goddard CJ in *Hill v Baxter*,[245] particularly the passage discussed above. The Court stated that:

> 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.[246]

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.[247]

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 was so tired, that in the circumstances, his or her driving (before falling asleep) amounts 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,[248] the defence of honest and reasonable mistaken belief was available. As noted at 3.2.6, the accused has an evidential burden in relation to mistake, so that the accused has to point to evidence that raises the possibility that he or she believed on reasonable grounds that their driving was not dangerous in the circumstances. The burden then falls on the prosecution to prove beyond reasonable doubt that the accused did not

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[244] Ibid, 579-580.

[245] (1958) 1 QB 277.

[246] *Jiminez v The Queen* (1992) 173 CLR 572, 581.

[247] Ibid, 581.

[248] As discussed at fn 185, this view is contrary to *De Montero* [2009] VSCA 255.

honestly believe on reasonable grounds that his or her driving was not dangerous. In the context of fall-asleep cases, where there is evidence that the accused had no prior warning of sleep, and honestly believed on reasonable grounds that it was safe to drive, this defence is especially relevant. If the accused had no prior warning of sleep and the objective circumstances suggest that it was unlikely that the accused would fall asleep (that is, that the accused was well rested and the period of driving was not extensive), it will fall to the prosecution to disprove such a suggestion.[249]

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.'[250] These matters were not clearly identified and the trial, therefore, miscarried.

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.[251] The above discussion of the relevant case law where voluntariness was considered in light of falling asleep demonstrates this clearly.[252]

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'.[253] 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'.[254]

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.[255]

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[249] *Jiminez v The Queen* (1992) 173 CLR 572, 584 and preceding discussion.

[250] Ibid, 584.

[251] 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; M Latham, 'Driver fatigue and the Law', in Joint Standing Committee Upon Road Safety (STAYSAFE Committee), *Sleep disorders, driver fatigue and safe driving*, STAYSAFE Report 28 (1995) 40.

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

[253] D Lanham, 'Involuntary Acts and the Actus Reus' 17 (1993) *Criminal Law Journal* 97, 97.

[254] Ibid.

[255] McCutcheon, above n 251, 79.

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.[256] In the information given to the STAYSAFE Committee, Sergeant Feenan said:

> We have had instances where a driver will get out of a car after a serious crash and say to police, 'I was feeling fine. I don't know what has happened, I must have fallen asleep', and the real situation is that police investigators are liable under these circumstances not to take action. If somebody says to you, 'I was driving on the road. It was 10 in the morning, I was feeling fine, I had a good sleep last night and I have just fallen asleep', where do we turn? What do we do? There is nothing we can do. If this sort of knowledge is widely spread, that is the ideal excuse, to say to somebody "I just fell asleep completely without warning. I felt fantastic and I must have just nodded off and while I am asleep I am not responsible for what I was doing". That is a statement we have to accept because we cannot disprove it.[257]

4.5.5 He added that:

> One of the things we are finding, one of the things we have in our office now is that we never use the word "sleep" to them. We do not raise it as an issue when we are questioning them. We let them raise it. Once upon a time we used to ask the question, "were you feeling tired or did you fall asleep". That is the last thing in the world we will raise now.[258]

4.5.6 As will be discussed at 5.6.1 – 5.6.15, there are evidential difficulties in relation to securing convictions for negligent driving in Tasmania. However, the Director of Public Prosecutions (Tas) makes the point that this is not unique to prosecutions following motor vehicle crashes, but 'is the reality prosecutors deal with daily'. The Institute's view is that the difficulties do not arise from the application of the *Jiminez* principle per se, but from the difficulty of proving liability for 'unexplained' accidents.

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. Decisions since *Jiminez* suggest that courts are dealing with such cases and that convictions are being obtained. In Tasmania, convictions have been obtained for causing death by negligent driving in circumstances where the driver fell asleep in *B2*, *B1* and *M*.[259] Examples from other Australian jurisdictions include *R v Rudebeck*,[260]

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[256] See for example the submission from DPEM who wrote that 'the problems experienced in both of … [the] prosecutions in *Courvisanos* and *Piggott* will continue until there is either legislative change or the decision in *Jiminez* is overturned by the High Court'. See also STAYSAFE 25, *Issues in Dangerous Driving*, 158-161; Victoria Department of Justice, *Culpable and Dangerous Driving Laws: Discussion Paper* (January 2004) 25; Joint Standing Committee Upon Road Safety (STAYSAFE Committee), *Responses to Recommendations in Staysafe reports of the 50th Parliament*, STAYSAFE Report Number 33, Parliament of New South Wales (1996); Joint Standing Committee Upon Road Safety (STAYSAFE Committee), *Sleep disorders, driver fatigue and safe driving*, STAYSAFE Report 28 (1995); Joint Standing Committee Upon Road Safety (STAYSAFE Committee), *Falling asleep at the wheel – Legal and Licensing Implications of Driver Fatigue*, STAYSAFE Report Number 46 (1998); Joint Standing Committee Upon Road Safety (STAYSAFE Committee), *Responses of Government agencies to recommendations in staysafe reports of the 51st parliament*, STAYSAFE Report Number 52 (2001).

[257] Joint Standing Committee Upon Road Safety (STAYSAFE Committee), *Falling asleep at the wheel – Legal and Licensing Implications of Driver Fatigue*, STAYSAFE Report Number 46, Parliament of New South Wales (1998) 31. Sergeant Feenan was Officer-in-charge, Hunter Crash Investigation Unit, New South Wales Police Service.

[258] STAYSAFE Report Number 46, ibid, 31.

[259] *B2*, Complaint no *40643/07*, Magistrates Court Tasmania; *B1*, Complaint no 64163/02, Magistrates Court Tasmania; *M*, Complaint no 32830/09, Magistrates Court Tasmania. These cases are discussed in Part 5.

[260] [1999] VSCA 155 (causing death by culpable driving).

Koltasz v The Queen,[261] *Tresize v Jensen*,[262] *Wood v The Queen*,[263] *Hasani v Read*,[264] *Stack v Appleby*,[265] and *Plenty v Bargain*.[266] All were cases where courts were satisfied that there was evidence the driver fell asleep and had warning of the onset of sleep or ought to have been aware of the real risk of falling asleep. In other cases, pleas of guilty have been entered to driving offences where the accused has fallen asleep.[267]

4.6.2 Appeals against convictions have been allowed where courts have failed to properly direct juries according to the principles laid out in *Jiminez*. Examples include *R v Franks*[268] and *R v Rowlson*.[269] 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*,[270] 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.[271]

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.[272]

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[261] [2003] WASCA 38 (dangerous driving causing death and grievous bodily harm).

[262] [2005] QDC 226 (driving without due care and attention).

[263] [2002] WASCA 95 (dangerous driving causing death).

[264] [2003] WASCA 40 (dangerous driving causing grievous bodily harm).

[265] WA (Unreported, 2 February 1999) (dangerous driving causing grievous bodily harm).

[266] [1999] WASCA 67 (dangerous driving causing bodily harm).

[267] *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); *R v Vance, ex parte A-G Qld* [2007] QCA 269 (dangerous driving causing death); *R v Ruka* [2009] QCA 113 (dangerous driving causing death).

[268] [1998] VSCA 100 (culpable driving causing death).

[269] [1996] SASR 96 (dangerous driving causing death).

[270] Ibid.

[271] Ibid, 101 (cited by Olsson J).

[272] Ibid, 102–103 (cited by Olsson J).

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:

> 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'.[273]

4.6.6 In the case of *R v Franks*,[274] the accused was charged with culpable driving causing death. The Crown led 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:

> It 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.[275]

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.[276]

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.[277]

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

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[273] Ibid, 105.

[274] [1998] VSCA 100.

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

[276] Ibid, 123.

[277] Ibid.

of driving immediately prior to falling asleep whilst he was conscious and therefore responsible for his actions.[278]

4.6.8 An examination of these cases reveals 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 properly to instruct themselves in respect of the law as formulated by *Jiminez* and *Kroon*.

4.6.9 It is also important to recognise that there is a presumption of voluntariness and that, in order to displace this presumption, there must be evidence capable of raising a reasonable doubt about the voluntariness of the act.[279] This was recognised in *Ives*, where the accused was charged with dangerous driving following the death of two people.[280] Gibson J's view was the defendant's assertion that he may have fallen asleep or lost consciousness at the time of the crash was not supported by any evidence. His Honour stated that:

> A jury is entitled to infer that a man intends to do what he is in fact doing, unless the inference is negatived by other evidential matter. A judge is under a duty to leave the issue of automatism or other states of mind negativing voluntary and intentional performance of the act complained of only where a proper foundation has been laid for it in the evidence. (*Bratty's* case).[281]

In *Ives'* case, a clear distinction was drawn between 'conjecture' and evidence that is sufficient to support an inference being drawn that the driving was involuntary.

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),*[282] 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'.[283] 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'.[284] 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

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[278] Ibid, 126.

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

[280] See discussion at 4.3.7.

[281] Unreported Serial No 77/1966 Supreme Court of Tasmania, 4–5.

[282] [1994] QB 91.

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

[284] Ibid, 94.

defence 'expert', someone 'driving without awareness' retains some control albeit substantially reduced, therefore excluding the operation of the defence.[285]

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

- *Watmore v Jenkins*[286] – where a 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.[287]
- *Broome v Perkins*[288] – 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'.[289]
- *Ahadizad* v *Emerton*[290] – where a driver suffered a sneezing attack for six seconds during which he did not apply or attempt to apply the brake. On appeal, it was accepted that the driving was not involuntary as 'even during rapid and severe sneezing one still has a modicum of control'.[291]

4.7.4 In contrast in *Langan v White*,[292] it was accepted that the act of driving would not be voluntary if the driver 'unexpectedly suffered a severe coughing or sneezing fit'.[293] There was no suggestion by the driver that she had suffered such a fit. She had no memory of the circumstances of the collision. In determining the issue of negligence, the Court considered that the coughing/sneezing fit was a reasonable hypothesis consistent with innocence.

4.7.5 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 Australian courts have found a driver liable for the crash include:

- *Gillett v R*[294] – 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.

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285 Ibid, 105.

286 [1962] QB 572.

287 Ibid, 585, 587.

288 (1987) 85 Cr App R 321.

289 Ibid, 332–333.

290 [2002] ACTSC 20.

291 Ibid, 2 (Miles CJ).

292 [2006] TASSC 83.

293 This case is discussed in more detail at 5.6.2 ff.

294 [2006] NSWCCA 370.

- *R v Day*[295] – 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.
- *R v Arnold*[296] – where the accused had fallen asleep prior to the collision. The accused had been awake all night before the accident and there was evidence of little sleep in the days before the collision. Sometime in the evening before the collision, the accused had taken ecstasy and expert evidence was given about the 'rebound effect' of ecstasy, that is the fatigue that occurs once the drug wears off. The accused crossed to the wrong side of the road and collided almost head-on with another vehicle, killing two of his passengers and injuring the occupants of the other vehicle. The accused was found guilty by verdicts of the jury of two counts of causing death by dangerous driving, one count of causing grievous bodily harm by dangerous driving and one count of causing bodily injury by dangerous driving.

[295] [2006] SADC 64.

[296] [2003] SASC 422.

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.

5.1.3 There have been four subsequent cases identified where drivers have been prosecuted for causing death or grievous bodily harm by negligent driving on the basis that the driver has fallen asleep. In the cases of *B2* and *B1*, the accuseds were convicted of negligent driving causing death and in the case of *M* the accused entered a plea of guilty to the charge. In order to examine these cases, reference has been made to the Magistrates Court file in each case, transcripts of the video records of interview conducted with the defendants and discussions with a senior accident investigator with knowledge of the cases. In the case of *Deborah May Lynch*, the driver was initially charged with causing death by negligent driving. In this instance, the coroner's decision was relied upon as this charge did not proceed and she entered a plea of guilty to driving without due care and attention.

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 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 the deceased'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 to 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, Dr Markos 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.[297]

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'.[298] 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.[299]

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.[300]

(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

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[297] Proof of Evidence, Dr James Markos, (1 March 2002) 4.

[298] Ibid.

[299] (1992) 173 CLR 572, 577.

[300] This no longer represents a correct statement of the law, see *Filz v Knox* [2002] TASSC 82, 2 (Crawford J).

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.[301]

Commentary

5.2.10 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 Dr Courvisanos was asleep).

5.2.11 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.

5.2.12 In the Issues Paper, it was stated that the decision of the learned Chief Magistrate represents a correct application of *Jiminez* to the *Traffic Act* s 32(2A). On further reflection, the Institute is now of the view that the learned Chief Magistrate was in error in applying the defence of honest and reasonable mistake to a negligence offence. As discussed at 3.2.7, honest and reasonable mistake of fact does not apply to negligence offences.

5.2.13 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 may have been a case where the prosecution could have considered calling expert evidence of its own to show the clear connection between lack of sleep and the likelihood of falling asleep whilst driving.

5.2.14 While Dr Courvisanos was not convicted, the standard of negligence that the prosecution has to establish in order to obtain a conviction for negligent driving has been clarified. The Supreme Court has now made it clear that the Crown is not required to prove that the defendant's negligence was culpable (as was the view of the Magistrate in Courvisanos).[302] This means that the Crown does not have to prove the negligence to a standard approximating the standard for negligence required for a

[301] 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.

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

conviction for manslaughter. A lesser standard of negligence is sufficient for conviction, namely inattention or carelessness.

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 where the driver 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) failed to keep a proper lookout.
>
> (c) failed to maintain safe and proper control of your motor vehicle.
>
> (d) 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 Piggot's car just prior to the crash. She had been travelling behind his car for some distance. There had been nothing unusual about Mr Piggot'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 Piggot 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 Piggott 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'.[303] In reaching this decision, it was accepted that the prosecution had confined its case to the period of driving after Mr Piggott 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.[304]

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 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. The learned Magistrate found these 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

5.3.11 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,

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

[304] Ibid, 3–4.

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.

5.3.12 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 crib room at his workplace nearly nine hours before the accident'.

5.3.13 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 Complaint no 64163/02 (*B1*)

5.4.1 The defendant was charged with negligent driving causing death contrary to the *Traffic Act 1925*, s 32(2A). The crash occurred on a straight section of the Bass Highway near Carrick. The weather was fine and clear. The accused travelled onto the incorrect side of road, then struck a vehicle approaching in the oncoming lane that had tried to avoid the collision, but was side swiped. The defendant's vehicle then continued and collided head-on into the vehicle driven by the deceased. The particulars of negligence were that she:

(a) Failed to keep proper lookout ahead.

(b) Failed to keep the vehicle to the left of a broken line painted on the roadway.

(c) Failed to exercise reasonable care and skill in handing of a vehicle.

(d) Failed to take all precautions to avoid a collision.

Record of interview

5.4.2 In the record of interview, she stated that:

- She remembers very little of the accident.
- She had been away for the night and stayed up until 3.15 am – 3.45 am but slept until 11.00.
- She had been not been drinking.
- She was driving from Ulverstone to Launceston. She left Ulverstone about 12.30 pm.
- She wasn't feeling tired when she left Ulverstone but started to feel tired at about Deloraine near Westbury. She said her eyes were feeling tired.
- She thought about stopping but didn't because didn't know whether there was anywhere to stop.
- She didn't recall braking; she crossed to the wrong side of the road without being aware of it and did not remember seeing a car coming toward her.

- At the scene she said that she thought that she might have gone to sleep.
- She could not recall going to sleep. She said falling asleep would be 'my immediate explanation for it was that I didn't know I'd crossed the road and I knew that I'd been on the wrong side of the road because I'd been right up against the railing which was on the other side.
- In response to the question 'you mentioned before that you can only presume that you'd gone to sleep at the wheel. ... and that you were feeling tired further up along the highway … do you think it would've been appropriate if you were to that stage that you, you could've stopped and had a rest or something', she said 'that it would have been appropriate if I had stopped and had a rest'.
- In response to the question, 'did you consider that by feeling tired and continuing on that you're being irresponsible in your actions and safety to other road users', she said 'I don't think I felt that tired that I thought I was being irresponsible, no'.

Transcript of hearing

5.4.3 At the hearing of the complaint, the prosecution called one witness, an accident investigator who gave evidence that there were places where the defendant could have stopped on the stretch of road where she began to feel tired.

5.4.4 In closing address, defence counsel submitted that 'the onus was on the prosecution to establish that [the accused] was affected by tiredness to an extent that in the circumstances her driving was negligent. He said that although she admitted that her eyes were starting to feel tired and that she contemplated stopping, she said that there wasn't anywhere to stop. He referred to the answer of the defendant in the police interview that she did not think that she was so tired that it was irresponsible to keep driving, he submitted that she had a good night sleep, there was no alcohol and speeding was not an issue. Counsel for the prosecution submitted that in the period prior to falling asleep, the defendant had a premonition of tiredness and that she had several opportunities to pull over which she failed to do.

Decision of the Magistrate

5.4.5 The Magistrate found the complaint proved. He accepted that the defendant fell asleep and that 'shortly before the collision she was not aware of anything other than her eyes being tired' and that she 'had thought of stopping'. The learned Magistrate applied *Kroon* as accepted in *Jiminez* that:

> 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 attention, and might 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 (McBride, per Barwick CJ at 51) to be regarded as the cause of the death or bodily injury.[305]

He considered that the question was 'whether just before she fell asleep she was driving without due care – that is carelessly, that is without regard for the safety of other road users or her own safety'.[306]

5.4.6 The Magistrate considered that the evidence gave rise to a number of hypothesis, some consistent with guilt and some with innocence. His view of the facts was that it was not apparent when

[305] See *Kroon* (1990) 52 A Crim R 15, 18 (King CJ).

[306] The Magistrate applied the decisions in *Price v Fletcher* [1972] Tas SR 35 and *Fehlberg v Gallahar* [1957] Tas SR 286.

or where in the course of driving prior to the accident, the defendant started to feel tired or considered stopping. He said that:

> Some inferences suggested by the evidence – that it was just before the accident, and it was a sudden thing, giving her no time to take any conscious avoiding action or it was a sufficient time before she fell asleep for her to have exercised any considered judgment and just put it off and she took the risk to drive on. Only the defendant can know and shed light on these matters. She may have contemplated stopping at the time, and was looking for a place. She may not have but chose to drive on knowing her tiredness. She may not have thought that there was a significant risk of nodding off to sleep. If she did not consider that there was a significant risk of her falling to sleep, she would not likely have thought it was worth stopping. Of course she could have chosen any part of that section of the road, to stop at the side, but decided to drive on, weighing the risks of stopping in an awkward and possibly dangerous spot, against the risk of falling asleep.

5.4.7 Applying the decision of the High Court in *Weissensteiner*,[307] the Magistrate stated that 'a reasonable hypothesis consistent with innocence may cease to be so if evidence in support of that hypothesis is solely within the knowledge of the defendant and the defendant [has] not chosen to give evidence'. On this basis, he found the complaint proved.

Motion to review

5.4.8 The defendant filed a motion to review which was dismissed by Underwood J.[308] His Honour accepted that the Magistrate had misdirected himself on *Weissensteiner* because the defendant's account was before the magistrate in the form of the police interview. Underwood J thought that there was no reason to suppose that her evidence would have added anything to that. He said that *Weissensteiner* applies to wholly circumstantial cases and this was not one. However, despite the legal error, he dismissed the motion to review on the basis that 'no other conclusion [was] reasonably open on the evidence' other than that the defendant's driving was negligent.

5.4.9 In his reasons, Underwood J considered the issue of what constitutes negligent driving. He applied the test of Burbury CJ as set out in *Fehlberg v Gallahar*, that is, it is driving carelessly and it is a different concept from that used in civil proceedings.[309] His Honour stated that 'the issue before the Magistrate was whether on the whole of the evidence he was satisfied to the requisite degree that the applicant had driven negligently and that that driving caused death'. His view was there was 'no doubt that as a matter of fact, the pleaded particulars of negligence were established on the evidence'. His Honour said that 'the only issue for the learned Magistrate was whether it was reasonably possible that the pleaded acts occurred through no act of carelessness on the part of the applicant'. Or 'to put it another way was [it] reasonably possible that the applicant suddenly and unexpectedly fell asleep so that she was deprived the opportunity to avoid driving onto the incorrect side of the road'?

5.4.10 In the circumstances, Underwood J said that 'the evidence does not establish that is reasonably possible that the applicant was deprived of the opportunity of avoiding driving onto the incorrect side of the road by falling asleep'. The defendant had admitted that somewhere between Deloraine and Westbury she started to feel tired and that was some distance from where the crash occurred. Although the defendant said that she did not know if there was anywhere that she could stop, the police officer had given evidence of the ample verge along the highway where she could have stopped. His Honour referred to the comments of King CJ in *Kroon* that:

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[307] (1993) 178 CLR 217.

[308] LCA 13/2004.

[309] [1957] Tas SR 286, 289. Underwood J noted that this had been affirmed in *Filz v Knox* [2002] Tas SC 82.

> 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.[310]

Underwood J did not consider that this was one of those rare cases. He said that the applicant had 'clear warning that she was at risk of falling asleep' and that 'there was nothing to prevent her stopping and thereby avoiding the risk of an accident. She failed to do that and consequently drove negligently. His Honour's view was that 'no other conclusion [was] reasonably open on the evidence'.

Commentary

5.4.11 This case highlights the importance of the initial police interview and investigation in obtaining a conviction. The authors 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.

5.4.12 This case also provides a clear statement of the test to be applied in cases where a driver falls asleep and is charged with negligent driving causing death or grievous bodily harm. As set out above, the test is 'was it a reasonable possibility that the defendant suddenly and unexpectedly fell asleep so that he or she was deprived the opportunity to avoid driving ... [in the manner alleged to be negligent].' Underwood J also makes the point that it is a rare case where a driver who falls asleep would be exonerated of negligent driving.

5.5 Complaint no 40643/07 (*B2*)

5.5.1 The defendant was charged with negligent driving causing death contrary to the *Traffic Act 1925*, s 32(2A) following a collision in April 2007 that resulted in the death of her passenger. The defendant was travelling on a straight level section of the Bass Highway when the vehicle crossed the centre line and collided with two vehicles. There was no evidence of speeding. The particulars of negligence were that she:

> (a) failed to keep a proper look out;
>
> (b) failed to exercise reasonable care and skill; and
>
> (c) failed to take reasonable precautions to avoid a collision.

5.5.2 In the record of interview, the defendant stated that:

- She had gone to sleep at about midnight on the night prior to the collision and had got up about 9.30. She said that this was a huge amount of sleep for her and that she had had a good night's sleep. She had consumed some alcohol that evening.
- She started to feel tired on the outskirts of Launceston and said to her passenger that she wanted to pull over at Westbury. She started to feel tired around Hadspen.
- In response to 'when you said that you believe you fell asleep, were you, were you fighting it with', she answered, 'I think I was. I think I was because I, I had it in my head that we're gonna stop at Westbury and so I, I think, you know reflecting back now that I was, just must have thinking I'll make it, you know thinking and you know, I failed to turn the heater off or, or wind the window down'.

[310] See *Kroon* (1990) 52 A Crim R 15, 19 (King CJ).

- At the scene, a police officer asked her what she could remember and she said 'I remember saying to him "I think I fell asleep"'.
- In response to the question, 'have you an explanation to offer as to why your vehicle has failed to keep left and cross the white line', she answered 'only the fact that I failed to stop when I felt tired'.

The decision of the Magistrate

5.5.3 The Magistrate accepted that the defendant had adequate sleep before the collision and had not been driving for an inordinately long period of time. He noted that the defendant had made admissions in the police interview that she had fallen asleep and that she had felt tired. She planned to stop in the next town that was about 15 minutes away. She fell asleep after about 10 minutes after making the decision to stop.

5.5.4 The Magistrate found that the first two particulars could not be sustained as they referred to a period of time during which she was asleep. In relation to (c), he accepted that this was broad enough to include circumstances where the defendant was said to be negligent by falling asleep. The Magistrate said that 'the overriding impression I am left with is that her level of tiredness was such that she believed she should stop the car for a break shortly to alleviate the risk that she may fall asleep. He found that the defendant was negligent as 'she was aware of her own tiredness and how it may affect her driving. That in my view inevitably involved notice to her of the risk that she may fall asleep'. The Magistrate stated that:

> In the driving preceding sleep [the defendant] should have done something to ensure that she did not go to sleep. She only had to stay awake for another 15 minutes or so before she had a break. In the circumstance of this case that did not necessarily require her to stop her car immediately on the side of the road. That may have imposed too high a standard. However, there were other things she could have done. She could have turned the radio on or up, wound the window down, adjusted the temperature control of the heater or turned it to fresh air, woken her grandmother to ensure the conversation continued or simply exercised the will, fortitude or concentration necessary to make sure she stayed awake She only had a short time to do so until she got a break from driving.

The defendant was sentenced to 2 months imprisonment wholly suspended on the condition that for a period of 12 months she be of good behaviour. Her driver's licence was cancelled for a period of 6 months.

Commentary

5.5.5 The Magistrate identified that a driver who is asleep is not capable of being found to have committed a voluntary and intentional act at the time being asleep. The Institute notes that the prosecution did not particularise her tiredness as the basis of her negligence and that of the three particulars of negligence relied on in the complaint, the first two particulars could not be maintained in relation to the time that the driver was asleep. While the Magistrate found that the particular that the accused failed to take reasonable precaution to avoid a collision was broad enough to cover the circumstances where the accused had fallen asleep, the Institute's view is that if drowsiness/falling asleep is the basis of the prosecution case, this should be set out in the particulars of negligence.

5.5.6 Having found that the defendant was aware of her tiredness and that there was a risk that she may fall asleep, it is interesting to note that the Magistrate accepted that something less than pulling over when feeling tired may have sufficed. Several measures were suggested by the Magistrate with the implication that if she had done any of these, her driving would not have met the threshold for negligent driving. Earlier cases have accepted that if a driver has warning of tiredness, then the driver

has an obligation to stop. In addition, there is scientific evidence that 'these measures have been found to have only a brief benefit and this rapidly dissipates'.[311]

5.6 Other cases identified

5.6.1 In the course of research for this Report, the Institute has identified two cases of negligent driving causing death/serious injury contrary to the *Traffic Act 1925* s 32(2A) that highlight particular difficulties for the prosecution in establishing negligence. Key features of both cases were that: (1) the prosecution did not suggest that the driver fell asleep; (2) the crashes occurred on unchallenging stretches of road; (3) the vehicles driven by the defendants veered suddenly onto the wrong side of the road; (4) independent witnesses observed the movements of the defendants' vehicles in close proximity to the crash; and (5) the defendants' accounts were that they had no memory of the crash. These cases differ from a case such as *B2* where a driver asserts that they may have fallen asleep or *M* (discussed at 5.7) where the evidence suggests that the driver may have fallen asleep and that the driver had little or no sleep preceding the collision.

Langan v White[312]

5.6.2 The defendant was charged with negligent driving causing death contrary to the *Traffic Act 1925*, s 32(2A). The collision occurred on the East Tamar Highway when the vehicle driven by the defendant veered onto the incorrect side of the road and collided with an oncoming vehicle killing the driver of that vehicle. In her evidence at trial, the defendant told the Magistrate that 'she had "just about every test you can have" to see if there was any medical explanation for her being on the wrong side of the road, but no possible explanation was apparent'. She was well rested before the collision and had never previously felt drowsy, fallen asleep or had a blackout when driving the car. She had no recollection of the events immediately preceding the crash. A witness described how the defendant's vehicle 'started to move rather erratically in the traffic'. He said that 'it started to move like when a vehicle, say, goes to overtake and then shoot back, it was that sort of motion' and that 'it then just veered in a sharp angle across the highway'.

5.6.3 The Magistrate considered that there were only two rational hypotheses for being completely on the wrong side of the road. The first was that the defendant had been 'distracted' by some unidentified cause but that her driving was a conscious act or acts. The other was that her driving was not a conscious act as she may have fallen asleep. In ruling that her driving was conscious and voluntary, the magistrate relied upon the evidence given by the witness of the 'correction' that almost immediately preceded the vehicle veering onto the wrong side of road and found the charge of negligent driving proved:

> There are only two rational inferences or rather hypothesis that arise from [the evidence of the witness]... The first was that the driver was distracted by something that she was doing or by something causing the vehicle to veer to the right in the line of travel on two occasions observed, the defendant being able to correct the first time and this inference supports the conclusion that the acts were conscious, done with the realisation that the defendant's vehicle was behaving inappropriately and on that moment correcting immediately. And then almost immediately after that correction the vehicle again veered out of the line of travel and across the two westbound lanes into the path of the defendant's [sic] vehicle.[313]

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311 L Hartley, 'Fatigue and Driving' in W Karwowski (ed), *International Encyclopaedia of Ergonomics and Human Factors* (CRC Pres, 2nd ed, vol 1, 2006) 719.

312 [2006] TASSC 83.

313 Ibid, [10].

The Magistrate considered that 'the acts of correction cannot be explained on the evidence by anything other than conscious acts of driving' and convicted the defendant.

5.6.4 On appeal, Underwood CJ set out the applicable principles:

- The doctrine of *res ipsa loquitur* has no application, and the mere happening of an accident does not give rise to a presumption of negligent driving;
- The facts and circumstances of the case may be such that an inference of negligence is the only one reasonably open unless an explanation is offered, ie where a defendant offers no explanation that may be sufficient to convert a prima facie case into one proved beyond reasonable doubt;
- Where a defendant offers an 'explanation' in the sense of establishing that there is no explanation within his present knowledge, the prosecution case does not go unanswered in that sense;
- Where there is no explanation offered, the court must consider all reasonable possibilities.[314]

5.6.5 In this case, the defendant had offered an explanation in the sense that she had said she did not know why the collision had occurred. It was accepted that all the evidence against the defendant was circumstantial[315] and that 'the prosecution does not have to prove beyond reasonable doubt each of the circumstantial facts relied upon, but in some cases there may be a fact or facts that is, or are, so critical to the chain of reasoning that it or they must be proved to that standard'.[316] Such a fact was whether the first movement of the defendant's vehicle (the initial swerve) was the result of a conscious act of driving. Underwood CJ considered that there was a reasonable hypothesis that the act of driving was not voluntary:

> It is reasonably possible that the applicant unexpected suffered a severe coughing or sneezing fit and in consequence, "started to move like when a vehicle goes to overtake" but was able to realise the danger and pull back. The fit may have continued immediately thereafter and to such a severe degree that the applicant was unable to control her vehicle and it crossed onto the incorrect side. Similar scenarios can be envisaged in the case of an unexpected fainting fit or giddiness or even falling asleep, half waking, correcting the vehicle and then immediately falling asleep again...
>
> His evidence is [also] reasonably consistent with the proposition that the first movement was not a correction at all, but an unconscious movement made whilst falling asleep ("nodding off") or whilst in the grip of a fainting spell or during, or as a result of a continuous, uncontrollable fit of coughing.

Underwood CJ quashed the conviction on the basis that it could not be established 'beyond reasonable doubt that the vehicle's movement right across to the wrong side of the road was a conscious, and therefore, negligent act'.[317]

Complaint no 41972/07 (G)

5.6.6 The defendant was charged with negligent driving causing death contrary to the *Traffic Act 1925*, s 32(2A) and negligent driving causing grievous bodily harm contrary to the *Traffic Act 1925*, s 32(2B) following a collision in April 2007. The defendant was travelling from Hobart to Launceston on the Midland Highway. The collision occurred on a sweeping bend just north of Tunbridge. The

[314] Ibid, [12].

[315] This is evidence of a fact from which the jury is asked to infer a further fact. It is contrasted with direct evidence.

[316] *Langan v White* [2006] TASSC 83 [13] relying on *Shepherd v R* (1990) 170 CLR 573.

[317] Ibid, [20].

vehicle driven by the defendant entered a sweeping left hand bend and crossed the centre line narrowly missing one vehicle and then colliding with another oncoming vehicle. The crash scene yielded no evidence of pre-crash skid marks. The particulars of negligence alleged were that he:

(a) failed to keep a proper lookout;

(b) failed to exercise reasonable care and skill in the handling of the vehicle;

(c) failed to take reasonable precautions to avoid a collision; and

(d) failed to keep as near as practicable to the left side of the road.

Record of interview

5.6.7 In the record of interview, the defendant said that:

- He was a P plater.
- He had driven from Georgetown to Hobart on the day before the collision and that this had been the first time he had been on the Midland Highway.
- He had had a good night sleep the night before the collision, going to bed at about 10 o'clock and getting up about 7.30, 8 o'clock.
- He had not been drinking.
- He left from Hobart in the afternoon with four other occupants.
- He didn't feel tired at any stage during the trip.
- He couldn't describe the Midland Highway where the crash happened, couldn't remember whether it was a straight bit of road or not, couldn't remember anything about the crash.
- He could remember that he could see a fair way ahead but couldn't say in words how far. He didn't see either vehicle (the near miss and the one he hit) prior to the crash.
- He had both hands on the wheel just prior to the crash and that he wasn't using a mobile phone.
- He wasn't adjusting the radio just prior to the crash.
- He didn't know what the speed limit was on the Midland Highway.
- He didn't remember using the brakes or having his foot on the accelerator prior to the crash and didn't remember crossing the centre line.

Transcript of hearing

5.6.8 During the course of the hearing, the prosecution called nine witnesses and tendered the defendant's record of interview. None of the witnesses could shed any light as to why the defendant's vehicle had crossed the centreline of the road. Four of the witnesses were passengers in the defendant's vehicle and could either not recall the events leading up to the crash and the crash itself or were not paying attention prior to the crash and only recalled the impact. The driver of the vehicle hit by the defendant had no memory of the collision. Evidence was also given by the driver of the vehicle who had (just prior to the fatal crash) taken evasive action to avoid the vehicle driven by the defendant. He said that the defendant's vehicle veered suddenly into the wrong lane and that the driver was leaning forwards towards the steering wheel but was not lying on the steering wheel. The defendant did not give evidence at the hearing.

5.6.9 Defence counsel referred the Magistrate to the decision of Underwood CJ in *Langan v White* and suggested that this was a similar case in that both vehicles veered suddenly and that this was an even stronger case, in that there was not even an attempted 'correction'. It was suggested that after the near miss with the witness' vehicle, if the defendant had been conscious, a correction would have been expected. Defence counsel submitted that the defendant's vehicle had veered suddenly and not gradually (which might occur if the defendant was fixing the radio). It was submitted that, as the Crown case was based on circumstantial evidence, it would only be proved beyond reasonable doubt if the only rational hypothesis on the evidence was that the defendant was on the wrong side of the road as a result of inattention or carelessness.

Decision of the Magistrate

5.6.10 The Magistrate dismissed the complaint on the basis that he was not satisfied beyond reasonable doubt that the vehicle's movement was a conscious, and therefore negligent act. Referring to the evidence, he said that the defendant said that he was well rested and that he had had a good night sleep and that there was no evidence that he was drowsy. The defendant had no recollection of the crash and there was no explanation offered by him as to why his vehicle crossed to the incorrect side of the road. The Magistrate referred to evidence given by a witness driving the vehicle narrowly missed by the defendant. The witness said that when he passed by the defendant, he 'seemed to be "leaning forwards towards the steering wheel" but not so far as to be touching it'. He said that as the defendant's 'vehicle got close to him, "all of a sudden it veered into the south-bound lane, it was quite a sudden movement"'. There were no skid marks pre-crash, so accident investigators were unable to estimate the speed of the vehicle. However, the witness gave evidence that the vehicle was travelling at closer to 110 kilometres per hour rather than 80 kilometres per hour (the limit for P-platers). It was noted that speed was not pleaded as a particular of negligence.

5.6.11 The Magistrate applied the decisions of *Filz v Knox* and *Langan v White*. He said that 'there is no explanation by the defendant as to why he crossed to the incorrect side of the road, except for what might be viewed as him wondering out loud so to speak that he thought he may have swerved into the wrong lane'. The Magistrate said that there was a lack of evidence to support his swerving into the wrong lane as a conscious act of driving:

- the witness saw him leaning forwards towards the steering wheel which the witness thought unusual. The Magistrate thought this was indicative of less than conscious control;
- the vehicle made a sudden movement into the wrong lane, again indicative of lack of control for some reason, possibly unconsciousness;
- the witness managed to avoid a near collision but even after that it continued to track further into the wrong lane, again indicative of unconsciousness;
- no skid marks such as to indicate that the defendant tried to avoid the ultimate collision being aware of his untoward driving and again indicative of unconsciousness.[318]

The Magistrate accepted that 'unconsciousness [was] a reasonable possibility here'.

Commentary

5.6.12 These cases highlight the difficulties confronting the prosecution in establishing negligence beyond reasonable doubt in cases of 'unexplained accidents', where the prosecution case is largely

[318] It is noted evidence at trial was given by a police officer who said that there were no skid marks on the road near the accident site. The absence of skid marks indicated that neither the defendant or the driver of the oncoming vehicle locked up their brakes to the extent to leaving skid marks but it is possible that the brakes were applied.

circumstantial. The prosecution may have difficulty establishing negligence where there is no evidence of speed, fatigue, alcohol/drugs, mechanical failure, road condition etc that may explain the crash and the driver can provide no explanation within his or her present knowledge as to how the collision occurred. As explained, the civil law doctrine of *res ipsa loquitur* (the thing speaks for itself) does not apply to a criminal charge of negligent driving. However, in some cases, 'the facts may be so strong that the only inference is that there has been negligent driving unless the driver suggests some explanation'.[319] This does not reverse the onus of proof; however, 'it is easier to draw an inference of guilt from a *prima facie* case when facts are peculiarly within the knowledge of the defendant'.[320] Absent mechanical failure or difficult road conditions, the fact that a driver veers suddenly onto the wrong side of the road into path of an oncoming vehicle would raise a prima facie case of negligence, that is inattention or carelessness, absent an explanation.

5.6.13 An example of the driver offering no explanation was the case of *Leary v Holloway*,[321] where the defendant was charged with causing death by negligent driving and the principal issue at trial was whether the defendant was the driver of a vehicle that had hit a pedestrian and caused injuries from which the pedestrian later died. The defendant denied he was the driver in his police interview and did not give evidence at trial. After finding that the defendant was the driver, the Magistrate concluded an inference of negligence was the only one reasonably open on the evidence. On review, Underwood CJ considered that the Magistrate was correct. The pedestrian was hit on a straight level stretch of road and the weather was fine. There were no vehicle obscuring the motorist's vision and no tyre or skid marks and the area was well lit. If the defendant had been keeping a proper look out he would have had time to avoid the collision unless the pedestrian had been within his view for an insufficient time to do this, such as if he had ran onto the roadway or stepped out close to the point of impact. In considering these possibilities, Underwood CJ stated that:

> These are unlikely events. *Prima facie* a case of causing death by negligent driving has been made out. Although the doctrine of *res ipsa loquitor* has no place in the criminal law, the facts may be so strong that the only inference is that there has been negligent driving unless the driver suggests some explanation. This is such a case. As Chamberlain J said in *Sanders v Hill* at 330, "it is not for the Court to conjure fancy improbable explanations". The Court's duty is to consider reasonable possibilities. Although there was no onus on the applicant to prove that he was not guilty, it is easier to draw an inference of guilt from a *prima facie* case where facts are peculiarly within the knowledge of the defendant, but he offers no explanation.[322]

This applied here because the defendant had lied to police about driving his car, and shortly after the accident his car was discovered by the police damaged and 'burnt out'.

5.6.14 In contrast, if the defendant says that there is no explanation within his or her present knowledge, such as in *Langan v White* and *G's* case, then the prosecution case does not go unanswered. In regard to the issue of negligence, the Crown's case was circumstantial – the magistrate needed to draw an inference of negligence from the fact that the defendants' vehicles suddenly swerved onto the wrong side of the road. The Court needed to make a determination as to whether it was the result of carelessness or inattention or otherwise. In both these cases, neither defendant could recall the circumstances of the accident and the defendant was the only person who could provide an explanation as to how their vehicle crossed the centre line. In *Langan v White*, the defendant gave evidence in relation to her memory of the collision and the circumstances leading up to the collision. In *G*, the defendant's interview with the police was tendered in evidence but the defendant did not give

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319 *Leary v Holloway* [2007] TASSC 52, [27] (Underwood CJ).

320 Ibid.

321 [2007] TASSC 52.

322 Ibid, [27] citing *Sanders v Hill* [1964] SASR 327. Underwood CJ quoted from *Sanders v Hill* at 329, 'where the prosecution case depends on facts which if unexplained, indicate guilt, the failure of the defendant to offer an innocent explanation, which if one exists could only be known to him, may well be treated as sufficient evidence that there is, in fact, no such innocent explanation'.

evidence. While it is recognised that it is for the prosecution to prove its case beyond reasonable doubt and not for the accused to prove his or her innocence, this was unsatisfactory in several respects. First, it is suggested that *G's* case is distinguishable from *Langan v White* and is an undesirable application of the principles set out by Underwood CJ in that case in relation to the application of *res ipsa loquitor* to criminal cases. It is suggested that the defendant did not provide a proper explanation as there was nothing to support the defendant's claim of memory loss.[323] The record of interview in *G's* case was contradictory in that the defendant claimed to have no memory at all of the collision, where it occurred, and how he came to be on the wrong side of the road but did recall several exculpatory features of his driving prior to the crash such as not using the phone or fiddling with the radio and having both hands on the wheel.[324] Second, it is suggested that the defendant falling asleep is not a reasonable possibility in view of the evidence that the defendant was well-rested and not feeling tired at any stage of the trip. As discussed in Part 2, sleep research has not reached the stage where it can conclusively be said that a person will be aware that they are going to fall asleep. However, it is generally accepted that, absent a sleep disorder, there is some feeling of tiredness.[325]

5.6.15 The Institute's view is that it would have been open to the Magistrate to reach another conclusion in *G's* case and that it should not be considered a precedent.

5.7 Complaint no 32830/09 (*M*)

5.7.1 The accused was charged with two counts of negligent driving causing death contrary to the *Traffic Act 1925*, s 32(2A). He was driving on the Bass Highway when he failed to negotiate a sweeping right hand down hill bend. His vehicle left the road, travelled in a straight line and collided with a tree killing both passengers in his vehicle. The particulars of negligence were that he:

(a) failed to keep a proper look out ahead;

(b) failed to exercise reasonable care and skill in the handling of the vehicle;

(c) failed to take reasonable precautions to avoid a collision; and

(d) drive at a speed excessive in the circumstances.

5.7.2 Statements taken from several friends of M detailed his movements on the evening prior to the crash and the fact that he had not been to sleep. Prior to driving off the road and colliding with the tree, M had been awake for at least 20 hours before leaving Ulverstone early in the morning to drive to the East Coast. M suffered severe injuries as a result of the crash and had no memory the collision or the period of driving prior to it. Shortly prior to the collision, a witness travelling behind M's vehicle saw the vehicle veering several times slightly towards the left side of the road across the white edge line. He overtook the vehicle and saw the driver looking ahead, as if focused and concentrating. He said that he was of the view that the driver was tired. Crash investigations established that from the time the vehicle left the road, it travelled in straight line without braking. The crash investigator considered that 'the crash [was] ... caused by inattention or the driver having fallen asleep'.[326]

5.7.3 The accused pleaded guilty to both counts of negligent driving causing death and was sentenced to 250 hours community service and disqualified from driving for two years.

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[323] This point was made by the police prosecutor in closing that there was no medical evidence to support the claim of memory loss and that it was a memory loss of convenience.

[324] This was not a case like *B1* where the defendant made several admissions in the police interview.

[325] See 2.2.19, 2.2.32.

[326] Z Dawtrey, 'Sentences for two young male death drivers', *The Examiner* (Launceston) 14 October 2009.

5.8 Deborah May Lynch

5.8.1 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 that 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.[327]

5.8.2 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'.[328]

[327] *Woolley* [2006] TASCD 076.

[328] Ibid.

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.[329]

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*.[330] The Report examined, amongst other things, the impact of the decision in *Jiminez v The Queen* upon the law that applies 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.[331]

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*.[332] In 1996, the STAYSAFE Committee tabled a report that examined the government response to the recommendations of its 1994 Report.[333] In 1998, the STAYSAFE Committee released a further report that examined the legal and licensing implications of driver fatigue.[334] This Report made several recommendations including:

- The Road and Traffic Authority, in consultation with the Attorney-General's Department, conduct further scientific and legal research into the question of whether drivers are aware of sleepiness prior to falling asleep at the wheel, and if justified, seek to become a party to a test case of a prosecution for dangerous driving causing death or

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[329] 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.

[330] 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, Parliament of New South Wales (March 1994).

[331] Ibid, 158–159.

[332] 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* (1992) 106 ALR 162 for relevant legislation relating to driving a motor vehicle, notably the *Crimes Act 1900* and the *Traffic Act 1909*.'

[333] Joint Standing Committee Upon Road Safety (STAYSAFE Committee), *Responses to Recommendations in Staysafe Reports of the 50th Parliament*, STAYSAFE Report Number 33, Parliament of New South Wales (1996).

[334] Joint Standing Committee Upon Road Safety (STAYSAFE Committee), *Falling Asleep at the Wheel – Legal and Licensing Implications of Driver Fatigue*, STAYSAFE Report Number 46, Parliament of New South Wales (1998).

serious injury where the driver states that he or she fell asleep unexpectedly and without warning that might challenge the prosecutorial requirements of a *Jiminez*-type case.[335]

- The Attorney General review the cases since the High Court judgment in *Jiminez v R* where a driver is charged with dangerous driving offences arising out of a road crash to determine if claims of 'suddenly, without warning, falling asleep at the wheel' are yielding a relatively high rate of dismissal of dangerous driving charges.[336]

6.1.3 The Attorney General's response to these recommendations was that the 'implications of the *Jiminez* decision have been considered and cases since the decision have not indicated the need for further reform'. In view of this, the Attorney General 'was not persuaded that extensive research of the type suggested ... is required or would be the most efficient use of the limited resources of the division'.[337] The STAYSAFE Committee expressed its dissatisfaction with this response:

> In the STAYSAFE 46 (1998) report, several cases were identified and discussed where a *Jiminez*-type defence had been tendered successfully against prosecutions for dangerous driving offences. ... STAYSAFE continues to be concerned that *Jiminez*-type defences may not be uncommon in cases involving prosecutions for dangerous driving, and that a claim of "suddenly, without warning, falling asleep at the wheel" may be yielding a relatively high rate of dismissal of dangerous driving charges.[338]

The Committee was also concerned that a *Jiminez*-type defence might arise in contexts other than falling asleep cases such as 'coughing, sneezing, or perhaps reflexive alarm reactions on the unexpected entrance of insects or spiders through windows or their appearance on the dashboard or on inside windscreen surfaces' as the basis of 'the defence of automatism offered against prosecutions of alleged criminal behaviour during driving'.[339]

Amendments to driver licensing regulations

6.1.4 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 motor vehicle (for example, as a result of sleep or loss of consciousness)'.[340] Such action may be taken regardless of whether the person is to be prosecuted for an offence.[341] Further, the Authority 'need not inquire into the likelihood of the person again becoming incapable of controlling a motor vehicle in similar circumstances'.

6.1.5 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.[342] 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,

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335 Recommendation 1.

336 Recommendation 2.

337 STAYSAFE Report Number 52, above n 256, 112.

338 Ibid.

339 Ibid, 112–113.

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

341 Ibid, reg 38(1A)(b).

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

such as sleep apnoea or narcolepsy, such drivers will need to be examined by a doctor before they may again be licensed.[343] The amendment followed the 1998 inquiry by of the STAYSAFE Committee that made recommendations in relation to the licensing implications of drivers who fall asleep at the wheel.[344]

6.1.6 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 reg 38(1A) on 17 occasions. The licence can only be re-instated by way of an order by a local court on appeal.[345]

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.[346] 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'.[347]

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'.[348] 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].[349]

6.2.3 The case of *R v Marriot*[350] was also referred to in the Paper 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'.[351] 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'.[352]

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

[344] STAYSAFE Report Number 46, above n 334; Submission of Safety & Policy Analysis International.

[345] *Road Transport (Driver Licensing) Regulation 1999* (NSW), reg 39(4A); Letter dated 20 June 2005 from G Crouch, for Manager, Driver Sanctions, Roads and Traffic Authority, NSW.

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

[347] Ibid, 3.

[348] Ibid, 25.

[349] *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.

[350] County Court of Victoria, 27 November 2002.

[351] Victorian Department of Justice, above n 346, 25.

[352] Ibid.

6.2.4 The Paper 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.[353] There then followed discussion about whether such a head of liability should be strict, or whether a fault element ought to be specified.[354] 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 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?[355]

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:

> 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.[356]

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

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353 Ibid, 26.

354 Ibid.

355 Ibid, 25–29.

356 Law Institute of Victoria, *Law Institute of Victoria submission in response to the Victorian Department of Justice Discussion Paper on 'Culpable and Dangerous 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*,[357] (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.

6.3 Queensland

6.3.1 The Queensland Parliament's Travelsafe Committee 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.[358]

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.[359]

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[357] [2004] VSCA 132.

[358] Ibid, 2.

[359] Parliamentary Travelsafe Committee, *Driving on Empty: Fatigue Driving in Queensland*, Report No. 43 (October 2005) 44.

6.3.4 The Report did not, however, make any recommendations to change the current legislation or to introduce new offences. Nevertheless, the Report did recommend that the New South Wales and Victorian models be monitored to assess their effectiveness before any legislative change is made in Queensland.[360]

6.4 New Jersey, USA

6.4.1 In 2004, the State of New Jersey legislature amended the New Jersey Code of Criminal Justice specifically to 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.'[361]

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 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.

6.4.3 While New Jersey is the only US state with a drowsy driving law,[362] it appears that several other states have pending legislation that would create either a separate offence of driving whilst fatigued or specify that driving whilst fatigue constitutes recklessness. The ASA also referred the Institute to reforms under consideration in Massachusetts that create the crimes of falling asleep or being impaired by drowsiness or sleep deprivation while operating a motor vehicle and motor vehicle homicide resulting from being impaired by drowsiness or sleep deprivation. The reforms would create a legislative test to establish impairment by drowsiness or sleep deprivation while operating a motor vehicle.[363] The legislation would provide that:

> Proof that the operator of a motor vehicle has been awake for at least 22 of the 24 hours prior to said operation of a motor vehicle or at least 140 hours of the 168 hours prior to said operation of a motor vehicle shall constitute sufficient evidence to conclude that said motor vehicle operator was impaired by drowsiness.[364]

As pointed out by the ASA, such a provision overcomes perceived problems with the New Jersey test, as a brief period of sleep does not place a person outside the legislative test proposed in Massachusetts. It sets out when a person is considered to be sleep deprived and the ASA suggests 'this test would overcome some of the evidentiary problems caused in jurisdictions with laws that require that the driver has knowledge of impairment by sleepiness'.

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[360] Ibid, recommendation 11, 45.

[361] *New Jersey Code of Criminal Justice*, NJ Stat. § 2C:11-5.

[362] Special Commission on Drowsy Driving (Massachusetts), *Asleep at the Wheel*, Report (2009) 20–21.

[363] For full details of the model legislation, see, Sleep Research Society, *Drowsy Driving* (1 July 2009) (<http://www.sleepresearchsociety.org/DrowsyDriving.aspx>.

[364] *An Act Relative to Drowsy Driving*, s 12. The report of the Special Commission recommends that the Act be passed, above n 362, 25.

6.4.4 Such a provision would not overcome the requirement for a voluntary and intentional act of driving. Further, it does not of itself establish negligence or dangerousness. The test for dangerous driving is not whether or not a person had warning that they were going to fall asleep. It is not whether he or she was impaired by tiredness. The legal question is whether the driver was so tired that, in the circumstances, the conscious and voluntary driving (prior to falling asleep) was a danger to the public. Impairment due to lack of sleep (with or without specific legislation) would be relevant to that issue, but it does not remove the need for the trier of fact to be satisfied that the driving was objectively dangerous. Similarly, lack of sleep would be relevant to the question of whether a person's driving was negligent, but it does not establish negligence per se. Again, a specific legislative provision that sets out a set period of time without sleep that amounts to sleep deprivation may not advance matters very much, as a fact finder presented with evidence that a person had had very little sleep over an extended period of time may well consider that driving in that state was dangerous or negligent.

Part 7

Options for Reform and Recommendations

In this Part, the Institute makes recommendations in relation to the possible options for reform set out in the Issues Paper. These included:

- Introduction of provisions specifying that if there is an appreciable risk of falling asleep, driving when sleepy/drowsy at the wheel may constitute negligence or dangerousness (Option 3 in Issues Paper);
- 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 (Option 4 in Issues Paper);
- Amendment of current legislation to 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* (Option 5 in Issues Paper);
- No change to the law (Option 1 in Issues Paper);
- No change to substantive law with power to suspend driving licence (Option 2 in Issues Paper).

7.1 Introduction of provisions specifying that if there is an appreciable risk of falling asleep, driving when sleepy may constitute negligence or dangerousness (Option 3 in Issues Paper)

7.1.1 An option for reform considered in the Issues Paper (Option 3) was 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.

7.1.2 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 death[365] or the lesser offence of dangerous driving causing death.[366] Culpable driving may be established by proof of recklessness, negligence or where the driver was under the influence of alcohol or drugs so as to be incapable of the proper control of the vehicle. The standard of negligence for culpable negligence is set out in the *Crimes Act 1958* (Vic), s 318(2)(b) which 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:

[365] *Crimes Act 1958* (Vic), s 318. See Appendix.

[366] Ibid. 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,[367] this provision appears to add an extra level of complexity to the current legislative framework in Victoria.

7.1.3 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,*[368] 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]'.[369] 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.

7.1.4 This option 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.

Responses received to Issues Paper

7.1.5 DIER and DPEM did not support this option. It was stated that the introduction of such a provision 'may add an extra level of complexity and blur the lines between elements of the offence and elements relevant to the defence of honest and reasonable mistake'. In addition, DIER noted that the 'amendments as introduced in Victoria by Section 318(2A) of the *Crimes Act 1958* (Vic) are not commensurate with the lower level of negligence in Tasmania's negligent driving offences'. DPEM noted that,

> while this option will provide a framework around which to properly particularise complaints that are laid, it does not alter the onus on the prosecution to establish beyond reasonable doubt that the driver knew, or ought to have known, they would fall asleep. It would not change the position as it currently exists in this regard and does not meaningfully progress the issue beyond Options 1 and 2 of the Issues Paper.

7.1.6 The Director of Public Prosecutions (NSW) agreed with the Institute that 'such provisions would add an extra level of complexity to the current legislation'. This was also the view of the Director of Public Prosecutions (Tas) who wrote that 'as I believe the law as expressed in *Jiminez* is relatively simple, clear and in accordance with well-known principles of criminal liability, I do not see the need to legislate as posed by Option 3. As the paper identifies, such legislation might well add greater – and unwelcome – complexity'.

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[367] See 6.2.9.

[368] [1999] 1 VR 518.

[369] Ibid, [23] (Winneke P).

7.1.7 In contrast, the Australian Lawyers Alliance supported this option, that is the 'introduction of a provision that specifies that if there is an appreciable risk of falling asleep, driving when sleepy may constitute negligence or dangerousness'. Their support was not based on an inadequacy in the current law but with a desire to make the law more readily understood by police and prosecutors:

> In our opinion the law at present is not necessarily inadequate. Rather, at times it seems as though prosecution cases are not prepared adequately and appropriate evidence in not obtained. In our opinion reform to the law introducing a provision specifically referring to an appreciable risk of falling asleep may in fact focus prosecutors' minds to that question and indeed focus the investigations of Police to determining whether or not there was an appreciable risk of falling asleep in the circumstances of each case. In our opinion, it seems that the situation at present is somewhat uncertain and not particularly well understood. This is particularly highlighted by the case of *William Robert Piggott* where it is noted that defence counsel was successful in arguing that the prosecution case was run on the incorrect basis, that is, that the relevant period of time for falling asleep was after Mr Piggott had allegedly fallen asleep at the wheel. In this regard, it seems to be the case that a clearer understanding of what is required by prosecutors and Police should be focused on.
>
> In that regard specifying a provision specifically dealing with the issues would be of assistance. It would focus a prosecutor's and the Police's minds when investigating the question at hand.

7.1.8 In the Issues Paper, the Institute expressed concern that such a provision may create greater complexity. However, the Australian Lawyers Alliance's opinion was that this was not the case and that 'at present there is evidently quite a bit of complexity and confusion in the prosecution and, in our opinion, a specific provision would focus the mind of the prosecutor and indeed enable the defence to clearly understand what case it is that they need to meet'.

7.1.9 The Institute also raised difficulties that may arise in relation to dangerous driving if a provision was introduced that specified that dangerous 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. As outlined at 3.2.12 – 3.2.14, the offence of dangerous driving is an objective test, and the concern raised was that a provision referring to the knowledge of the accused may blur the lines between the elements of the offence and elements of the defence of honest and reasonable mistake. The Australian Lawyers Alliance did not consider that this raised an issue:

> It is noted that the proposed provision would be an objective test as to whether there is an appreciable risk of falling asleep and furthermore that it may constitute negligence or dangerousness. There would be no deeming as such, and the consideration of whether the accused did have an honest and reasonable belief would still be applicable and able to operate. In our opinion the introduction of such a provision would not necessarily introduce the elements of actual knowledge unless it was later interpreted as such. In any event an amendment to the provision as proposed could overcome that difficulty.

7.1.10 The Australian Lawyers Alliance considered that this option would also have the additional benefit of community education and awareness.

> We note that such a campaign might well obtain a great deal of attention given that a lot of time, energy and effort is already spent in Tasmania on trying to convince drivers not to drive whilst drowsy. An amendment to the law would further reinforce this issue with Tasmanian drivers and hopefully avoid crashes that may otherwise have occurred.

7.1.11 Such reform was also seen to have a benefit for a plaintiff in respect of the establishing the civil liability of drivers who fall asleep:

> It would also enable a plaintiff who has been injured in such a motor vehicle accident by a negligent driver to better proceed with their case, on the basis that Police prosecutors would have already conducted an examination focusing on the issue of the negligence or otherwise of a driver who drove whilst sleepy and, in addition to that, an amendment in this

> regard should and would make the plaintiff's action a lot easier to seek damages. A plaintiff who has been injured by a driver who has fallen asleep at the wheel by ignoring signs or a medical condition should properly be proceeded against and a criminal investigation and conduct of the matter would greatly assist a plaintiff who should not have been injured in the first place provided at least there is negligence established.

This option was also supported in the submission received from Mr Jones.

The Institute's view

7.1.12 An advantage of introducing provisions specifying that if there is an appreciable risk of falling asleep, driving when sleepy may constitute negligence or dangerousness is that it would clarify what must be proved to establish negligence and/or dangerousness, and it would 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.

7.1.13 However, the Institute's view is that these advantages are outweighed by the disadvantage of adding greater complexity to the prosecution of falling asleep cases in cases of dangerousness and negligence. This concern was identified in the Issues Paper and reiterated in several submissions received by the Institute. Currently, dangerousness is not established by reference solely 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'.[370] 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 reasonable mistake is taken to be subsumed in the standard of criminal negligence.[371] 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.

Recommendation 2

Option 3 of the Issues Paper not be adopted, that is there be no provision that specifies that if there is an appreciable risk of falling asleep, driving when sleepy may constitute negligence or dangerousness.

7.2 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 (Option 4 of the Issues Paper).

7.2.1 This option was 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

[370] *Kroon v R* (1990) 52 A Crim R 15, 16 (King CJ).

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

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'.[372] 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.

7.2.2 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 Code 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"'.[373] In the report of the Senate Standing Committee on Constitutional and Legal Affairs, it was stated that:

> 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.[374]

The Senate Scrutiny of Bills Committee has adopted this approach as general practice.[375] 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.[376] 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',[377] such a reversal is exceptional.

7.2.3 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 successfully to defend a charge where it is probable that they had no awareness that they were at risk of falling asleep.

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[372] S Bronitt and B McSherry, *Principles of Criminal Law* (LBC Information Services, 2001) 119.

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

[374] 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.

[375] Senate Scrutiny of Bills Committee, ibid, 2.81.

[376] Minster for Justice and Customs, *Framing Commonwealth offences, civil penalties and enforcement powers* (2004).

[377] Senate Scrutiny of Bills Committee, *The Work of the Committee during the 39th Parliament November 1998 – October 2001*, cited in ibid.

Responses received to Issues Paper

7.2.4 This option was opposed by several respondents on the basis that it encroached on the fundamental presumption of innocence. This was the view of the Director of Public Prosecutions (NSW). It was also the view of the Director of Public Prosecutions (Tas):

> Fixing criminal liability on someone for causing a death is a very grave matter. The present law does not fix liability for an unconscious act. It can fix liability for a conscious and voluntary act – driving when one is or should be aware that one shouldn't be because of the real risk of sleep. I don't believe the law ought to be changed to introduce deeming provisions reversing the onus of proof. When criminal liability for death is at stake, the presumption of innocence which a reverse onus undermines is particularly important.

Similarly, the Australian Lawyers Alliance wrote that,

> the difficulty of [the] prosecution establishing, or more likely misunderstanding the case they are attempting to prove should not lead to an automatic adjustment of the law such as to severely encroach upon an individual's right to have a fair trial. A rebuttable presumption requiring a person to prove that they had no warning that they were falling asleep would be unfair and unjust and should not be implemented'.

DIER's view was that 'the creation of a rebuttable presumption of prior awareness of the risk of falling asleep is unpalatable in creating a 'reverse onus', with the legal burden of proof placed on the defendant. This option conflicts with the fundamental legal principle that the prosecution must prove the defendant's guilt'.

7.2.5 It was also rejected on scientific grounds. In the Issues Paper, it was pointed out that sleep research has a critical role to play in the assessment of the criminal responsibility of drivers who fall asleep as a key question was likely to be whether the accused had prior warning of the onset of sleep.[378] The ASA's submission makes it clear that the current state of knowledge is such that 'we do not agree at present that a person can be presumed to have prior awareness that they were at risk of this happening based on their prior feelings of sleepiness'. The ASA referred to a study that asked sleep deprived subjects to predict whether they would fall asleep in the next two minutes. It was noted that 'only 42% of subjects were successful at predicting [their] first episode of falling asleep, hence people often appear to be poor at predicting that they are likely to fall asleep'.[379] Dr Johns also noted that it may be 'difficult [for people] to anticipate their first dozing episode whilst driving at a particular time' and that more research in this area was required. The Director of Public Prosecutions (NSW) also noted that 'research in this particular area is limited and reliance cannot be placed on the basic assumption that healthy drivers who fall asleep at the wheel do have prior warning of tiredness'. As pointed out by the Director of Public Prosecutions (NSW), the test for liability for dangerous driving is not whether a person had prior warning of the onset of sleep but 'whether the driver was so tired that, in the circumstances, his or her (conscious and voluntary) driving – before falling asleep – was a danger to the public'.

7.2.6 There was support for this possible reform from DPEM:

> It is acknowledged that presumptions are not as a rule favoured by legislators as they are viewed as offending against the fundamental principle of the presumption of innocence.
>
> However, DPEM notes that in the past, the common law of Tasmania held that falling asleep was indicative of negligence regardless of the reasons. *Robertson v Watts* [1964] TSR 51/64 is an example where this principle was upheld. Whilst those decisions are no

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[378] See, Tasmania Law Reform Institute, *Criminal Liability of Drivers Who Fall Asleep Causing Motor Vehicles Crashes Resulting in Death or Other Serious Injury: Jiminez*, Issues Paper Number 12, (2007) 2.2.14.

[379] ASA submission referring to Barger et al, Harvard Work Hours, Health and Safety Group, 'Extended work shifts and the risk of motor vehicle crashes among interns' (2005) 352 *New England Journal of Medicine* 125.

> longer regarded as a precedent due to the High Court decision in *Jiminez*, and various other authorities, a return to the principle of making drivers responsible for their actions should be considered.
>
> If there were a rebuttable presumption, the defendant would still have the ability to show that he or she had no prior knowledge or could not have known he or she would fall asleep. Honest and reasonable mistake would continue to be a component or this type of legislation.
>
> DPEM is of the view that a rebuttable presumption still allows the principles of natural justice to apply as, once raised, assuming it is with proper foundation, the prosecution has the onus of providing beyond reasonable doubt that the driver did not have an honest and reasonable belief that it was safe to drive'.

The Institute's view

7.2.7 The Institute's view is that it is undesirable to introduce a deeming provision 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. As the discussion above shows, this is contrary to the scientific research and also to fundament legal principle. As Ashworth has observed:

> the presumption [of innocence] is inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources between the State and the defendant, because the trial system is known to be fallible, and above all, because conviction and punishment constitute official censure of a citizen for certain conduct and that respect for individual dignity and autonomy requires proper measures to be taken to ensure that such censure does not fall on the innocent.[380]

The Institute's view is that the case studies examined in this Report do not provide a basis for interfering with the onus of proof and the presumption of innocence.

7.2.8 It is important to recognise that in driving cases of causing death or injury, existing legal principles assist the prosecution to establish guilt beyond reasonable doubt. There is no need for the prosecution to prove subjective 'fault' on the part of the driver – in relation to dangerous driving and negligent driving, the test is objective. It is also not enough for a driver to say that he fell asleep, as the High Court in *Jiminez* recognised, as this admission provides a basis for the jury to infer that the accused was so tired that the driving was objectively dangerous to the public. If a driver who falls asleep is charged with dangerous driving, and seeks to rely on the defence of honest and reasonable mistake that it was safe to drive, the defendant has an evidentiary burden, that is to demonstrate that there is an evidentiary foundation for his or her claim. It is the Institute's view that it would be inappropriate to impose a legal burden on the defendant. In relation to negligent driving, judicial statements affirm that it is a rare case where a driver who falls asleep would not be guilty of negligent driving.

Recommendation 3

Option 4 of the Issues Paper not be adopted, that is there be no deeming provision 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.

[380] A Ashworth, 'Four threats to the presumptions of innocence' (2006) 10(4) *The International Journal of Evidence & Proof* 241, 251.

7.3 Amend current legislation to exclude falling asleep at the wheel from being relied on in relation to driving offences under the *Criminal Code* and the *Traffic Act* (Option 5 of the Issues Paper)

7.3.1 This option is to amend current legislation to 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 exclude falling asleep at the wheel from being relied upon as a defence was not supported by the NSW STAYSAFE Committee, who referred it to the Attorney-General for further consideration.[381]

7.3.2 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 by voluntary and intentional.

7.3.3 Such a reform 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.

Responses received to Issues Paper

7.3.4 There was no support for this option in the responses received by the Institute. Both DIER and DPEM did not support this option and agreed, 'for the reasons stated in the Paper, that this would be an extreme position'. DPEM acknowledged that 'there are times where a person may fall asleep through no fault of their own or without any prior knowledge such as an undiagnosed medical condition'. The Australian Lawyers Alliance wrote that 'this approach is entirely unreasonable and amendments should not be made to this effect. Again such an amendment would be unfair or unjust on the basis that actions are treated in a different manner than normal criminal charges. An account of the circumstances must always be taken into account in any matter before the law and to simply ignore a fact which did occur would be to offend against the fundamental principles of justice'.

7.3.5 In 2001, the Attorney General (NSW) asked the advice of the Director of Public Prosecutions (NSW) about a possible amendment to the *Crimes Act 1900* (NSW) that would provide that falling asleep cannot be offered as a defence to a prosecution for dangerous driving. In his submission to the Issues Paper, the Director of Public Prosecutions (NSW) indicated that his view was (and remains) the 'state of the law was satisfactory. To legislate that drivers are criminally liable for involuntary acts (occurring in a sleeping state) or to exclude falling asleep from being relied upon would be a radical departure from the general principles of criminal liability and in my view unsupportable'.

[381] See discussion at 6.1.

7.3.6 The ASA also rejected this option on the basis that that it is not possible to presume that a person who fell asleep had prior awareness that they were at risk of this happening based on their prior feelings of sleepiness.[382]

The Institute's view

7.3.7 The Institute's view is that current legislation should not be amended to exclude falling asleep at the wheel from being relied on in relation to driving offences. This was not supported in submissions received by the Institute and is an extreme position that is contrary to fundamental legal principles. The research conducted by the Institute shows that convictions can be obtained in cases where a driver has fallen asleep and caused serious injury or death and the driver admitted feeling tired prior to the crash or had had very little sleep prior to the crash. Such an amendment is unnecessary and radical.

Recommendation 4

Option 5 of the Issues Paper not be adopted, that is there be no amendment to exclude falling asleep at the wheel from being relied on in relation to driving offences under the *Criminal Code* and the *Traffic Act*.

7.4 No change to the law (Option 1 of the Issues Paper)

7.4.1 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'.[383] The jury is able to draw that inference from 'a finding that the applicant went to sleep at the wheel'.[384] However, the court also held that the liability for dangerous driving causing death was strict rather than absolute.[385] Accordingly, the defence of honest and reasonable mistaken belief is available for dangerous driving. 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'.[386] The absence of warning of the onset of sleep, if accepted by jury, would provide reasonable grounds and the accused would be acquitted.

Responses received to Issues Paper

7.4.2 No change to the law was supported by DIER, the Director of Public Prosecutions (NSW) and the Director of Public Prosecutions (Tas). DIER wrote that it:

> does not support a change to the current law. The Department is aware that there are difficulties in gaining convictions for driving offences resulting in death or grievous bodily harm under current laws. The difficulties with securing convictions are not confined to driving cases where the driver has fallen asleep but extend generally to death and/or injury cases. It is the Department's view that an improved understanding of the intricacies of some aspects of the law in this area, including the use of expert opinion evidence in appropriate cases, might alleviate these difficulties.

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[382] See discussion at 2.2.23 ff.

[383] *Jiminez v The Queen* (1992) 173 CLR 572, 583.

[384] Ibid.

[385] However, note the decision in *R v De Montero* [2009] VSCA 255.

[386] *Jiminez v The Queen* (1992) 173 CLR 572, 584.

7.4.3 The Director of Public Prosecutions (Tas) wrote that no change was 'consistent with the long accepted principles which underlie the criminal law and make it coherent. Particularly for cases involving causing death or grievous bodily harm, I believe that it is important to adhere to those principles'. Similar sentiments were expressed by the Director of Public Prosecutions (NSW) that the 'relevant driving must be a conscious and voluntary act and this principle should not be changed'.

7.4.4 In contrast, DPEM supported change to the law 'in order to overcome the difficulties currently being experienced following the High Court decision in *Jiminez*'. Further DPEM consider that:

> The *Issues Paper* highlights the difficulties experienced in the Tasmanian cases of *Courvisanos* and *Piggott*, which both concerned prosecutions where it was alleged that the driver had fallen asleep at the wheel.
>
> These cases highlight the difficulties faced by the prosecution when a defendant claims to have no warning they were about to fall asleep, proving that the person fell asleep at a time prior to the crash and that, prior to falling asleep, they ought to have had warning that they were likely to do so.
>
> The DPEM is of the opinion that the problems experienced in both of these prosecutions will continue until there is either legislative change or the decision in *Jiminez* is overturned by the High Court.

The submissions received from Mr and Mrs Whayman, Mr Close and Mr Jones would also support changing the law to limit the circumstances in which falling asleep at the wheel can negate criminal responsibility.

7.4.5 The ASA preferred an alternative approach to drowsy driving legislation based on the proposed reforms in Massachusetts. This is discussed further at 6.4.3. It indicates that such an approach was endorsed by the major sleep medicine/research associations in the United States. The Association suggested that:

> It may be helpful to draw an analogy between driver impairment by sleepiness and impairment by alcohol intoxication, since the research to date has clearly established that sleep loss may result in a comparable degree of impairment to alcohol intoxication. The laws on alcohol and driving are stated in terms of an absolute limit of blood alcohol concentration, rather than the degree of impairment in the individual or knowledge of impairment. So too we would argue that the law on sleepiness/drowsiness and driving should be stated in terms of absolute limits.

7.4.6 While supporting the introduction of a provision specifying that if there is an appreciable risk of falling asleep, driving when sleepy/drowsy at the wheel may constitute negligence or dangerousness (Option 3 of the Issues Paper), the Australian Lawyers Alliance did not consider that the current law was 'necessarily inadequate'. However, it was the view of the Alliance that change to the law may serve an educative purpose for the prosecution:

> In our opinion reform to the law introducing a provision specifically referring to an appreciable risk of falling asleep may in fact focus prosecutors' minds to that question and indeed focus the investigations of Police to determining whether or not there was an appreciable risk of falling asleep in the circumstances of each.

The Alliance concluded that 'we suggest that either the law remain as it is with prosecutors and Police being instructed in a more detailed fashion about the current operation of the law, or secondly and probably more preferably, to make an amendment to the law to specially outline what is required to prove the charge'.

The Institute's view

7.4.7 While the Institute has sympathy for family members who have had relatives lose their life in motor vehicle crashes and feel that 'justice' has not been served, the Institute's view is that this option is the preferred option. That is, that the current law as set out in *Jiminez* should continue to apply. This means that prosecution will be required to prove that the accused's act of driving that caused death or grievous bodily harm was voluntary and intentional. An acceptance of the principle of voluntariness merely shifts the focus of the legal inquiry from the time when the driver fell asleep to the immediately preceding time when the person was awake. In other words, in 'fall asleep cases', the prosecution can rely on the period of driving prior to falling asleep to establish the voluntary and intentional act. The central issue to be resolved remains the same, namely was it negligent or dangerous in the circumstances to continue to drive when affected by tiredness.

7.4.8 This option recognises that our current legislative framework is capable of accommodating criminal responsibility in cases where falling asleep at the wheel leads to crashes resulting in death or serious injury. The decision of the High Court in *Jiminez* clarified the operation of the law in relation to voluntariness in fall asleep cases. As noted at 4.5, this was not a new approach. As Latham writes, 'I do not think that *Jiminez* has created any new law at all. Indeed, if you read the judgment it is perfectly common sense'.[387] In *Jiminez*, the High Court relied upon the judgment of King CJ in *R v Kroon*, that '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'.[388] Further, that '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'.[389] In *Jiminez*, the High Court stated that:

> It follows from what has been said above that it was necessary for the prosecution in the present case to establish that the applicant was affected by tiredness to an extent that, in the circumstances, his driving was objectively dangerous. It was open to the jury to draw an inference to that effect from a finding that the applicant went to sleep. It was, however, also open to the jury to find that the applicant honestly and reasonably believed that, in all the circumstances, it was safe to drive ... The absence of any warning of the onset of sleep, if the jury found that there had been none, laid a foundation for that being an honest and reasonable belief.[390]

7.4.9 There are three important points to highlight from the extracts from *Kroon* and *Jiminez*:

- If a person falls asleep at the wheel in circumstances where he or she knew or ought to have known that there was a real risk of falling asleep, then that is driving without due care and attention and may be dangerous driving;
- If the jury accepts that the driver fell asleep, the jury can draw an inference that the driving preceding sleep was dangerous;
- There is then an evidentiary onus on the defendant to lay a foundation for an honest and reasonable belief by showing no warning of sleep.

The *Jiminez* principle is not an easy standard to meet. As Latham writes, the defence of honest and reasonable mistake only applies 'if you had absolutely no warning of the onset of sleep and you could not be expected to have any warning of the onset of sleep'.[391] Similarly, Leader-Elliott writes:

> Evidence that the driver felt tired and was aware of the onset of drowsiness lends credibility to the inference of dangerous driving. But the absence of warning signs or any realisation of the degree of fatigue does not defeat the inference. The objective circumstances may be

[387] M Latham, above n 251, 41.

[388] (1990) 52 A Crim R 15, 20.

[389] Ibid, 21.

[390] (1992) 173 CLR 572, 583 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[391] Staysafe Report 28, above n 251, 40.

> quite sufficient to support the conclusion that the defendant was likely to fall asleep and drive in a manner dangerous.[392]

7.4.10 Following from this, the Institute stresses that the *Jiminez* principle is an onerous standard for an accused for meet. The prosecution can rely on the presumption of voluntariness and the accused must point to evidence sufficient to displace the presumption.[393] In addition, an accused must provide an evidentiary foundation for the defence of mistake that is based on no warning of sleep and the absence of objective circumstances that would support a conclusion that the accused was likely to fall asleep.

7.4.11 It was suggested in the Issues Paper that this option may be contrary to evidence from sleep research which shows that healthy drivers are aware that they are sleepy before they actually fall asleep. However, as Part 2 shows, sleep research has not reached this point of certainty. To reiterate the comments of the ASA, 'we do not agree at present that a person who fell asleep can be presumed to have prior awareness that they were at risk of this happening based on their prior feelings of sleepiness'. Further, Dr Johns suggests that awareness of drowsiness is often retrospective and that it may be 'difficult for drivers to anticipate their first dozing episode while driving at a particular time'.

7.4.12 As was argued in the Issues Paper, a disadvantage of Option 1 is that difficulties may exist for the prosecution in proving the accused had warning of sleep. Absent an admission by the defendant that they felt tired, the prosecution must establish that the objective circumstances were such that the defendant ought to have been aware that there was risk of falling asleep. The Institute has reached the view that the case studies discussed in the Issues Paper and this Report do not demonstrate a problem with the substantive law concerning voluntariness and fall-asleep cases.

7.4.13 Option 1 of the Issues Paper 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, where the objective circumstances do not suggest that the driver ought to have been aware of the risk of falling asleep, or in cases where an undiagnosed sleeping disorder may have played a part. There is a strong argument that criminal liability should not attach in a case where a driver did not and ought not have had prior warning of the onset of sleep.

7.4.14 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. In cases where there is evidence that the accused fell asleep or may have fallen asleep and the accused admitted to warning of the onset of sleep or had been awake for a long period of time, convictions have been obtained.

7.4.15 Further, since the decisions in *Courvisanos* and *Piggott*, police prosecution practices have changed in cases of motor vehicle crashes so that there is oversight from the Director of Public Prosecutions in cases that may involve a crime or a summary offence.[394] In addition, the Supreme Court has clarified the test for negligence under the *Traffic Act*, s 32(2A). It is now clear that the standard is not criminal or culpable negligence but the lesser standard of carelessness and inattention.[395]

7.4.16 The clear advantage of Option 1 is that the current law reflects long accepted legal principles requiring proof of a voluntary and intentional act. In the Model Criminal Code Officers Committee Report, it was stated that:

> The physical movements of a person who is asleep, for example, probably should not be regarded as acts at all, and certainly should not be regarded as acts for the purposes of criminal responsibility. This would be inconsistent with the principle of free will which

[392] Leader-Elliott, above n 118, 65.

[393] See 4.6.9.

[394] See further at 7.6.1, 7.6.8.

[395] See 3.2.21 – 3.2.22.

> underlies the rules of criminal responsibility. These propositions are embodied in the rule that people are not held responsible for involuntary 'acts', ie physical movements which occur without there being any will to perform that act.[396]

Fairall and Yeo write, 'the voluntary act theory is firmly established as an axiom of the criminal law'.[397] Voluntariness is not a special rule that is uniquely applicable to motor vehicle crashes – it is a fundamental principle that applies to all criminal offences.

Recommendation 5

Option 1 of the Issues Paper be adopted, that is there be no change to the law in relation to the requirement for a voluntary and intentional act.

7.5 No change to substantive law but with the introduction of a power to suspend driving licence (Option 2 of the Issues Paper)

7.5.1 This option 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 6.1.4 – 6.1.6) could be adopted. In the *Road Transport (Driver Licensing) Regulations 1999* (NSW), 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.

7.5.2 The provisions contained in the *Vehicle & Traffic (Driving Licensing & Vehicle) Regulations 2000* (Tas), 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 regs 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.

7.5.3 In Tasmania, under reg 4 of the *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000*, the Registrar of Motor Vehicles can take into account evidence of any offence committed by a person that may indicate that the person is not a fit and proper person to hold a driver licence. The submission of the Department of Premier and Cabinet makes it clear that it is unnecessary for the person to have been convicted of this offence and that it may include requiring a medical assessment. The Registrar of Motor Vehicles has the power to suspend the driving licence of a

[396] Model Criminal Code Officers Committee, above n 373, 202.2.

[397] P Fairall and S Yeo, *Criminal Defences in Australia* (4th ed, 2005) 12.

person in certain circumstances.[398] This includes where a person has failed or refused to submit to a medical examination or has failed any such medical examination,[399] 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.[400] In addition, a person is only eligible for a licence if they are medically fit to drive a motor vehicle.[401] 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[402] or renewal of a licence.[403] These powers are relevant to medical conditions that affect a person's ability to driver such as sleep apnoea or narcolepsy.[404] 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). 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*.[405]

7.5.4 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.[406] 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.[407] The decision of the Registrar of Motor Vehicles is subject to review under the *Judicial Review Act 2000*.

7.5.5 The Austroads guidelines for health professionals set out the medical standards for licensing for sleep disorders.[408] 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 crashes 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.[409]

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

399 Ibid, reg 25(1)(a).

400 Ibid, reg 25(1)(b).

401 Ibid, reg 11(1)(c).

402 Ibid, reg 13(2).

403 Ibid, reg 23(2).

404 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 2.2.10. Sufferers of narcolepsy experience excessive daytime sleepiness and may fall asleep with little or no warning, see 2.2.13.

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

406 Ibid, reg 4.

407 Ibid, reg 10.

408 Austroads, above n 45.

409 Ibid, 89 (emphasis in original).

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.[410] 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.[411]

7.5.6 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:

> 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.[412]

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.[413]

7.5.7 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.[414] 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).

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[410] Ibid, 89, 90.

[411] Ibid.

[412] Austroads, *Information for Health Professionals* (2010) <http://www.austroads.com.au/aftd/hp.html>.

[413] 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).

[414] See *Motor Vehicle Act 1999* (NT), s 11(4).

7.5.8 In the Issues Paper, the Institute asked the following 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?

Responses received to Issues Paper

7.5.9 There was little support for this option, that there should be no change to the substantive law with power given to the Registrar of Motor Vehicles to suspend a person's driving licence where they have fallen asleep and caused death or grievous bodily harm. The Australian Lawyers Alliance wrote:

> Option 2 [of the Issues Paper]… we consider would not be in the public interest as persons' private medical records would be open to scrutiny and examination by a person such as the registrar of Motor Vehicles, and driving licences may be cancelled with little ability for the affected person to address this situation. This is not, in the opinion of Australian Lawyers Alliance, an appropriate recommendation and it certainly would not realistically prevent people from falling asleep whilst driving. Furthermore it is in our opinion, common that people can fall asleep whilst driving even in the absence of medical conditions. It does not properly alert people's minds to the fact that their decision to drive whilst tired should not be done. It simply affects only those people with a medical condition that may or may not cause them to be sleepy at the wheel of a motor vehicle.

7.5.10 DIER and DPEM also did not support this option. It was their opinion that 'the current powers of the Registrar of Motor Vehicles (RMV) to suspend a person's licence, in certain circumstances, are sufficient'. It was noted that:

> The RMV has the power under the current statutory framework to cancel a driver licence when the person is no longer eligible to hold it and in particular when the RMV is satisfied that they have a medical condition (such as sleep apnoea) which has caused a crash. Tasmania Police often notify the RMV that a driver has been involved in a crash and advise that the driver's licence should be reviewed. As part of the review, the RMV requires a medical assessment in accordance with national guidelines set out by *Assessing Fitness to Drive – Commercial and Private Vehicle Drivers* published by Austroads. A sleeping disorder, such as sleep apnoea, should be detected as part of this assessment. This would lead to the driver's licence being suspended or cancelled.

7.5.11 Similarly, the Director of Public Prosecutions (Tas) considered that the current powers of the Registrar to suspend a person's licence were sufficient. He wrote that:

> Option 2 [of the Issues Paper] proposes an administrative power in the Registrar of Motor Vehicles to cancel or suspend a licence if it appears that a person has occasioned death or grievous bodily harm as a result of becoming incapable of controlling the motor vehicle. I have practised law in a time where a Registrar decided he had a power to suspend licences in certain circumstances as they appeared to him. Much litigation and hardship to persons affected followed (this was pre-*Judicial Review Act* and the only remedy was a prerogative Writ). I do not believe almost arbitrary power ought to be given to the Registrar as

> proposed by Option 2 [of the Issues Paper]. I believe his powers, collated in the paper at 7.2.3 [of the Issues Paper and 7.5.3 in Final Report] are sufficiently wide now.

7.5.12 MAIB also supported the retention of the current position:

> The Board notes that the Registrar of Motor Vehicles has the power to suspend a person's driver's licence and that these decisions are reviewable. It is also noted that he may require any licence holder to undergo a medical assessment when he is notified by a doctor or other health professional, police officer, or a family member/neighbour of the licence holder, that they have a medical condition which may impact on their ability to drive safely.
>
> The Board also understands that the *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2000* provide that medical practitioners and health professionals must carry out medical assessment for licensing purposes in accordance with the Austroads *Assessing Fitness to Drive Guidelines*. In other words, when carrying out a medical assessment at the request of the Registrar, they are obliged to have regard to the guidelines when assessing a person's suitability for licensing purposes.
>
> There is also an indemnity provision providing that they would not incur any civil or criminal liability providing any notification to the Registrar is made in good faith.
>
> Depending on advice received, the Registrar also has the power to require any licence holder to undergo a driving test to ensure that they continue to have the maximum level of driver competency.
>
> This approach provides adequate safeguards and its retention is supported.

7.5.13 Support for change was expressed by Mr and Mrs Whayman. It was also noted by the Director of Public Prosecutions (NSW) that this option was already accommodated by the law in New South Wales.

7.5.14 There was a divergence of view in relation to the creation of a mandatory obligation for medical practitioners 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. As indicated, it was not supported by the Australian Lawyers Alliance. Similarly, DIER indicated that it opposed the introduction of a mandatory notification requirement, unless this provision had the full support of medical practitioners and their representative bodies.

> The issue of mandatory reporting was discussed and opposed by the medical profession during the Austroads/National Transport Commission project of developing the 2003 national medical standards for licensing and clinical management guidelines for commercial and private vehicle drivers. Any proposal to impose compulsory disclosure of medical conditions affecting medical fitness to driver would require consultation and approval amongst the medical profession.

DIER considered 'that there is currently a reasonable level of notification to the Registrar by health care professionals both with and without their patient's knowledge'.

7.5.15 The MAIB suggested a middle ground between the current position and mandatory reporting. In its submission, it noted that 'there is no statutory provision mandating health professionals to provide a medical report to the Registrar if a person has a medical condition that may impair a person's ability to drive safely'. The Board submitted that:

> it would be advantageous if the relevant legislation was amended so that health professionals are obliged to have regard to the Austroads *Assessing Fitness to Drive Guidelines* when dealing with this situation. Naturally, the immunity from civil and criminal liability should remain.
>
> While a legislative link to the Austroads Guidelines may not mandate compulsory reporting by health professionals, it does nevertheless, provide a consistent approach to the issue. Further, it may assist the health professionals convince the patient that he or she should notify the Registrar themself. It is suggested that educative campaigns which highlight a

> driver's responsibility to notify the Registrar if they have a medical condition that may impair their driving would also assist the process.
>
> As the guidelines have been endorsed by medical associations and colleges, there seems little point in going down another legislative path that may not be supported by the medical profession.

7.5.16 DPEM supported the mandatory requirement of medical practitioners to notify the RMV where a person is suffering from a medical condition that is likely to affect their ability to drive safely. This was also supported by Mr and Mrs Whayman.

7.5.17 The Director of Public Prosecutions (NSW) indicated that 'although disclosure of this manner would raise issues of privacy and confidentiality between doctor and patient', he was of the view that 'it is an issue worth examining'. The submission made reference to *Gillett v R*,[415] where the treating doctor of the accused had expressed concern that Gillett had not reported his epilepsy to the Road Traffic Authority (RTA). The Director observed that 'in such circumstances, namely persons with conditions that could affect their driving, it may be reasonable for a medical practitioner to have to register the diagnosis with the RTA. I note, however, that there is often resistance to requirements for mandatory reporting of matters of this kind'.

The Institute's view

7.5.18 In the Issues Paper, the Institute identified that an advantage of an amendment that allowed the Registrar of Motor Vehicles to suspend a person's driving licence was 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, the Institute was concerned 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 would then be a matter for the driver to appeal the administrative decision to reinstate their licence. It is the Institute's view that considerations of fairness and transparency weigh against this option and that the current powers of the Registrar are sufficient. This accords with the views of DIER and DPEM, as well as the Director of Public Prosecutions (Tas).

7.5.19 A further option considered was compelling medical practitioners 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. An advantage of compulsory reporting would be that it would clarify 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. However, as recognised by DIER, the MAIB and the Director of Public Prosecutions (NSW) such an obligation is not likely to be successful unless it is supported by medical practitioners.

7.5.20 The Institute agrees with the view expressed by the MAIB that a middle ground may be the best approach. This would mean that the relevant legislation be amended so that health professionals are obliged to have regard to the Austroads *Assessing Fitness to Drive Guidelines* when considering the issue of fitness to drive.

Recommendation 6

That the Department of Infrastructure, Energy and Resources consult with medical practitioners in relation to the introduction of legislative amendments that would require health professionals to have regard to the Austroads *Assessing Fitness to Drive Guidelines* when considering the issue of fitness to drive.

[415] (2006) 166 A Crim R 419.

7.6 Prosecutions of cases involving motor vehicle crashes

7.6.1 The Institute has also given consideration to procedural matters in relation to the prosecution of cases involving motor vehicle crashes. All serious and fatal motor vehicle crashes are investigated by the Accident Investigation Squads. The police in these squads 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 prepare a file which is forwarded to the Director of Public Prosecutions or Deputy Director who 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. Officers in the prosecution section then draft and file complaints in the Magistrates Court.

7.6.2 There is a large range of offences that 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 of 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.[416] The Tasmanian cases identified in this Issues Paper involved the (lesser) summary offence of causing death by negligent driving. In the submission of the Director of Public Prosecutions (Tas), it was made clear that there was no policy or practice in Tasmania in relation to the charging of fall asleep cases as negligent driving:

> There is no rule of practice, policy or guideline here to say that [fall-asleep] cases will *only* be charged as negligent driving causing death or grievous bodily harm. The cases we have dealt with recently have not involved tiredness due to intoxication nor wilful blindness nor overt defiance of the risks or of the warnings of others on the part of the drivers prosecuted. If those additional factors were present the charge selection may well have favoured charges of causing death or grievous bodily harm by dangerous driving. Those additional aggravating circumstances, if present, will certainly play a significant part in charge selection.

7.6.3 In the Issues Paper, the Tasmanian position was contrasted with the position in other jurisdictions, where fall-asleep cases (in some instances) have proceeded on the basis of culpable driving or dangerous driving.[417] The Director of Public Prosecutions (Tas) was critical of this comparison:

> It may be misleading to compare charge selection in different jurisdictions of Australia, let alone in different countries. The level of available penalty, the choice of courts (we are limited to two here, as we have no intermediate court) and the statutory description of the crimes may be completely different even if the label is the same.

7.6.4 The Institute acknowledges that it is difficult to assess whether the cases referred to in the Issues Paper represent the general trend in relation to charging in those jurisdictions. It is also difficult fully to appreciate the intricacy of jurisdictional differences. 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 in some jurisdictions. 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 which is akin the manslaughter by criminal negligence under the *Criminal Code*.[418] In New South

[416] 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).

[417] See cases referred to at 4.6, *Rowlson* [1996] SASR 96; *R v Franks* [1998] VSCA 100.

[418] See *Crimes Act 1958* (Vic), s 318 discussed at 6.2 and 7.1.2.

Wales, the guideline judgment for cases of dangerous driving occasioning death or grievous bodily harm was reformulated in *R v Whyte*,[419] to include the degree of sleep deprivation in the list of aggravating features in addition to the degree of speed and the degree of intoxication or substance abuse. Dangerous driving causing death is punishable by 10 years imprisonment in New South Wales. The Institute makes no recommendation in relation to charging practice.

7.6.5 In the Issues Paper, the Institute asked several questions in relation to the prosecution of offences arising from injuries caused by motor vehicle crashes:

> 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?

Responses received to Issues Paper

7.6.6 Some responses directly considered these questions. In response to question 1 (the appropriateness of police prosecutors being responsible for prosecuting drivers charged with negligent driving causing death or grievous bodily harm), Mr and Mrs Whayman agreed that it was appropriate for police prosecutors to be responsible for prosecuting drivers charged with negligent driving causing death or grievous bodily harm. DIER and DPEM were content with the current arrangements. Their submission noted that:

> In prosecuting these complaints, Police prosecutors seek the advice of the Director of Public Prosecutions particularly in the case of a death or serious injury occurring as a result of driving, in relation to the appropriate charge or charges and, importantly, particulars of the charges to be included in the complaint. Where an investigation or answers given by a driver during interview suggests that falling asleep was a contributing factor in a crash then those evidentiary matters are discussed with the DPP to particularise complaint details.

The Director of Public Prosecutions (NSW) expressed the view that it is not 'appropriate that police prosecute any offences' but observed 'that is a matter for another time'.

7.6.7 The Director of Public Prosecutions (NSW) outlined the procedure in the prosecution of offences in New South Wales. The Office of the Director of Public Prosecutions is responsible for prosecution if an accused is charged with manslaughter under s 18 of the *Crime Act 1900* or dangerous driving occasioning death or aggravated dangerous driving occasioning death under ss 52A(1) and (2) of the *Crimes Act 1900*:

> In relation to the lesser charges of dangerous driving occasioning grievous bodily harm and aggravated dangerous driving occasioning grievous bodily harm under sections 52A(3) and 52A(4) of the *Crimes Act 1900*, police prosecutors forward the brief to this Office to determine if an election should be made pursuant to my Prosecution Guideline 8.[420] If a

[419] (2002) 55 NSWLR 252, reformulating the guideline judgment in *R v Jurisic* (1998) 45 NSWLR 209.

[420] The Protocol sets out the procedures relevant to the making of an election. It notes that an election should not be made unless: (i) the accused person's criminality (taking into account the objective seriousness and his or

> senior member of this Office elects, then the matter will be prosecuted on indictment by a member of my Office. There are some exceptions, for example if the accused is a police officer the matter will always be prosecuted by this Office (even summary charges). An accused may also elect to have the lesser charge dealt with on indictment and this Office would prosecute.
>
> When this office takes over a prosecution the matter is prosecuted by members of my staff at committal and at trial. Such a protocol means that only lesser incidents (and of course purely summary matters) will remain to be prosecuted by police prosecutors and this appears to work appropriately enough. In particular, matters may be dealt with expeditiously, there is less disruption to witnesses and sentencing options for Magistrates are adequate.

7.6.8 In Tasmania, as indicated above, police prosecutors seek the advice of the Director of Public Prosecutions in cases where death or serious injury has occurred as a result of driving. In the submission received from DPEM, there was support for this procedure:

> DPEM [does] not believe that there is a need to change the way that fall asleep cases are currently charged. Members of the DPEM seek the advice of the Director of Public Prosecutions (DPP), particularly in the case of death or serious injury occurring as a result of driving, in relation to the appropriate charge or charges and, importantly, particulars of those charges to be included in the complaint.

7.6.9 In response to question 2, the Director of Public Prosecutions (NSW) expressed the view that it would not be appropriate for changes to be made to the way in which fall-asleep cases are charged. He wrote 'such prescriptive terms may complicate the manner in which these matters are prosecuted'. Further, that 'driving when too tired to stay awake' was a subjective test and should not form part of the legislative framework. He noted that the 'circumstances of aggravation are set out in section 52A(7) and are objective matters involving alcohol, drugs or escaping pursuit by police'. This was also the view of DIER and DPEM:

> We agree that great care needs to be taken in the preparation of fall asleep cases, especially particularising the offence in appropriate cases to include inter alia the period of driving prior to falling asleep. However, DIER and DPEM do not believe that there is a need to change the way that fall asleep cases are currently charged. Members of DPEM seek the advice of the Director of Public Prosecutions (DPP), particularly in the case of a death or serious injury occurring as a result of driving, in relation to the appropriate charge or charges and, importantly, particulars of those charges to be included in the complaint.

7.6.10 In contrast, Mr and Mrs Whayman considered that there did need to be a change in the way fall-asleep cases are charged. This was also the view of the ASA, who drew the Institute's attention to the development of the model drowsy driving legislation in the United States. It noted that:

> Key provisions in this model legislation are as follows: inclusion of sleep-related issues in drivers' license examinations (including school bus drivers' license examination); inclusion of sleep experts on the Registry's Medical Advisory Board; inclusion of drowsy driving as a factor in determining habitual traffic offenders; establishing the crime of falling asleep or being impaired by drowsiness or sleep deprivation while operating a motor vehicle; inclusion of sleeping and being impaired by drowsiness or sleep deprivation in the crime of motor vehicle homicide; requirement to report and collect information on drowsy driving accidents; assistance to protective custody of individuals presumed to be impaired by sleep deprivation; and the establishment of a Special Commission to recommend additional penalties, means to measure drivers impaired by lack of sleep, or sleep disorders and

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her subjective considerations) could not be adequately addressed within the sentencing limits of the Local Court; and/or (ii) for some other reasons, consistent with these guidelines, it is in the interests of justice that the matter not be dealt with summarily (eg a comparable co-offender is to be dealt with on indictment; or the accused person also faces a strictly indictable charge to which the instant charge is not a back-up).

> training programs for drivers and law enforcement personnel, and evaluation of highway rest areas.

The ASA noted the test that was proposed for the crime of falling asleep or being impaired by drowsiness or sleep deprivation while operating a motor vehicle was based on a calculation of the numbers of hours sleep in a certain time period.

7.6.11 In response to question 3, the Director of Public Prosecutions (NSW) indicated that he was unaware of any specific concerns raised by prosecutors in relation to the way evidence is collected in cases of motor vehicle crashes causing death or serious injury. He noted 'that it has been a lengthy time since the decision in *Jiminez* was given and it is expected that police investigators are well versed in ways of investigating 'fall asleep' cases'. DPEM also expressed the view that there was not any deficiency in the way evidence is collected in cases of motor vehicle crashes causing death or serious injury. In its submission it noted that:

> These crashes are investigated by members of DPEM Accident Investigation Services (AIS). AIS members have the requisite qualifications and expertise to investigate fatal and serious crashes and have, on occasions, been recognised as expert witnesses by the Supreme Court of Tasmania. On limited occasions the DPP has sought the evidence of interstate experts and this will continue as identified by the DPP. Sole occupant single vehicle crashes may be investigated by other police members, but with advice and assistance available from AIS.

7.6.12 In contrast, Mr and Mrs Whayman expressed the view that there should be greater access to the medical records of the accused. The ASA's submission included a list of information that would be helpful to evaluate whether the driver was likely to have been affected by sleepiness or fatigue:

- time of day of the crash;
- prior sleep pattern of the driver for the previous week (when and for how long did they sleep including naps in a diary format);
- prior work history of the driver for the previous week (when and for how long did they work in a diary format);
- a specific sleepiness scale could be administered and specific symptoms sought with regard to how the driver felt prior to the accident (eg Karolinska Sleepiness Scale, and the driver could be questioned about specific sleepiness symptoms);
- if it is suspected that the crash was related to sleepiness evaluation for a specific sleep disorder should be considered, with referral to a sleep specialist; and
- medication history. (References omitted).

7.6.13 In response to question 4, the Director of Public Prosecutions (NSW) expressed the view that calling an expert on sleep research or related issues would depend on the nature of the particular case and the decision should remain at the discretion of the Crown Prosecutor. In its submission, DIER stated that it 'believes that expert opinion evidence may be appropriate in some cases, however, it should not be called as a matter of standard practice'. The ASA indicated that there was scope for the greater use of expert evidence:

> Greater use of expert evidence could assist in evaluation and prosecution of sleepiness related crashes through the following means: establishing clearly whether the prior sleep and wake pattern of the driver and crash circumstances were such that the driver was likely to have been affected by sleepiness and/or fallen asleep; provide an opinion as to whether the driver ought to have known that they were impaired as a result of sleepiness and/or at risk of falling asleep; evaluating whether a driver has a specific sleep disorder.

Mr and Mrs Whayman expressed concern that the greater use of expert evidence may mean a greater scope for conflicting expert evidence.

7.6.14 In response to question 5, the Director of Public Prosecutions (NSW) indicated that he had not received any complaint as to any procedural difficulty or deficiency in relation to the prosecution of cases where the drivers fall asleep causing death or other serious injury. DPEM commented 'that video interviews could be improved by being conducted by members of the Tasmania Police with an understanding of the issues surrounding *Jiminez*'.

7.6.15 In other submissions, the questions were not addressed. However, some submissions averted to the need for evidence to be collected by experienced investigators with knowledge of the legal issues that may arise in fall-asleep cases. The Director of Public Prosecutions (Tas) wrote that:

> There are certain difficulties faced by prosecuting authorities in proving that if a person fell asleep before a crash that they had or ought to have had warning that they were likely to do so. The difficulty is not insuperable where there is available evidence and in that respect, as the paper points out, experienced accident investigators, aware of the legal issues involved, will look diligently for such evidence. If there is no evidence, or if it is weak or unconvincing, a case will not arise, or if pressed, will fail. That is the reality prosecutors deal with daily. So long as that result arises as a result of the application of predictable principle in a fair hearing or trial, an acquittal or a decision not to prosecute is not only an acceptable result, but a good one.

The Australian Lawyers Alliance commented that 'at times it seems as though prosecution cases are not prepared adequately and appropriate evidence is not obtained'.

The Institute's view

7.6.16 After considering the submissions received, it is the view of the Institute that the current procedure, with the oversight of the Director of Public Prosecutions, appears to be working well in relation to formulation of the charge. The Institute's view is that it is appropriately an area for the exercise of prosecutorial discretion. However, there appears to be some continued problems in relation to the drafting of the particulars of negligence in fall-asleep cases. As noted at 5.5.5, in relation to *B2*,[421] several of the particulars referred to the period of driving after the accused had fallen asleep (and so could not be criminally responsible) and tiredness and failure to stop were not cited as particulars of negligence. This also occurred in *B1*[422] and *M*.[423] The Institute stresses that great care must be taken in drafting particulars to ensure that they comply with the requirements of *Jiminez*.

7.6.17 As pointed out in the Issues Paper, consideration needs to be given as to how to counter any defence of honest and reasonable mistake in relation to dangerous driving or the absence of warning in relation to negligence. In a survey of cases from other Australian jurisdictions, the Institute notes that expert evidence appears to have been useful in some cases in obtaining convictions over an accused's denial of sleep or feelings of fatigue. However, it is not invariably necessary or useful. In the Western Australian cases of *Wood v R*[424] and *Koltasz v The Queen*,[425] the accuseds were convicted of dangerous driving causing death. In both cases, the accused denied that they had fallen asleep. In *Wood*'s case, the accused claimed to have suffered a sneezing fit. In *Koltasz*'s case, the accused had no memory of the crash. In both cases, the Crown case was that the accused had fallen asleep as a result of sleep deprivation and expert evidence was given in relation to the consequences of sleep deprivation on the likelihood of a person falling asleep. In the Victorian case of *R v Rudebeck*,[426] expert evidence was called in relation to fatigue. On appeal, the Court considered that the evidence was relevant but had limited probative value. Nonetheless, the Court considered that there was sufficient evidence to

[421] Complaint no 40643/07.

[422] Complaint no 64163/02.

[423] Complaint no 32830/09.

[424] [2002] WASCA 95.

[425] [2003] WASCA 38.

[426] [1999] VSCA 155.

convict the accused.[427] After consideration, the Institute's view is that the use of expert evidence should remain at the discretion of the prosecutor and the Institute makes no recommendation.

7.6.18 The consultations and research conducted by the Institute highlights the importance of the initial investigation by the police, including the police interview. As with all prosecutions for all offences, it is essential that there is sufficient evidence. In relation to driving cases resulting in death or serious injury, the driver is often the only person who can account for the crash and this means that the police record of interview has additional importance in any criminal prosecution. Successful cases have been prosecuted in Tasmania where the crash was investigated by a member of DPEM Accident Investigation Services and the interview conducted by a police officer with experience in driving cases. DPEM commented that the prosecution of fall-asleep cases could be improved by having the video interviews 'conducted by members of the Tasmania Police with an understanding of the issues surrounding *Jiminez*'. The Institute would endorse this view and recommend that police procedures reflect this.

Recommendation 7

Police policy and procedure reflect the need for:

- the investigation of crashes to be conducted by members of the Tasmania Police with training in the legal principles set out in *Jiminez*;
- the interview of drivers that may be 'fall asleep' cases be conducted by members of the Tasmania Police with training in the legal principles set out in *Jiminez*.

Recommendation 8

Police prosecutors, with guidance from the Office of the Director of Prosecutions, prepare a precedent for the particularalisation of negligence where it is alleged that the driver has fallen asleep.

[427] Ibid at [8].

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)[428] and dangerous driving causing grievous bodily harm (namely dangerous driving).[429] However, there are no alternative verdicts 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'.[430] 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.

8.2.3 In the Issues Paper, the Institute asked whether the alternative verdicts provisions should be changed to reflect the full range of offences applicable where motor vehicle crashes result in either death or serious injury.

Responses received to Issues Paper

8.2.4 The Director of Public Prosecutions (NSW) wrote that 'the issue of alternative verdicts for indictable offences and double jeopardy are addressed in sections 52AA (4), (5) and (6) of the *Crimes Act 1900* (NSW). Usually where more serious charges are laid it will be the case that a related

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[428] *Criminal Code*, s 334.

[429] Ibid, s 334B.

[430] Ibid, s 1.

summary charge, usually of negligent driving, will also be preferred but will not proceed until the indictable charge has been determined'.

8.2.5 There was a divergence of view in the submissions received from DIER and DPEM. DIER did not support the introduction of an alternative verdict on the basis that:

> It would be problematic and undesirable. There is a difference between the state of mind that needs to be proved for the alternative offence. In essence, the prosecution would have to prepare and progress two cases within the one. It may also give rise to situations where the trier of fact (jury) feels that it must convict a person of the lesser charge of negligent driving causing death or serious injury in circumstances where the more serious charge of dangerous driving causing death or serious injury has not been made out, and which, if the 'negligence' had been charged separately in the lower court, would not be found by a different trier of fact (Magistrate).

8.2.6 In contrast, DPEM supported the proposition that the alternative verdicts provisions should be changed to reflect the full range of offences:

> Alternative verdicts have two benefits, both positive. In the first instance, if the evidence falls short during the trial there is the option to go to the lesser charge rather than a total failure of the case. The second positive is where charges have been laid and what was originally available as evidence disappears or becomes corrupted. Death and illness normally cause this to occur. The alternative verdict allows discussions on a plea of guilty rather than a hearing that may be doomed to failure or adverse consequences on a witness's health.

This was also supported by Mr and Mrs Whayman.

The Institute's view

8.2.7 The Institute's view is that negligent driving causing death (*Traffic Act 1925*, s 32(2A)) or grievous bodily harm (*Traffic Act 1925*, s 32(2B)) should be specified as alternatives to dangerous driving causing death (*Criminal Code*, s 167A) or grievous bodily harm (*Criminal Code*, s 167B). Dangerous driving and negligent driving are matters of degree, in terms of the departure from the acceptable standard of driving (accepting that there is a different test for the prosecution to establish).[431] As noted at 8.2.1, there is a clear precedent within the *Criminal Code* for providing that an offence under the *Traffic Act* is an alternative to an offence under the *Code*.

Recommendation 9

That negligent driving causing death (*Traffic Act 1925*, s 32(2A)) or grievous bodily harm (*Traffic Act 1925*, s 32(2B)) should be specified as alternatives to dangerous driving causing death (*Criminal Code*, s 167A) or grievous bodily harm (*Criminal Code*, s 167B)).

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.[432] Children dealt with in the Youth Justice Division face penalties under the *Youth Justice Act 1997* as opposed to the *Sentencing Act 1997*.

[431] See overview of the current law in Part 3.

[432] *Youth Justice Act 1997*, s 161(1)(a).

8.3.2 There are, however, a number of offences which are defined as prescribed offences.[433] A youth who is charged with a prescribed offence is dealt with as an adult.[434] 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 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'.[435] The policy behind this may be the recognition 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*.

8.3.5 In the Issues Paper, the Institute asked whether it was 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 were charged with the lesser offences of negligent driving causing death or grievous bodily harm or the more serious offence of manslaughter.

Responses received to Issues Paper

8.3.6 The response from DIER and DPEM indicated that both were 'of the view that a 17 year old charged with dangerous driving causing death or grievous bodily harm should be dealt with by the courts as an adult so that there is consistency between the treatment of a 17 year old in respect of this charge and the lesser charge of negligent driving causing death or grievous bodily harm'.

8.3.7 The Director of Public Prosecutions (NSW) indicated that:

> In NSW a child may be dealt with according to law under s 18(1) of the *Children (Criminal Proceedings) Act 1987* depending upon the following factors:
>
> (a) the seriousness of the indictable offence concerned;
>
> (b) the nature of the indictable offence concerned;
>
> (c) the age and maturity of the person at the time of the offence and at the time of sentencing;
>
> (d) the seriousness, nature and number of any prior offences committed by the person; and
>
> (e) such other matters as the court considers relevant.
>
> If refer you to *R v Sherbon* (CCA NSW 5 December, 1991 unreported) where it was held that the judge was in error in dealing with the serious case of culpable driving under the

[433] *Youth Justice Act 1997*, s 3.

[434] Ibid, s 3 definition of 'offence' in conjunction with s 161(1)(a).

[435] Ibid, s 3 definition of a 'prescribed offence'.

Children (Criminal Proceedings) Act rather than at law. The factors to be taken into account in determining whether to deal with a child or young person according to law were extensively considered by *R v WKR* (1993) 32 NSWLR 447.

The Institute's view

8.3.8 The Institute's view is that there should be consistency of treatment for young people charged with offences relating to death or serious injury. The recognition 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 would support the view that causing death by dangerous driving and dangerous driving causing grievous bodily harm should also be prescribed offences for 17 year olds.

Recommendation 10

Dangerous driving causing death (*Criminal Code*, s 167A) and dangerous driving causing grievous bodily harm (*Criminal code*, s 167B) should be prescribed offences for a youth who is 17 years old under the definition contained in *Youth Justice Act*, s 3(c)(ii).

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	• Dangerous driving occasioning death (s 52A(1) *Crimes Act 1900*) – 10 years imprisonment; • Aggravated dangerous driving occasioning death (s 52A(2) *Crimes Act 1900*) – 14 years imprisonment; • Dangerous driving occasioning grievous bodily harm, (s 52A(3) *Crimes Act 1900*) – 7 years imprisonment; • Aggravated dangerous driving occasioning grievous bodily harm (s 52A(4) *Crimes Act 1900*) – 11 years imprisonment; • Wanton or furious driving causing bodily harm (s 53 *Crimes Act 1900*) – 2 years imprisonment; • Negligent driving causing death (s 42(1)(a) *Road Transport (Safety and Traffic Management) Act 1999*) – 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) *Road Transport (Safety and Traffic Management) Act 1999*) – 20 penalty units and/or 9 months imprisonment (1st offence) or 30 penalty units and/or 12 months imprisonment (2nd or subsequent offence).
Victoria	• Culpable driving causing death (s 318 *Crimes Act 1958*) – Level 3 imprisonment (maximum 20 years) and/or a level 3 fine; • Dangerous driving causing death (s 319(1) *Crimes Act 1958*) – Level 5 imprisonment (10 years maximum); • Dangerous driving causing serious injury (s 319(2) *Crimes Act 1958*) – Level 6 imprisonment (5 years maximum).
Queensland	• Dangerous operation of a vehicle causing death or grievous bodily harm (s 328A(4) *Criminal Code Act 1899*). Under s 328(4)(a) 10 years imprisonment where neither paragraph (b) or (c) apply; or 14 years (where (b) the offender is adversely affected by an intoxicating substance, or excessively speeding or taking part in an unlawful race or speed trial; or (c) where the offender knows or reasonably ought to have known that the other person was injured or killed and leaves the scene other than to seek medical assistance or other help before a police officer arrives).
South Australia	• Death caused by reckless, dangerous or culpably negligent driving (s 19A(1) *Criminal Law Consolidation Act 1935*) – 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; • Bodily harm caused by reckless, dangerous or culpably negligent driving (s 19A(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 serious caused) or life imprisonment and 10 years disqualification or such longer period as the court orders (subsequent offence where serious harm caused) or 5 years imprisonment and disqualification for 1 year or such longer period as the court orders (1st offence where serious harm is not caused) or 7 years imprisonment and disqualification for 3 years or such longer period as the court orders (subsequent offence where serious harm is not caused).
Western Australia	• Dangerous driving causing death or grievous bodily harm (s 59(1) *Road Traffic Act 1974*) – 20 years imprisonment (where the person driving was intoxicated or driving dangerously in circumstances of aggravation and has caused the death of another person) or 14 years (where grievous bodily harm is caused); 10 years imprisonment if causing the death of another person or 7 years for GBH (if convicted upon an indictment in any other circumstances) as well as a fine of any amount and a minimum of 2 years disqualification from driving; 3 years imprisonment or 720 penalty units, and disqualification for a minimum of 2 years (if convicted summarily); • Dangerous driving causing bodily harm (s 59A(1) *Road Traffic Act 1924*) – 9 months imprisonment or 80 penalty units, and disqualification for a minimum of 12 months (1st offence) or 18 months imprisonment or 160 penalty units and disqualification for a minimum of 18 months (2nd or subsequent offence). In the circumstances of aggravation, a driver who is under the influence of drugs or alcohol or both (ss 1(a)) the person is liable to a fine of any amount and imprisonment for 7 years, and disqualification for a minimum of 2 years. A penalty of 18 months imprisonment, or a fine of 160 penalty units and disqualification for a minimum of 18 months (if convicted summarily) (s 3(a)).
ACT	• 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	• Driving motor vehicle causing death (s 174F(1) *Criminal Code Act*) – 10 years imprisonment. • Driving motor vehicle causing serious harm (s 174F(2) *Criminal Code Act*) – 7 years imprisonment.