DANGEROUS/CARELESS DRIVING

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1. Statutory provision for Dangerous driving

***Road Safety Act* 1986**

Dangerous driving

64(1) A person must not drive 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.

(2) A person who contravenes subsection (1) is guilty of an offence and is liable to a fine of not more than 240 penalty units or to imprisonment for a term of not more than 2 years or both and on finding a person guilty of the offence the court must, if the offender holds a driver licence or permit, cancel that licence or permit and must, whether or not the offender holds a driver licence or permit, disqualify the offender from obtaining one for such time (not being less than 6 months or, if the vehicle was driven at a speed of 45 kilometres per hour or more in excess of that permitted, 12 months) as the court thinks fit.

(2A) A person must not drive a vehicle, other than a motor vehicle, at a speed or in a manner that is dangerous to the public, having regard to all the circumstances of the case.
Penalty: 120 penalty units or imprisonment for 12 months or both.

(3) If on a prosecution for an offence under this section the court is not satisfied that the accused is guilty of that offence but is satisfied that the accused is guilty of an offence against section 65, the court may convict the accused of an offence against section 65 and punish the accused accordingly.

(4) In this section—
"vehicle" does not include—
(a) a non-motorised wheel-chair; or
(b) a motorised wheel-chair that is not capable of a speed of more than 10km per hour.

2. Test to be applied in dangerous driving cases

(a) Objective standard

Per Latham CJ, Rich, Dixon and McTiernan JJ:

> "[I]n our opinion, indifference to consequences is not an essential element either of driving in a culpably negligent manner, or of driving at a speed which is dangerous to the public, or in a manner which is dangerous to the public. The driver may have honestly believed that he was driving very carefully, and yet may be guilty of driving in a manner which is dangerous to the public. The jury is to determine, not whether the accused was in fact, as a matter of psychology, indifferent or not to the public safety, but whether he has driven in a manner which was dangerous to the public. The standard is an objective standard, "impersonal and universal, fixed in relation to the safety of other users of the highway" (per Hewart LCJ in *McCrone v Riding* (1938) 1 All ER 157; and see *Kingman v Seager* (1938) 1 KB 397). The standard is impersonal in the sense that it does not vary with individuals, and it is universal in the sense that it is applicable in the case of all persons who drive motor vehicles."

Per Latham CJ, Rich, Dixon and McTiernan JJ in *R v Coventry* [1938] HCA 31; (1938) 59 CLR 633; [1938] ALR 420, 6 June 1938.

(b) Not an absolute offence – the notion of "Fault" not applicable – case based on tiredness

Per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ

> "13. The manner of driving encompasses "all matters connected with the management and control of a car by a driver when it is being driven": *R v Coventry* [1938] HCA 31; (1938) 59 CLR 633, at p639; [1938] ALR 420. For the driving to be dangerous for the purposes of *Crimes Act* 1900 (NSW) s52A 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: *McBride v The Queen* [1966] HCA 22; (1966) 115 CLR 44 per Barwick CJ at pp50, 51; [1966] ALR 753; (1965) 40 ALJR 57; *R v Buttsworth* (1983) 1 NSWLR 658, at pp686-687. Although a course of conduct is involved it need not take place over any considerable period: See *R v Coventry* [1938] HCA 31; (1938) 59 CLR 633, at p638; [1938] ALR 420. 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: See *Giorgianni v The Queen* [1985] HCA 29; (1985) 156 CLR 473, at p499; 58 ALR 641; (1985) 16 A Crim R 163; (1985) 59 ALJR 461; (1985) 2 MVR 97; 4 IPR 97, 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 a driver must amount to something other than a lack of due care: *McBride v The Queen* (*supra*) (1966) 115 CLR 44, per Barwick CJ at p50, 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. As Barwick CJ said in *McBride v The Queen ibid.*, at pp49-50:

> "The section speaks of a speed or manner which is dangerous to the public. This 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 as members of the public may be upon or in the vicinity of the roadway on which the driving is taking place."

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

14. In *Hill v Baxter* (1958) 1 QB 277; [1958] 1 All ER 193; (1958) 42 Cr App R 51, the respondent's motor-van behaved erratically after a period during which it had apparently been driven skilfully. The defendant was charged with the offence of driving in a dangerous manner. He could remember nothing after a certain point. Lord Goddard CJ said *ibid.*, at QB pp282-283:

> "There was in fact no evidence except that of the respondent, and while the justices were entitled to believe him, his evidence shows nothing except that after the accident he cannot remember what took place after he left Preston Circus. This is quite consistent with being overcome with sleep or at least drowsiness. That 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. ... I agree that there may be cases where the circumstances are such that the accused could not really be said to be driving at all. Suppose he had a stroke or an epileptic fit, both instances of what may properly be called acts of God; he might well be in the driver's seat even with his hands on the wheel, but in such a state of unconsciousness that he could not be said to be driving. A blow from a stone or an attack by a swarm of bees I think introduces some conception akin to *novus actus interveniens*. ... In the present case I am content to rest my judgment on the ground that there was no evidence which justified the justices finding that he was not fully responsible in law for his actions, and that his intention was immaterial as there was here an absolute prohibition."

15. The offence of driving at a speed or in a manner dangerous to the public (See *Traffic Act* 1909 (NSW), s4(1)), or the more serious but related offence of culpable driving, is not an absolute offence, at all events in the sense in which that term is used in this country. But we shall return to that later. If, in the passage which we have set out above, 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: See *Dennis v Watt* [1942] NSWStRp 34; (1943) 43 SR (NSW) 32; *Kroon v R* (1990) 55 SASR 476; (1990) 12 MVR 483; (1991) 52 A Crim R 15.

16. Further, the passage which we have quoted may suggest 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: See *R v O'Connor* [1980] HCA 17; (1980) 146 CLR 64; (1980) 29 ALR 449; (1980) 54 ALJR 349; (1980) 4 A Crim R 348. As we have said, a driver who drives when tired or drowsy may, depending upon all the circumstances, be guilty of driving in a manner dangerous to the public. But if he does fall asleep, his actions during the period of sleep are neither conscious nor voluntary.

17. A statutory offence which imposes absolute liability is one which, in addition to excluding the requirement of *mens rea*, also excludes a defence of honest and reasonable mistake: See *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523, at p590; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. In a well-known passage in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536, at p540. Dixon J drew a distinction between *mens rea* as an ingredient of an offence and an honest and reasonable belief in a state of facts which, if they existed, would make a defendant's act innocent. If honest and reasonable mistake is not excluded in the case of a statutory offence, it will afford an excuse for what would otherwise be an offence, although the burden of establishing the excuse will in the first place be upon the defendant. The burden on the defendant is evidentiary only, and the prosecution retains the burden of proving guilt by establishing beyond reasonable doubt that the defendant did not honestly believe on reasonable grounds in the existence of facts which, in the circumstances, would take his act outside the operation of the statute: *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR, at pp534-535, 573-575, 582 and 592-594; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. See also *Gibbon v Fitzmaurice* [1986] TASSC 55; [1986] Tas R 137; (1986) 23 A Crim R 12, at p19; *Chard v Wallis* (1988) 12 NSWLR 453, at pp455-456; 36 A Crim R 147; and *Caralis v Smyth* (1988) 34 A Crim R 193, at pp197-200; (1988) 65 LGRA 303. The majority of the Court in *R v Coventry* recognized that the defence of honest and reasonable mistake was available to a charge under the equivalent of s52A in South Australia. In that case the majority said (1938) 59 CLR, at p638:

> "No doubt the language of the section does not exclude a defence of mistake of fact on reasonable grounds or of involuntariness (for example, interference by another person with the driving of the car), and perhaps there may be other exceptional excuses, based on special facts, to which a state of mind may not be immaterial. But, speaking generally, 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."

18. In England the courts have not taken up the defence of honest and reasonable mistake and see themselves as having to decide between an offence requiring *mens rea* to be proved as an ingredient and absolute liability which excludes guilty intent entirely. Nevertheless, the Court of Appeal has rejected the suggestion of Lord Goddard CJ that the offence of dangerous driving is an absolute offence. They did so in *R v Gosney* [1971] 3 All ER 220; (1971) 55 Cr App R 502. That was a case in which the appellant drove in the wrong direction upon one carriageway of a dual highway. The appellant wished to prove that there was no indication that the right-hand turn she made into the carriageway was prohibited and that there was nothing to indicate to a competent and careful driver in all the circumstances that she was about to drive or was driving in the wrong direction. She was stopped from leading this evidence at first instance, but the Court of Appeal held that she was entitled to do so, saying that "fault" on the part of the driver was an element of the offence of driving in a dangerous manner: *ibid.*, at p508; see also *R v Spurge* [1961] 2 QB 205; (1961) 2 All ER 688; (1961) 45 Cr App R 191. 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 country, 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. Perhaps the most obvious example is where a driver is unaware of the defective condition of his vehicle and believes it upon reasonable grounds to be in good working order. And the same issue is raised when, in a case like the present where the dangerous manner of the driving is said to consist in the likelihood of going to sleep, a driver claims that he had no warning of the onset of sleep.

19. 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 at the wheel. 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. Apart from any inference that might be drawn from the fact that the applicant had fallen asleep, there was little in the evidence to support a finding that the applicant had felt drowsy or that he had reason to believe that he was tired. He had had four hours' sleep shortly before setting out on the trip and a further period of up to three hours while the deceased woman drove the car. He had

not been driving for an excessive period before the accident. There was no evidence before the jury that he had consumed any alcohol or drugs. He was thinking of stopping at the next town, but that could be explained by his statement that he intended to have breakfast there. The fact that he slept for some hours after the accident could, in the light of the other evidence including evidence that he was emotionally upset and affected by grief, scarcely found an inference that he had had insufficient sleep beforehand. In these circumstances, the inference that the applicant believed that, in all the circumstances, it was safe to drive might have been drawn by the jury from the very fact of his driving. 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. Lack of warning as to the onset of sleep is only one of a number of circumstances that may bear on the question whether a driver honestly and reasonably believed that it was safe for him to drive. Ordinarily, the circumstances which bear on whether the driving was dangerous will also bear on this question.

21. 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. In particular, they must be told that if they conclude that the driving was a danger to the public, they must also consider whether the driver might honestly have believed on reasonable grounds that it was safe for him to drive. And, of course, they must be instructed in appropriate terms that the onus of negativing that defence rests with the prosecution. That did not happen in this case, presumably because neither counsel nor the trial judge appreciated the real nature of the issue raised.

22. In the present case, where there was evidence that the applicant fell asleep at the wheel and there was no real evidence that he had any warning of the onset of sleep, it was also essential for the trial judge to identify the period of driving during which it was alleged that the driving was dangerous. Further, it was essential that the jury be informed that if the applicant fell asleep, his actions while he was asleep were not voluntary and could not amount to driving in a dangerous manner. The nearest the learned trial judge came to identifying the relevant period of driving in his charge to the jury was in the following passage:

> "The issue is, was his manner of driving when his car left the road dangerous to the public? The Crown say to you that it seems clear he became tired, he closed his eyes and the car left the road."

That passage is entirely equivocal and, in any event, does not raise any question of voluntariness.

23. The applicant's counsel raised with the trial judge the fact that he failed to allude to the "involuntary nature of .. the onset of the sleeping episode". The trial judge suggested that counsel had not alluded to that matter either. After a rejoinder by counsel that he did so in so many words although he did not use the word "involuntary", the matter was allowed to rest. There was no redirection. Thus objection was taken (although hardly pressed) to the omission in the charge. In these circumstances there was a defect in the charge in an important respect and that defect amounted to a miscarriage of justice.

24. Special leave to appeal should be granted. The appeal must be allowed and the conviction quashed. We have given careful consideration to the question whether a new trial should be ordered. It is now more than three and a half years since the accident occurred. The applicant has already been subjected to the expense, strain and inconvenience of a trial. The case against him was not a compelling one. There was no evidence that the applicant was affected by alcohol or drugs. There was evidence to the effect that he had had adequate sleep before commencing to drive and that he had had no prior warning, or otherwise ought to have known, that he was about to fall asleep. The sentence imposed, upon the applicant's conviction, was one of periodic detention which, if it had been served, would by now have expired. In all these circumstances, we have reached the conclusion that it would be inappropriate to order a retrial."

Per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ in *Jiminez v The Queen* [1992] HCA 14; (1992) 173 CLR 572; 106 ALR 162; 15 MVR 289; 59 A Crim R 308; 66 ALJR 292, 6 May 1992.

(c) Objective standard and fault on driver's part

Per Williams J (Connolly and Ambrose JJ agreeing)

"There are two steps involved in determining that a driver should be convicted of dangerous driving. Firstly, the driving (that is what actually occurred) must be considered objectively by the tribunal of fact and be held to be dangerous. (*R v Coventry* [1938] HCA 31; (1938) 59 CLR 633; [1938] ALR 420; *R v Warner* (1980) Qd R 207; 1 A Crim R 18; *R v Gosney* (1971) 2 QB 674; [1971] 3 All ER 220; (1971) 55 Cr App R 502).

Secondly, there must be some fault on the part of the driver which caused that danger to the public. (*R v Gosney*, *R v Warner*, *R v Hinz* (1972) Qd R 272 and *R v Smith* (1976) WAR 97). [Ed note: See

Jiminez v The Queen above, to the effect that fault is not an element of the charge.]

It was submitted on behalf of the applicant that something more than an "error of judgment" was required before either question could be decided against the driver. But that does not appear to be the law. The classical statement is still that of Latham CJ, Rich, Dixon and McTiernan JJ in *R v Coventry* at CLR p638:

> "... speaking generally, 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. It is, in our opinion, wrong to exclude an act or omission from 'manner of driving' because it is casual or transitory in some senses in which these somewhat flexible words may be understood ... Sudden, even though mistaken, action in a critical situation may not, in all circumstances of a case, constitute driving to the danger of the public. But casual behaviour on the roads and momentary lapses of attention, if they result in danger to the public, are not outside the prohibition of that provision merely because they are casual or momentary. Further, 'manner of driving' includes, in our opinion, all matters connected with the management and control of a car by a driver when it is being driven."

To that can be added the often quoted observation of Atkinson J in delivering the judgment of the Court of Criminal Appeal in *R v Evans* (1963) 1 QB 412 at 418; (1962) 3 All ER 1086; (1963) 47 Cr App R 62:

> "It is quite clear from the reported cases that if a driver in fact adopts a manner of driving which the jury thinks was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best."

If further authority be needed I would refer to the unreported decision of this Court in *R v Flaherty: Attorney-General* – Appellant (CA No. 166 of 1982, judgment delivered 20 September 1982). That was an appeal by the Attorney-General against the sentence imposed for the offence of dangerous driving causing grievous bodily harm. In dismissing the appeal Sheahan J (with whom Macrossan J agreed) after referring to a number of cases said:

> "However, those guidelines clearly recognise – and with respect I consider rightly – that there is a vast difference in culpability between momentary inattention and reckless or deliberate course of driving over an appreciable interval of time in a manner dangerous to the public ... I prefer to regard the collision as a result more of momentary inattention than of reckless or deliberate disregard for the safety of others."

The Court of Criminal Appeal clearly recognised that momentary inattention could result in a finding of dangerous driving, but such was a very relevant circumstance when it came to penalty.

The Magistrate clearly held that regarded objectively the course of driving (that is travelling across the double centre lines on to the incorrect side of the carriageway) constituted dangerous driving. It is difficult to see how, given the authorities referred to above, he could have come to any other conclusion. But the real point for his determination was whether or not there was fault on the part of the applicant causing that situation. In *Warner's case* (at p210) the Court of Criminal Appeal held that on a charge of dangerous driving the tribunal of fact may have to consider defences under s25 in combination with s24 of the *Criminal Code*. Section 25 deals with "extraordinary emergencies" and in broad terms provides that a person is not criminally responsible for an act done "under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise." The existence of the emergency could either be factual or the product of an honest and reasonable, but mistaken, belief.

In my view the Magistrate directed his mind to those considerations. It was contended for the applicant that she had an honest and reasonable, but mistaken, belief that because the other vehicle was straddling the centre line she could not pass safely between it and the cliff face. The Magistrate held, for sound reasons which he gave, that such belief was not reasonable. He also held that an "experienced driver" who was "blinded by headlights of an approaching vehicle" would not cross the double centre lines to the incorrect side of the road way. In so reasoning, in my view he applied the objective test laid down in s25 of the Code."

Per Williams J (Connolly and Ambrose JJ agreeing) in *R v Webb* [1986] 2 Qd R 446; (1986) 3 MVR 302; MC 48/1986, 4 July 1986.

(d) Definition of speed dangerous driving

Per Sholl J:

> "Now gentlemen, the next alternative is driving a motor car on a highway at a speed dangerous to the public having regard to all the circumstances of the case, and the last alternative is driving a motor car on a highway in a manner dangerous to the public having regard to all the circumstances of the case. There must be the driving of a motor car. It must be on a highway, and the manner of driving must be dangerous to the public, having regard to all the circumstances and so on. It is sufficient if one member of the public is put in actual or potential danger. The passengers in a motor car may be members of the public, for that purpose.... The driving may be only temporarily dangerous, but that is enough; and again you may look at any part of the journey with which the evidence admitted on the manslaughter count is concerned. Driving in a dangerous manner includes all matters connected with the management and the control of a motor car by the driver while it is being driven."

Per Sholl J in *R v Burnside* [1962] VicRp 14; [1962] VR 96, 29 August 1961.

3. Examples of driving at a Speed Dangerous

(a) Driving at 105km/h in a 60km/h zone

The appellant was convicted of driving a motor car at a speed dangerous to the public. It was alleged that the appellant drove at least 300 metres at 105 km/h at 2 a.m. along a main road with 2 marked lanes on either side of the centre line. Where the offence occurred, business and domestic premises lined both sides of the main road; a factory employing night-shift workers abutted the road – although no workers were said to be emerging at the time. The bitumen surface of the main road was good but wet; traffic was light: no embarrassment was caused to other traffic. In dismissing the appeal, White J said:

> "The special magistrate knew at the time, and I know at the time of the appeal, that driving in a built up area at 105 km/h where the speed limit is 60 km/h. and where other persons might be about, is driving at a sufficiently high speed to support a conviction of speeding in a manner dangerous to the public."

Per White J in *Panozzo v Dunsmore* (1982) 104 LSJS 137 (NT); MC 22.1/1983.

(b) Open highway – maximum speed 110km/h – travelling at 169km/h

1. In order to prove that a motorist drove at a speed dangerous to the public, it must first be shown that the driving created a wholly unreasonable and unwarranted danger to the life, or limb, or both, of other road users.

Pope v Hall (1982) 30 SASR 78, applied.

2. Where a motorist was intercepted whilst driving his wife and child on a sealed highway at a speed of 169km/h in a 110km/h zone, (2 lanes either way with no access roads, made footpaths nor houses in the vicinity but other vehicles travelling in the same direction) it was open to the Magistrate to conclude that travelling at such speed increased the incidence of risk and the likely consequences of any untoward event to an extent which was unreasonable and unwarranted and accordingly to find that such driving constituted a danger to the public.

Per Johnston J:

> "In *Pope v Hall* (1982) 30 SASR 78 which has come to be regarded as a leading case in this Court on this section, Wells J said (at 79):
>
> > "It is now well settled that if driving in a manner, or (where appropriate) at a speed, which was dangerous to the public is to be proved, it must be demonstrated that, in all the circumstances, the impeached driving passed beyond the point where it represented a mere departure – and nothing more serious – from the rules of the ordinary highway code, and became so serious a departure from those rules that the manner or speed of the driving (as the case may be) created a wholly unreasonable and unwarranted danger to the life, or limb, or both, of other road users. To speak of the degree of danger created by any given act or course of conduct comprehends, in my opinion, two factors: the degree of risk that, if something untoward does happen, the damage caused will be more, rather than less, serious. If one were directing a jury one would say: Ask yourselves how likely it was, in the circumstances, that an accident of some sort would occur, and, at the same time, assuming that an accident did occur, how serious it would be; it will be by weighing both those factors together that you will be able to determine the degree of risk created by the situation – in other words, how dangerous the defendant's driving was."
>
> In my opinion, there was danger associated with the defendant's driving, given the nature of the location in which he was driving. His very speed reduced his power to make accurate observation of what was going on about; in a practical way, he himself thought for a moment that an accident had

occurred, whereas in fact what had happened was that the police officers had stopped an earlier vehicle travelling in the same direction as the defendant. Driving at that speed could easily give rise to a situation of acute danger to others if for some reason the defendant himself was temporarily less able to control the vehicle than he normally would be, by some fainting turn, a coughing fit, or some small event of that sort.

A vehicle that stopped on the side of the road, perhaps because it had been called on to stop by the police unit, would eventually make its way back in the stream of traffic. The driver might look and observe an oncoming car but the driver would not assume or be able to discern that the vehicle further back along the road was travelling at 169 kilometres per hour. The fact that none of these events occurred is not to the point. What is to the point is the risk. Another risk is a problem arising from a blow-out. It may of course be said that some of these risks attend an act of driving at 110 kilometres per hour, and so they do; but the risk is not an unreasonable and unwarranted risk in the ordinary circumstances of this road, because society says that that is the speed which in ordinary circumstances can be reached on this sort of stretch or road.

To travel at a speed greatly above the maximum is to increase the incidence of risk and to increase the likely consequences of any untoward event to an extent which is unreasonable and unwarranted. In my view, the magistrate was perfectly correct in finding that this driving constituted a danger to the public. The "public" in the relevant sense is any persons using the highway at that time and included, in the particular instance, the police officers who were attending to their equipment at the side of the road, the defendant's wife and child who were with him in the car, and other road users including more particularly the vehicle in front of him and such vehicles as were travelling in the opposite direction.

I pause to mention that Mr Mayne correctly put to me that the speed at which the defendant was travelling was such as to put it very likely beyond his power to deal with a situation arising not from anything done by him but from a vehicle travelling in the opposite direction encroaching onto its wrong side of the road. The appeal against the finding of guilt fails."

Per Johnston J in *Firth v Prestwood* (1986) 44 SASR 427; MC 34/1988, 11 March 1987.

(c) Driver observed driving at a fast rate of speed in Seymour – driver followed by police car to Nagambie a distance of 40 kms – travelled on wrong side of road for about 1 km – vehicle travelled at speeds which varied between 140-160 km/h – traffic likely to be encountered on highway – charge found proved by magistrate

HELD: Where at night a driver of a motor car drove his vehicle from Seymour to Nagambie – a distance of about 40 kms – at a speed which varied between 140-160km/h, and also drove on the wrong side of the road for one kilometre passing a stationary vehicle, it was open to the magistrate to find that the driver was guilty of a charge of driving at a speed which was dangerous to the public having regard to all the circumstances of the case.

Per Beach J:

"What does the material in the affidavit disclose as being the circumstances of the case? In the first place it establishes that the applicant drove his vehicle along the Goulburn Valley Highway from Seymour to Nagambie. I consider I am entitled, as I have no doubt was the Magistrate, to take judicial notice of the fact that that is a distance of about 40 kilometres. I consider I am also entitled to take judicial notice of the fact that the Goulburn Valley Highway between Seymour and Nagambie is a two-way carriageway and is a highway on which one can expect to encounter traffic 24 hours a day. That it is a two-way carriageway is, of course, supported by the evidence the respondent gave to the effect that at one stage the applicant's vehicle had travelled for about one kilometre on its wrong side of the road while passing a stationary vehicle.

In the second place, it is clear from the reference to the lights burning on the applicant's vehicle that the offence occurred at night.

In the third place, I consider the evidence established that over the bulk of the distance over which the applicant travelled that night whilst pursued by the police vehicle, his vehicle travelled at speeds which varied between 140 kilometres per hour and 160 kilometres per hour. That is not only the inference to be drawn from the evidence the two police officers gave to the effect that those were the speeds of the police vehicle over the distance in question and that even though travelling at speeds of that order they lost sight of the applicant's vehicle from time to time, it is also a conclusion one is entitled to draw from the fact when the police officers apprehended the applicant at Nagambie and detailed their observations of his driving to him, the applicant simply replied that he was in a hurry.

From those facts it would seem to me that it was open to the Magistrate to arrive at the conclusion that what occurred on the evening in question was a high speed chase involving the applicant on the one hand and the police on the other and that that chase took place over a distance of 40 kilometres along a two-way highway in central Victoria on which one could expect to encounter other traffic from time to time. In my opinion it was open to the Magistrate to find that to drive at that rate of speed over that length of that particular highway that night, was to drive at a speed dangerous to the public having regard to all the circumstances of the case.

As Lord Goddard said in *Bracegirdle's case* when considering the driving of a truck driver (see *Bracegirdle v Oxley* [1947] KB 349; (1947) 1 All ER 126 at p130);

> "He may be convicted because he is driving too fast and only because he is driving too fast, but, of course there must be taken into consideration all the circumstances of the case, because a speed which is too fast on one road in certain circumstances may be dangerous when driving on another road in other circumstances."

In my opinion there is no basis for interfering with the decision of the Magistrate in this case and accordingly the order nisi will be discharged."

Per Beach J in *Thomson v Holcombe* [1980] VicSC 443; MC 02/1981, 1 October 1980.

4. Examples of driving in a Manner dangerous

(a) Definition of manner dangerous driving

Per Sholl J:

"Now gentlemen, the next alternative is driving a motor car on a highway at a speed dangerous to the public having regard to all the circumstances of the case, and the last alternative is driving a motor car on a highway in a manner dangerous to the public having regard to all the circumstances of the case. There must be the driving of a motor car. It must be on a highway, and the manner of driving must be dangerous to the public, having regard to all the circumstances and so on. It is sufficient if one member of the public is put in actual or potential danger. The passengers in a motor car may be members of the public, for that purpose.... The driving may be only temporarily dangerous, but that is enough; and again you may look at any part of the journey with which the evidence admitted on the manslaughter count is concerned. Driving in a dangerous manner includes all matters connected with the management and the control of a motor car by the driver while it is being driven."

Per Sholl J in *R v Burnside* [1962] VicRp 14; [1962] VR 96, 29 August 1961.

(b) Unroadworthy motor vehicle – defendant drove a motor vehicle at a fast speed in Warrnambool – the tyres screeched when entering a roundabout – the footbrake and clutch were ineffective – no left-hand rear vision mirror – whether magistrate should have found the defendant guilty of careless driving if not satisfied the evidence was sufficient to sustain a charge of driving in a dangerous manner

HELD: The Magistrate should have held that there was a *prima facie* case made out that the defendant did drive a motor on a highway in a manner which was dangerous to the public, as alleged in the information, and that the Magistrate was wrong in law in holding that, in respect of the charge of driving in a manner dangerous, the defendant had been wrongly charged.

Per McInerney J:

"In the present case the material which was relevant in relation to the issue of driving in a manner dangerous appears to me to be the following;

- That the intersection was an intersection of three streets, one of which was the main thoroughfare from the shopping area of Warrnambool to the Mortlake Road, which could be expected to carry traffic at all hours of the day and night;
- That the intersection was in a built-up area
- That although it was a wide intersection, the view into Princess Street from Liebig Street or Howard Street was very limited;
- That there were houses on the corner of Princess Street and the intersection;
- That there were two private hospitals within two hundred or three hundred yards of the intersection;
- That the driver in driving made five complete circular turns around the middle of the intersection at a speed, which was described as a fast speed;
- That the tyres of the vehicle screeched loudly as these turns were being made, and
- That on examination the footbrake was ineffective in that it travelled nearly to the floor before taking effect and the clutch was ineffective in that when it was depressed to the floor it would stick and not return.

A further relevant fact is that, in the defendant's panel van there was no left-hand side exterior rear vision mirror. It is also relevant that although this incident occurred at 11.50pm at night it was during the month of January, when perhaps a greater volume of traffic might reasonably be expected than a corresponding time in the month of June.

Even though the evidence indicated that the vehicle was under perfect control throughout, a matter which gives rise to an inference that the defendant was a capable driver, capable of controlling his vehicle, nevertheless the defective condition of the footbrake and of the clutch indicated possible sources of danger in the manoeuvres in which the defendant was engaged, and the absence of a rear vision mirror on the left-hand side of the vehicle must have made it more difficult for the defendant to observe the possible approach of traffic from the various intersections as he turned around and around in the course of these five complete circular turns in the middle of the intersection.

I am not able to say that that is conduct which can never constitute dangerous driving, and in my view the Magistrate was wrong in taking the view, if indeed he took the view, as I think he did, that the circumstances could never amount to dangerous driving. If he took the view that in the circumstances he was not satisfied beyond reasonable doubt that the offence of dangerous driving had been made out it might have been more difficult for the informant to persuade this court to interfere, but, since the Magistrate has taken the view that the defendant was wrongly charged with dangerous driving, he must, I think, have meant by that that in the circumstances no court could regard the conduct of the defendant as amounting to dangerous driving. In so ruling I think the Magistrate erred in law.

I think the Magistrate also erred in law, if he was not satisfied that the defendant was guilty of an offence against s80A(1) of the *Motor Car Act*, in failing to exercise his discretion as to whether the defendant should be convicted of an offence under s81(1), namely, of driving carelessly. I think the provisions of sub-s3 confer on the court a discretion as to whether, when not satisfied that a defendant is guilty of an offence under s80A(1), it should go on to convict the defendant of an offence under s81(1). The court is not bound to proceed to convict the defendant under sub-s1 of s81 but I take the provisions of sub-s3 as meaning that if the court is not satisfied that the defendant is guilty of the offence of driving recklessly or in a manner dangerous to the public or at a speed dangerous to the public under sub-s1, it ought in such circumstances to consider whether it is appropriate to exercise its power under sub-s3 of proceeding to convict the defendant of the offence of careless driving under sub-s1 of s81 of the Act.

In those circumstances I am of opinion that grounds 2 and 4 of the order nisi to review the dismissal of the information for driving dangerously have been made out. In other words (under ground 2) the Stipendiary Magistrate should have held that there was a *prima facie* case made out that the defendant did drive a motor on a highway in a manner which was dangerous to the public, as alleged in the information, and (under ground 4) that the Stipendiary Magistrate was wrong in law in holding that, in respect of the charge of driving in a manner dangerous, the defendant had been wrongly charged.

As to ground 3, which asserts in the alternative that the Stipendiary Magistrate should have held that there was a *prima facie* case made out that the defendant did drive a motor car on a highway recklessly, I am not myself prepared to go further than to say that, if the Magistrate was dismissing the information of driving in a manner dangerous to the public, he ought to have applied his mind under sub-s3 of s80A, to the question whether it was proper for him in the circumstances to record a conviction of careless driving under sub-s1 of s81. To my way of thinking, the state of facts testified to by the informant is suggestive of reckless driving rather than careless driving. In making that observation, I am not, however, to be taken as saying that conduct of this sort cannot be the subject of the charge of careless driving."

Per McInerney J in *Hoy v Small* [1970] VicSC 152; MC 14/1970, 16 June 1970.

(c) Two counts allegedly committed on same day – acts of driving separated in time & place

(1) Where acts of driving are substantially separated in time and place, in the absence of any connecting link evidence of the one act of driving is not evidence of the other.

R v Horvath [1972] VicRp 60; (1972) VR 533, applied.

(2) In the present case, the acts of driving were separated in time and place to the extent that separate charges were laid. As the first charge had been stood down it was not open to the Magistrate to take into account when dealing with the second charge, material which related to the first.

Per Kelly SPJ (with whom Matthews and Shepherdson JJ concurred):

"On the question of the admissibility of the hearing of the Iindah Road charge of evidence of the manner of driving by the applicant at an earlier time and in a different place the principle to be applied is stated in *R v Horvath* [1972] VicRp 60; (1972) VR 533, at p538 in these words:-

> "Where acts of driving are substantially separated in time and place, evidence of one is not, in our opinion, evidence of negligence of the other, in the absence of some connecting link, such as existed in *R v Buchanan* [1965] VicSC 65;[1966] VicRp 3; (1966) VR 9, or in *R v Lewis* [1913] VicLawRp 55; (1913) VLR 227; 19 ALR 107. Failure to exercise care, depending, as it does, on the particular circumstances of the occasion is, in our view, not a constant feature of human behaviour and, accordingly, failure at one place and time not forming part of the occasion in issue does not, in itself, tend to prove failure at another time and place."

In the present case the acts of driving are separated in time and place to the extent that the prosecutor chose to make them the subject of separate charges and in those circumstances I am unable to see any connecting link, other of course than the fact that the acts related to the driving of the same vehicle on the same night, which would justify the admission on the hearing of the Iindah Road charge of the applicant's driving earlier that night, albeit that the driving in Iindah Road was the culmination of a course of conduct which had commenced some time earlier and some distance away. At the stage at which the Stipendiary Magistrate was dealing with the Iindah Road charge he was aware of the March Street charge which had merely been stood over but had not been dealt with.

If the Stipendiary Magistrate did take into account in sentencing the applicant on the Iindah Road charge all the material which had been placed before him he was in error in so doing. If, on the other hand, he limited his consideration of the material to the evidence which was properly admissible on the Iindah Road charge I would consider that his sentencing discretion miscarried.

The nature of the driving shown by the passage from Sergeant Lenord's statement to which I have referred was such as to be deserving of punishment but, having regard to the maximum punishment which may be imposed on summary conviction, namely, a fine of $500.00 and imprisonment with hard labour for six months, I would regard a sentence of three months' imprisonment to be manifestly excessive.

I would add that if the Stipendiary Magistrate in sentencing the applicant had properly been able to consider all the evidence as to the applicant's manner of driving on that night I would not then be prepared to say that the sentence which he imposed was excessive, but that, of course, is not the case.

The applicant was nearly 20 years of age at the date of the offence and had no previous convictions and in all the circumstances the matter should have been dealt with by the imposition of a relatively severe fine and a significant period of disqualification.

In my opinion leave to appeal against sentence should be granted, the appeal should be allowed, the sentence imposed should be set aside and in lieu a fine of $400 should be imposed, in default imprisonment for one month. The order for disqualification should stand."

Per Kelly SPJ (with whom Matthews and Shepherdson JJ concurred) in *R v Clark* [1986] 4 MVR 245; MC 54/1986, 8 October 1986.

5. Statutory provision for Careless Driving

***Road Safety Act* 1986**

Careless driving

65(1) A person who drives a motor vehicle on a highway carelessly is guilty of an offence and liable for a first offence to a penalty of not more than 12 penalty units and for a subsequent offence to a penalty of not more than 25 penalty units.

(2) A person must not drive a vehicle, other than a motor vehicle, on a highway carelessly.
Penalty: For a first offence, 6 penalty units;
For a subsequent offence, 12 penalty units.

(3) In this section—
"vehicle" does not include—
(a) a non-motorised wheel-chair; or
(b) a motorised wheel-chair that is not capable of a speed of more than 10km per hour.

6. Examples of Careless Driving charges

(a) Driving too close and parallel

Per Bongiorno J:

> "43. In relation to [the careless driving] count there was clearly evidence that as the appellant's vehicle was alongside the vehicle in which Mr Somasundaram was a passenger Mr Pillai wound down the window and made hand gestures at Mr Somasundaram. The dispute here is whether there was any

evidence from which the Magistrate could conclude that the appellant was driving too close or draw the inference that he drove parallel for the purposes of allowing Mr Pillai to make such gestures out the window.

44. The evidence of Mr Somasundaram was that "the van was very close to our car" and described the distance with reference to objects in the courtroom which the Magistrate took to be a distance of 10 feet. The finding that this was driving too close so as to constitute careless driving was a matter for the Magistrate. It raises no question of law. There was clearly evidence to support the charge of careless driving.

45. Counsel for the appellant also submitted that this charge was duplicitous as it relied on the same acts as the charge of stalking by following. Ms Judd for the respondent submitted that two offences can be committed by the one act and that here the two different types of offences had different elements and were charged to reflect the whole of the criminality of the appellant. In *Environment Protection Authority v Australian Iron & Steel Pty Ltd* (1992) 28 NSWLR 502 at 508; (1992) 64 A Crim R 124; (1992) 77 LGRA 373, Gleeson CJ, dealing with this problem said:

> "Where two or more different statutory prohibitions apply to the same set of primary facts, this will often be because each prohibition fastens upon some different aspect of those facts and makes it the gist or gravamen of the offence. It may be that one particular feature of the facts is immaterial for the purpose of one prohibition and material for another."

46. This is just such a case. The charge of stalking by following was said to be constituted by following the alleged victim in the vehicle with the requisite intent. It was said to be directed towards the placing of the alleged victim in fear or apprehension. The charge of careless driving relates to the specific acts of driving too close and driving parallel, and is directed to the safety of the appellant's driving for the protection of all road users. There is no duplicity in charging, convicting and punishing the defendant for both offences in these circumstances, although, as I have found the prosecution on the stalking charge fails anyway.

4A Did the Magistrate err in law by failing to make a specific finding as to the basis on which the careless driving charge was proven?

47. In his reasons for judgment the Magistrate stated:

> "I am satisfied that the course of driving in travelling too close and or alternatively, travelling parallel for the purpose of permitting Pillai to protrude his body out of the window and to indulge in intimidatory behaviour, amounts to careless driving."

48. The appellant submits that the Magistrate was bound to make a specific finding as to the conduct which constituted careless driving. I take it from the Magistrate's reasons that he found that the defendant had both driven too close and travelled parallel to allow Pillai to protrude his body out of the window and that both could amount to careless driving and that in any event the course of driving as a whole constituted careless driving. There was no obligation on the Magistrate to specify only one action which constituted careless driving if in fact he made findings of two actions either or both of which satisfied the elements of the offence. The appellant's appeal in respect of this charge must be dismissed and there is no reason to add his proposed question to the Master's order."

Per Bongiorno J in *Nadarajamoorthy v Moreton* [2003] VSC 283; MC 23/2003, 6 August 2003.

(b) Defendant's vehicle travelled onto the incorrect side of the roadway thereby forcing an oncoming vehicle to run off the road

The defendant drove his car at about 11 o'clock in the evening on the 28 March 1969 northward along the Point Nepean Highway in the vicinity of Carrum. He was travelling at about 35mph. His car was following another car proceeding in the same direction along the Highway at about the same speed. Suddenly the defendant's car was seen to swing to its right onto its incorrect side of the roadway and it forced a car travelling in the opposite direction to run off the surface of the roadway into an earth section on the eastern side of the highway. The defendant's solicitor submitted that there may have been exculpatory matters. Charge dismissed by Justices.

HELD:

(1) There was no evidence before the Justices which would have entitled them to give attention to the submissions made by the solicitor for the defendant that there may have been a blackout, or that there may have been a tyre blown out or any other circumstance which, it had been proved, might have exonerated the defendant. The justices had before them the case of a motor car which had behaved in an erratic way, and the defendant was the driver of that motor car. The various suggestions and submissions made at the Bar Table were not evidence but it seemed that the

Justices in effect took them to be evidence or to be explanations which were appropriate to be considered by them. The defendant gave no evidence as to his own condition before the accident or as to what he knew of events leading up to the accident, nor was there any effort made by the defendant to show that the cause of the accident was something for which he could not be held responsible.

(2) There was no evidence before the Justices which would justify them giving consideration to the defence of non-culpability because of some extraneous circumstance taking the control of the situation out of the hands of the defendant. Accordingly, the Justices were in error in holding that there was no *prima facie* case established and the order which the Justices had made was set aside and the matter sent back to the Court of Petty Sessions at Frankston for re-hearing by a differently constituted Court from what it was on the earlier occasion.

Per Anderson J:

"I think therefore that the only question which arises for determination in each of these cases is whether the Justices were entitled to hold that the informant had not established a *prima facie* case for I do not think that the matter gets as far as the situation envisaged in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671 to which I have referred. I propose therefore to deal first with the information charging the defendant with having driven carelessly.

Mr Charles for the informant in submitting that on the evidence before them, the Justices should have held that there was a case to answer referred to *R v Burge* (1961) 2 QB 205; [1961] 2 All ER 688; (1961) 45 Cr App R 191; *Hill v Baxter* [1958] 1 QB 277; [1958] 1 All ER 193; (1958) 42 Cr App R 51; *Sanders v Hill* [1964] SASR 327. He conceded that while the ultimate onus was on the informant to satisfy the court of the guilt beyond reasonable doubt of an accused person, no obligation rested upon the prosecution, so he submitted, to negative a number of possible or hypothetical exculpating matters of which there was not, at the time when the submission was made of no case to answer, any evidence, and he contended that the present case before the Magistrates was such a case. He relied on the *dicta* of Devlin J in *Hill v Baxter* at pp264-5 which is in the following terms – the relevant quotation starts at the top of p284, but I do not propose to read the way in which His Lordship leads into what is the material passage, which, to my mind, is:

> "It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively, and beyond a reasonable doubt, that the accused was at the time of crime sober or not sleepwalking or not in a trance or blackout. I am satisfied that such matters might not be considered at all until the defence has produced at least *prima facie* evidence."

That passage in its context is equally applicable to the case before me here, and my view is that there was just no evidence before the magistrates which would entitle them to embark upon a consideration of whether there was a circumstance which would exculpate the defendant in the way in which it was suggested by his solicitor that it might do so. By using the word "exculpate", I do not wish to convey the impression that the onus is upon the defendant to prove, on any basis, the existence of a condition or circumstance which would exonerate him. The court may, after considering such evidence as is placed before it, be left in sufficient doubt, but this is a case in which there was in my view, no evidence before the court which would justify the magistrates in considering any of the suggestions made by the defendant's solicitor as being matters which they should take into account.

Mr Charles also referred to *Sanders v Hill* [1964] SASR 327 as an illustration of a case where the defendant had gone into evidence and had done all that he could to explain the incidence of alleged careless driving. There is a contrast, I think, to be drawn so far as the facts are concerned between *Hill v Baxter* on the one hand and *Sanders v Hill* on the other. So far as the facts are concerned they may be a little difficult to reconcile, but both cases, I think, illustrate the principle that while the Crown in fact has the ultimate burden of satisfying the court beyond reasonable doubt as to the guilt of an accused person, nevertheless it is improper for the court to embark upon a consideration of matters as to which there is no evidence and both cases at least are consistent, in principle, as to that.

I did mention earlier that some reference had been made in the course of the submission to the Magistrate of there being possible mechanical defects. Whether or not that is ultimately the position which I should consider probably does not matter because, as I said, a mechanical defect or a blackout or some other circumstance as to which there was no evidence, but as to which the accused might lead evidence, are all of the same order, but it is interesting that in the case of the mechanical defect which was raised in the case of *R v Spurge* (1961) 2 QB 205; [1961] 2 All ER 688; (1961) 45 Cr App R 191, the court there lays down which I believe is the true basis for the consideration of alleged exculpatory matters, and it is at p691 of the All ER that the following passage appears. In that case

the Crown was submitting that the onus was on the defendant of establishing the defence that the mechanical defect of the car excused the driving and made it not careless, and it is Salmond J, who delivered the judgment of the Court of Criminal Appeal, and the relevant passage reads this way;

> "It has been argued by counsel for the Crown that even if a mechanical defect can operate as a defence, yet the onus of establishing this defence is on the accused. It is of course conceded by the Crown that this onus is discharged if the defence is made out on a balance of probabilities. In the opinion of this court the contention made on behalf of the Crown is unsound, as in cases of dangerous driving the onus never shifts to the defence. This does not mean that if the Crown proves that a motor car driven by the accused has endangered the public the accused can successfully submit at the end of the case for the prosecution that he had no case to answer on the ground that the Crown had not negatived the defence of mechanical defect. The court will consider no such special defence unless and until it is put forward by the accused. Once, however, it has been put forward it must be considered with the rest of the evidence in the case. If the accused's explanation leaves a real doubt in the mind of a jury then the accused is entitled to be acquitted. If the jury rejects the accused's explanation, the jury should convict. It has been suggested by counsel for the Crown that the onus of establishing any defence based on mechanical defect must be on the accused because necessarily the facts relating to it are peculiarly within his knowledge. The facts, however, relating to a defence of provocation or self-defence in a charge of murder are often peculiarly within the knowledge of the accused since only the persons present at the time of the killing are the accused and the deceased. Yet once there is any evidence to support these defences the onus of disproving them undoubtedly rests on the Prosecution."

That of course is the case when there is any evidence to import these defences, but that onus does not arise until there is such evidence and that I think is the tenor of all the authorities that I have considered and it seems to be in line likewise with what is proper.

Now my view then, and I will deal with Mr Bayliss' arguments in a moment, is that there was no evidence before the Justices which would entitle them to give attention to the submissions made by the solicitor for the defendant that there may have been a blackout, or that there may have been a tyre blown out or any ether circumstance which, it had been proved, might have exonerated the defendant. The justices had before them the case of a motor car which had behaved in an erratic way, and the defendant was the driver of that motor car. The various suggestions and submissions made at the Bar Table of course were not evidence but it seems to me that the Justices in effect took them to be evidence or to be explanations which were appropriate to be considered by them. The defendant gave no evidence as to his own condition before the accident or as to what he knew of events leading up to the accident, nor was there any effort made by the defendant to show that the cause of the accident was something for which he could not be held responsible.

Mr Bayliss submitted that the Justices were, however, justified in finding that there was no *prima facie* case. He argued that there was no way in which the defendant could have assisted the court because first of all he had been rendered unconscious at the accident and secondly he was critical – I do not mean in an improper sense – but he was critical of the police in the matter because they had not led any evidence as to an inspection which they may have made of the motor car to ascertain and to possibly negative any suggestion that there was defective mechanism, and that therefore, since it was possible that the car might have had a defect, the defendant was entitled to have that aspect considered. He also submitted that there was evidence on which the Justices could have relied and that was the evidence of the driver of the motor car who was preceding the defendant along the highway, that evidence being to the effect that in the rear vision mirror he had observed the defendant's car which appeared to be driven normally.

Well that was much the same circumstance that existed apparently in the case of *Hill v Baxter* where the Justices had before them indeed evidence, the defendant gave evidence and his evidence was to the effect that he only remembered incidents up to a certain point a certain distance back from where the accident happened. The Justices then concluded from that that because he had apparently driven the motor car from that point to the point where the collision eventually occurred, therefore he must have driven carefully in that intervening distance, and there was no evidence in effect that he had driven otherwise than carefully. That was not accepted by the Court of Appeal, and in my view too, the fact that at most times a person is driving carefully is no evidence that in a particular instance of where apparently there is careless driving, he is therefore to be held not responsible for it.

Mr Bayliss referred me to the case of *R v Roseblade* (1943) 3 DLR at p733 as illustrating how the defendant was entitled to an acquittal because all that the prosecution had proved was that an accident had occurred, and at p754 he read part of the judgment of Judge Harvey who was a County Court Judge in Ontario and what he read was this passage at p734:

> "As for the application for non-suit or dismissal, I feel bound to grant the same and to do otherwise

> would, in my judgment be a denial of the application of one of the most important principles in our jurisdiction, namely the necessity of burden of proof. Under the *Highway Traffic Act*, applying to this section, there is no onus on the accused to explain or even to disprove the accusation against him. The onus is on the prosecution and in this case all the evidence that is before me is the testimony of two witnesses who merely found the bus in the ditch, that the same was in charge of the accused in arriving at that position, but without any evidence or explanation as to how it got there. As far as I am concerned the bus might have been towed there or pushed there, or forced in there by some other vehicle colliding with it, or by any number of means, and the fact that some of the passengers in the bus were injured is not necessarily evidence of the careless or even incompetent driving on the part of the driver. To permit a traffic officer or a constable to prosecute for careless driving on mere assumption would be absurd and make a travesty of justice."

The facts in that case which the Judge was at that stage considering was evidence that the accused was the driver of a bus which was found by the police, lying on its side in a ditch beside the highway, and there was a tyre mark leading from the rear of the bus up onto the shoulder of the road and along the shoulder for a distance of 115 feet, to the edge of the pavement. His Honour in the headnote is described as finding:

> "That the position of the bus in such circumstances is consistent with many reasonable hypotheses other than careless driving on the part of the accused."

I mention this case at some little length for two reasons: first of all, when one looks at the whole of the report one finds that the proceedings before the Judge were in effect by way of appeal, much the same as we would have in our County Court from a conviction before a magistrate, and at the close of the case for the prosecution where the evidence was as scanty as has been set out, a submission was made by counsel for the accused for a non-suit and dismissal. The Judge in that case, however, followed a course which we would find strange, he reserved his decision on that particular submission and proceeded then to hear such evidence as the defence desired to call, and the defence proceeded to call quite a number of witnesses and those witnesses, including the bus driver and two passengers, gave evidence that in effect – and I am summarising this – the bus had been forced off the road by a small green sedan which had cut in front of them and the driver in an attempt to avoid the green sedan had turned to his right and finished up on the bank. His Honour finishes his judgment in these terms:

> "If it is any comfort to the parties concerned, I may say I would also have allowed the appeal on the merits in any event as I am satisfied with the evidence of the driver of the bus and the two independent passengers as being a reasonable explanation of a normal act on the part of this driver when suddenly confronted with what appeared to be a dangerous situation fraught with possible serious consequences. The bus was not only not speeding, but not even going fast. It merely got out of control due to an unforeseen result of a normal, genuine effort on the part of the driver to avoid an accident."

Why His Honour did not found his judgment upon the evidence rather than, in a reserved judgment, give a ruling which would seem quite unnecessary, is a little surprising. Be that as it may. But the reason I mention this case at some length is because it was later considered by the Court of Appeal in Ontario in 1965 and was over-ruled, and that occurred in the case of *R v McIver* (1965) 4 CCC 182 and in that case it was held that "the fact of an accident itself without any direct evidence of the manner of driving may constitute sufficient circumstantial evidence to justify a conviction for careless driving, and the Crown is not required to negative suggestions or hypotheses of innocence which are not founded on proven facts."

Moreover, "With respect to the offence of careless driving the Crown need only prove that the accused committed the prohibited act and unless he can show that such act was done without negligence or fault on his part, he will be convicted." That is almost in line incidentally with the remarks of Lord Goddard in *Hill v Baxter* that it is the objective test which is applied and not the subjective test where careless driving is the charge. And in the course of the judgment, and it consisted of five Judges in the Court of Appeal in Ontario, they agree with the Chief Justice when he says that he would over-rule *R v Roseblade*.

Well from what I have said it is clear that I am of the view that there was no evidence before the magistrates which would justify them giving consideration to the defence of non-culpability because of some extraneous circumstance taking the control of the situation out of the hands of the defendant. And I therefore am of the view that the magistrates were in error in holding, as I believe they did, that there was no *prima facie* case established. As to what should be done with that, I feel I should set aside the order which the magistrates have made there, and should send the matter back to the Court of Petty Sessions at Frankston for re-hearing. The Court, I think, should be differently constituted from what it was on the earlier occasion."

Per Anderson J in *Bettington v Stephenson* [1970] VicSC 66; MC 07/1970, 7 April 1970.

(c) Vehicle travelled onto incorrect side of road and collided with a tree

HELD: Conviction set aside.

1. The civil doctrine of *res ipsa loquitur* has no application in criminal proceedings and the mere happening of an accident does not give rise to an inference of driving without due care.

2. Whilst the erratic course followed by the motor car may have indicated that it was not being driven with due care, the prosecution was required to exclude any reasonable hypothesis consistent with innocence. Extraordinary things occur in every day life including whilst a person is driving a motor vehicle. Given the driver's lack of explanation and his professed lack of recollection of how the accident occurred, it was not open to the magistrate to be satisfied beyond reasonable doubt that the vehicle was driven without due care.

Per Martin J:

"The civil doctrine of *res ipsa loquitur* has no application in criminal law and the mere happening of an accident does not give rise to a presumption of driving without due care: *R v Hinz* [1972] Qd R 272 at 278.

Any presumption, (which I would prefer be called an inference) in criminal law must be arrived at beyond reasonable doubt if the alleged offence is to be found proven. In a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence: *Chamberlain v R* [1984] HCA 7; (1984) 153 CLR 521; 51 ALR 225; (1984) 58 ALJR 133 per Gibbs CJ and Mason J (at 536), Murphy J (at 570), Brennan J (at 599). Here the circumstances were that the motor vehicle followed an erratic course, which was indicative that it was not at that time being driven with due care. Can it be inferred beyond reasonable doubt that that was so? Do the known circumstances exclude reasonable hypotheses consistent with innocence?

It is no doubt reasonable to observe, as Angas Parsons J said in *Virgo v Elding* [1939] SAStRp 26; [1939] SASR 294, that a motor car, in "the ordinary course of things" does not behave in the way which the vehicle driven by the appellant behaved, but it does not follow that if a motor vehicle does behave in such a way, the course of such things out of the ordinary leads to a conclusion beyond reasonable doubt that the driver was driving without due care. Extraordinary things occur in every day life including whilst a person is driving a motor vehicle.

The onus of proof rests upon the prosecution and there is no rule of law that where the facts are peculiarly within the knowledge of the accused, the burden of establishing any defence based on those facts shifts to the accused, (statutory provisions excepted). However, the failure of a defendant to give evidence or offer an explanation may well be treated as sufficient to convert a *prima facie* case proved as a matter of probability, into a case proved beyond reasonable doubt: per Chamberlain J in *Sanders v Hill* [1964] SASR 327 at 329. His Honour then referred to the "classic authority" of *R v Burdett* [1814-23] All ER 80; (1820) 4 B & Ald 95; 106 ER 873 in which Abbott CJ (at 898 of the English Reports) said:

> "A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained, by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft, is rarely seen to break the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the *prima facie* case tends to be true, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily..."

To the same effect see Best J (at 883), Holroyd J (at 890) and Bayley J (at 894); see also, P Gillies, *Law of Evidence in Australia,* p591.

What then if the defendant is unable to give an explanation? In *Sanders v Hill* (*supra*) the appellant had been charged with driving a motor vehicle without due care, the vehicle driven by him having

collided with the rear of a stationary vehicle parked in a suburban street. The magistrate held that a *prima facie* case had been made out and the appellant gave evidence, which the magistrate accepted, that he had suffered concussion in the collision and was unable to remember anything of the circumstances of the accident. There was no other evidence to explain how the collision occurred. He was convicted. Chamberlain J held that the magistrate had properly held that a *prima facie* case had been made out, which called upon the appellant to offer an explanation and that although he had been unable do so, he had proved that there was no explanation within his knowledge and that this removed the inference which could have been drawn from a failure to offer any answer. After considering what was known, and showing that speculation as to how the accident might have occurred does not assist, his Honour pointed out that the case illustrated the difference between proof on the balance of probabilities and proof beyond reasonable doubt and allowed the appeal.

That it is not necessary for a defendant to give evidence himself, by way of a call for explanation, is demonstrated in *Butler v Livitt; Ex parte Livitt* [1969] QWN 93. The defendant told a policeman that he had bumped his nose and did not know what happened. That was given in evidence by the policeman as was further evidence, in cross-examination that the defendant had made it clear that he had been forced off the road by a vehicle travelling in the opposite direction. The opinion of Hart J, upon consideration of the policeman's evidence, was that there was no evidence on which the magistrate could have convicted. Lucas J went further and said that even if the defendant's explanation was entirely discounted, all that was left was that the car went from its correct to its incorrect side of the road and those facts were not sufficient to convict for driving without due care. Douglas J agreed.

That the defendant said he did not know what happened and yet gave an explanation, seems to me to have been inconsistent, but the defendant did not give or call evidence on his own behalf. Those statements of his went in through the evidence of the policeman in the prosecution case. Burt J referred to *Butler v Livett* in *Duckrell v Lee* [1972] WAR 48, although that case had not been referred to in counsel's arguments before him. The appellant had been convicted of careless driving after his vehicle had left a bitumen road and overturned. The appellant had given an explanation out of court and did not give evidence upon the hearing of the charge. His Honour found that the magistrate had misapprehended the facts and had been thus led to draw an inference which could not be sustained. Reference is also made to errors in law made by the magistrate in equating the notion of a case to answer with the ultimate conclusion of guilt, and in transferring the onus of proof to the accused, in requiring him to set up an innocent explanation and prove it. After referring to the facts his Honour said:

> "All that one knows is what one can infer from the marks left by the vehicle on the road, but if one reaches that point, you may then by legitimate inference be able to say how the vehicle as a physical object behaved – if I can use that word with reference to an inanimate object – but that does not, I think, in the particular circumstances of this case, enable me to draw any legitimate inference as to the quality of the behaviour of the driver as a driver, and it would not enable me to sustain a conclusion that he had been guilty of careless driving ..."

The respondent referred to some decisions of the High Court of Justice, Queen's Bench Decision, reported in short form in [1972] Crim LR under the heading "Road Traffic", but I can find nothing in the limited information available in those reports which would cause me to think that the law which I accept, as set out in the Australian authorities, is not to be followed. I have also considered *R v Hinz* [1972] Qd R 272 but it is distinguishable on the facts, there was an independent witness to the accident, and it was an appeal concerning the directions of the trial judge to a jury.

The learned magistrate fell into error in the following respects:

1. By applying the civil doctrine of *res ipsa loquitur* to a charge for a criminal offence.
2. Holding that the appellant was required to give an explanation.
3. Finding the offence proven upon the basis that there was no explanation from the appellant.
4. Not paying sufficient or any regard to the distinction between a *prima facie* case and proof beyond reasonable doubt.
5. Failing to pay any regard to the appellant's professed lack of recollection of the critical events, as given in evidence by one of the prosecution witnesses. That might well have been coupled with the evidence that the appellant had suffered an injury to his head and was unconscious or semi-conscious at the scene of the accident.

Looking at the matter for myself, (excluding from consideration what was said in mitigation regarding the appellant's injuries), the evidence does not show beyond reasonable doubt that the path followed by the vehicle was caused by the appellant's driving of it without due care. The appeal is allowed. The finding that the offence was proven and the penalty arising therefrom are set aside."

Per Martin J in *Waldie v Cook* (1988) 91 FLR 413; [1988] 8 MVR 191; MC 47/1989, 19 July 1988.

(d) Single vehicle collision – no recollection by driver as to how collision happened – defendant charged with drink/driving and careless driving – explanation not accepted

Per Crockett J:

"It is to be noted that with respect to the conviction for careless driving the Magistrate gave no reasons for his having rejected the submissions made by the applicant's counsel in connection with this charge or for his determination that the charge had, in fact, been proved. The contention in support of the review of that particular conviction is to this effect. Admittedly the evidence would permit the inference to be drawn that the car driven by the applicant at the material time struck the tram rail divider and, as a result, overturned. But that was an event which could be as consistent with a lack of carelessness as it could with carelessness.

It was submitted that the conclusion that what had occurred was the product of careless driving could be come to only if the Magistrate drew an adverse inference from the fact that the only person who could say what had occurred, namely, the applicant, failed to proffer any explanation for what had happened. The argument then proceeded to the next step, which was that the applicant had not so declined to give an explanation. He had said to the respondent at the time of the accident and each of two other police officers at two subsequent interviews, merely that he had no memory of what had occurred. It was said that, although this was not the subject of sworn evidence by the applicant himself, nevertheless it was an explanation given by him and it was not, therefore, left open to the Magistrate to draw an adverse inference on the basis of a failure to give evidence as to how the accident had occurred leading to the overturning of the vehicle. Without such inference, as I have already said, the argument is to the effect there is insufficient direct evidence, or evidence that may be established otherwise by inference, of careless driving.

A number of authorities were referred to, all with a view to establishing what I think was encapsulated in this passage from the judgment of Chamberlain J in *Sanders v Hill* [1964] SASR 327 at 329, where his Honour said:

> "Where the prosecution's case depends on facts which, 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."

Thus, I think in the present case, in the absence of reasons for his decision, it must be taken that the Magistrate did take the view that there was a failure on the part of the applicant to offer an innocent explanation and, accordingly, that that failure could give rise to the inference that there was, in fact, no such innocent explanation. As I have said, the applicant himself elected not to give evidence and it was open to the Magistrate to find that the proffered explanation of having no recollection of what had occurred was not a correct one; that is to say, it was open to the Magistrate to conclude that he did not believe that the applicant was telling the truth when, according to the police evidence, he told each of the police witnesses that he had no such recollection.

If the Magistrate rejected the explanation as being untrue, then he was left with no explanation. On my view, it was perfectly open to the Magistrate to reject the explanation. In the first instance, the evidence as to the nature of the injuries suffered by the applicant would not support the conclusion that they were of such a nature as to induce amnesia, nor was there evidence of such a consumption of alcohol as to cause memory loss. Indeed, of course, the applicant was constrained during his interrogations not to make any admission in relation to any significant consumption of alcohol. On one of such interrogations he did, however, admit that, "I had a few beers at a social function".

The Magistrate may well have thought that the evidence of alcohol consumption contained in that admission constituted a motive to fabricate an account of having no memory of the relevant events. There was evidence that the applicant admitted having driven the car in question and, for the reasons that I have indicated, it was in my view open to the Court to have found the charge of careless driving established. I think the order to review with respect to that particular offence should, in consequence, be discharged."

Per Crockett J in *Kislinsky v Spence* [1989] VicSC 516; (1989) 10 MVR 163; MC 55/1989, 25 October 1989.

(e) Motor vehicle driven with nine passengers (four adults, five children) – no evidence that driver's ability to drive interfered with nor rear vision impaired

1. When considering a case of careless driving, it is necessary to take into account not only the driving but also the surrounding circumstances.

2. Where a person drove a motor car with nine passengers in it, but there was no evidence that the person's ability to drive was being interfered with or that the ability to use the rear vision mirror was impaired, a magistrate was not in error in dismissing a charge of careless driving.

Per Beach J:

"Whilst it is true that when one is considering a case of careless driving it is not sufficient to look merely at the driving, as such, one must also consider the driving in the light of the surrounding circumstances. If I drive a vehicle along an empty road, on a clear sunny day at 100 kilometres an hour, in the absence of more that could hardly be said to be careless driving. On the other hand, if at twelve noon on a business day I drove down Collins Street at 60 kilometres an hour it could well be said that that would amount to careless driving. I agree that it is not sufficient simply to look at the act of driving itself in isolation, one must look at the surrounding circumstances.

What are the surrounding circumstances in this case? Well, it is said that there were nine passengers in the car and that the simple presence of those passengers in the car would, of itself, cause one to categorise the driving of the defendant as "careless" because either of the fact that there would be a risk of injury to those passengers if the car was involved in a collision, or the presence of those passengers in the car could well interfere with the defendant's ability to drive the vehicle, or could well interfere with her vision, that is, her ability to properly use the rear vision mirror in the car.

The fact of the matter is that there is no suggestion whatsoever that the presence of the nine passengers in the car interfered in any way with the defendant's ability to drive the car; it, therefore, is a matter of sheer speculation. One may say: well, one could speculate that if one had only two passengers in the rear seat, one of them by some stupid action may interfere with the driver's ability to drive the car, but as I say, there is nothing in this case to indicate that the defendant's ability was interfered with in any way.

As I said during the course of discussion one could envisage a situation where the sheer presence of a large number of persons in the car would affect a driver's ability to drive in that they may be crowding all over him and just prevent him physically from controlling, amongst other things, the steering wheel properly. Nor is there any evidence at all to suggest that the defendant's ability to use the rear vision mirror was in any way impaired. There is no evidence one way or the other as to whether there were rear vision mirrors attached to one or more sides of the vehicle. And, again, it is not for me, or for that matter, the Magistrate, to speculate in relation to it. The case really comes down to the fact that the defendant was driving a car with nine passengers in it. Had she been driving a Combi-van with nine passengers in it it would hardly be said that she was, in the circumstances of this case, guilty of careless driving. In my view the Magistrate acted quite properly in dismissing the information. The Order Nisi to review will be discharged."

Per Beach J in *Pearcy v Elidemir* [1991] VicSC 26; MC 25/1991, 4 February 1991.

(f) Driver travelling at 40-50km/h – another vehicle overtook and cut driver off – driver drove onto incorrect side of road and collided with a stationary vehicle – penalty considerations

Per Gillard J:

"26. The learned Judge's decision [in respect of the careless driving charge] was supported by the evidence and was correct.

29. The evidence before the Court, however, shows that in the course of the plea her Honour made a number of observations about alcohol before she pronounced the penalty. The learned Judge had dismissed the .05 charge. In arriving at her decision on the careless driving charge, in her reasons she did not make any reference to the plaintiff's consumption of alcohol prior to the collision. In a number of paragraphs she carefully considered the facts relating to the charge of careless driving, but at no stage did she refer to the question of consumption of alcohol and its effect. She made no mention of whether it had impaired the capacity of the plaintiff in his driving. It is well established by authority and accords with common sense, that if a person drives a vehicle, having consumed liquor to the point where his ability is impaired, that is a matter that goes to the question of whether or not he has acted as a reasonable person. It is relevant to the issue of careless driving. However, her Honour did not make any reference to the effect of drinking but instead made her findings on what I would describe as the pure facts relating to the collision itself.

30. It follows, based on what the learned Judge had found concerning the relevant facts of the careless driving, that in determining an appropriate penalty the consumption of liquor and its effect were not relevant to the exercise. Having said that, of course, there will be cases where it might be relevant but the way the learned Judge dealt with the matter, it was not. In particular, one must not overlook the fact that she dismissed the .05 charge and in the course of considering that charge it was noted that there was a dispute of fact as to the amount of alcohol that the plaintiff had consumed on that night before the accident.

> 36. It appears to me on that material that the learned Judge did take into account irrelevant matters in arriving at the penalty. The Judge had been informed that if she cancelled the licence the applicant would have to undergo a drink-driving course. I interpolate to observe that the parties agree this was incorrect. Whether or not it was correct, there is enough material before me to lead to the conclusion that her Honour did take that matter into account in arriving at the cancellation. I say that because if the charge of careless driving is considered, as found by the Judge and bearing in mind the age of the plaintiff, his driving over 20-odd years, one prior conviction that went back about 28 years which her Honour said she would not take it into account, cancellation is a severe penalty. If it was appropriate to take the licence one might then ask the question, why not suspend rather than cancel? One is then driven, in my view, to the conclusion that her Honour had in mind that because of the .05 charge the consumption of liquor and the circumstances of the accident, that the plaintiff should do a drink-driving course before he would get his licence back. In my view, that was an irrelevant matter, as was the effect of the alcohol in the circumstances because of the Judge's findings on careless driving. So nobody misunderstands me, alcohol could have been a relevant factor but because of the way the learned Judge dealt with the matter it is my view that she should not have taken it into account. This demonstrates that she did make an error in her decision-making process. She took into account irrelevant matters which she was not entitled to consider, when determining what was the appropriate penalty. The result supports that view. One might think, given all the circumstances, that if it was appropriate to take some action concerning the licence, suspension would have been appropriate.
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> 37. In my view the evidence establishes there was an error of law in the decision-making process concerning penalty."

Per Gillard J in *Smith v County Court of Victoria & Primrose* [2005] VSC 396; MC 25/2005, 23 August 2005.

7. Meaning of "motor vehicle", "highway" and "road"

Road Safety Act 1986 s3(1) provides:

"motor vehicle" means a vehicle that is used or intended to be used on a highway and that is built to be propelled by a motor that forms part of the vehicle but does not include—
(a) a vehicle intended to be used on a railway or tramway; or
(b) a motorised wheel-chair capable of a speed of not more than 10 kilometres per hour which is used solely for the conveyance of an injured or disabled person; or
(c) a vehicle that is not a motor vehicle by virtue of a declaration under subsection (2)(b).

"highway" means road or road related area.

"road" means—
(a) an area that is open to or used by the public and is developed for, or has as one of its main uses, the driving or riding of motor vehicles; or
(b) a place that is a road by virtue of a declaration under subsection (2)(a)—
but does not include a place that is not a road by virtue of a declaration under subsection (2)(a).

(2) The Governor in Council may by Order published in the *Government Gazette*—
(a) declare any place or class of places, whether open to vehicles or not, to be or not to be a road or roads or a road related area or road related areas for the purposes of this Act.

(a) Whether a Polaris quad bike is a 'motor vehicle' – meaning of 'motor vehicle' – meaning of 'road related area'

HELD:

1. Having regard to the definition of "motor vehicle" in s3(1) of the *Road Safety Act* 1986 ('Act'), it can be seen that a motor vehicle is one that is either used or intended to be used on either a road or a road related area, which include areas that are used for the driving or riding of motor vehicles.

2. The authorities make it plain that the words 'used' or 'intended to be used' in the definition of motor vehicle have different meanings. 'Used' refers to how the vehicle is actually used whereas the expression 'intended to be used' directs attention to an objective assessment of what the vehicle is 'suitable or apt' or 'meant' for.

3. When considering an 'intended' use, one should focus objectively on the attributes and characteristics of the vehicle in question and ask for what use is it suitable or apt. It is not a subjective issue requiring, for example, evidence of what the manufacturer might have thought

the vehicle should be used for or how a particular user might wish to use the vehicle.

4. Areas such as bush trails or open scrubby areas, many of which would be open to the public, fall within the definition of a 'road related area' in s3(1) of the Act. Such areas may not all be roads in the sense of areas developed for or having as one of their main purposes the driving of motor vehicles. But they are areas which are open to or used by the public for riding or driving motor vehicles. Intended off-road driving use is not a contra-indication to the vehicle being a motor vehicle as defined. If the vehicle is suited for 'off road' driving on both public and private land, it does not matter that a particular user might only intend it for use on private land: it is nonetheless a 'motor vehicle'.

5. Accordingly, applying the concept of 'intended' use to the attributes of the Polaris quad bike in question, in the context of 'road related area', the Polaris was a motor vehicle under the Act.

Per Redlich and Priest JJA and Macaulay AJA:

> "32. So it can be seen that a motor vehicle is one that is either used or intended to be used on either a road or a road related area, which include areas that are used for the driving or riding of motor vehicles. There is a clear circularity in the definition.
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> 33. The authorities make it plain that the words 'used' or 'intended to be used' in the definition of motor vehicle have different meanings. 'Used' refers to how the vehicle is actually used whereas the expression 'intended to be used' directs attention to an objective assessment of what the vehicle is 'suitable or apt' or 'meant' for. *Transport Accident Commission v Serbec* [1993] VicSC 532; (1993) 6 VAR 151; *Transport Accident Commission v Ball* (1999) 1 VR 64; (1998) 27 MVR 1; 13 VAR 133.
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> 34. There was no evidence before the Tribunal or Croft J as to how or where Polaris quad bikes are actually used. As there was no evidence of the types of areas on which that kind of vehicle had been driven or ridden, argument centred on the second of the two limbs in the definition, namely the vehicle's 'intended' use.
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> 35. In *Transport Accident Commission v Ball* (1999) 1 VR 64; (1998) 27 MVR 1; 13 VAR 133, the Court of Appeal was concerned with whether a motor cycle that had long fallen into disrepair and which was no longer fit to be ridden on public roads and was only used on a private farm as a paddock bike, was a motor vehicle. The definition of motor vehicle in the *Road Safety Act* was not then precisely the same as it is in its current form. But, with a similar structure to the present definition, motor vehicle was defined by reference to whether it was 'used or intended to be used' on a highway or a public place. Dealing with the limb of 'intended' use, Buchanan JA (Callaway and Batt JJA agreeing) focused on the attributes of the motor cycle. It was not the use in fact being made of the motor cycle that was determinative for the relevant limb of the definition; rather it was what the motor cycle was suitable, apt or meant for, having regard to its characteristics. On that analysis, the attributes of the particular motor cycle fitted it for use on the smooth surface of a highway shared with other vehicles and thus it was a motor vehicle as defined.
>
> 36. This analysis shows that, when considering an 'intended' use, one should focus objectively on the attributes and characteristics of the vehicle in question and ask for what use is it suitable or apt. It is not a subjective issue requiring, for example, evidence of what the manufacturer might have thought the vehicle should be used for or how a particular user might wish to use the vehicle.
>
> 37. Adopting this analysis, the Polaris is suitable or apt for driving on bush trails or fire access tracks in forested areas, on open scrubby areas such as may be found in desert, country or in alpine regions, or perhaps on open beaches, and so forth. The knobbly tyres and long track suspension give the impression the vehicle is more suited for rough terrain driving, albeit on cleared tracks or open spaces wide enough for a four wheel vehicle, rather than on smooth surfaced carriageways of the kind found in towns or cities. Being a high performance vehicle, it might also be suitable for competition driving on dirt tracks or motor courses. The Polaris quad bike is suitable or apt for off-road recreational driving on areas of public land similar in nature to those where Mr Hogan formerly rode motor bikes.
>
> 38. Such areas, many of which would be open to the public, fall within the definition of a 'road related area'. Such areas may not all be roads in the sense of areas developed for or having as one of their main purposes the driving of motor vehicles. But they are areas which are open to or used by the public for riding or driving motor vehicles. (See paragraph (d) of the definition). Intended off-road driving use is not a contra-indication to the vehicle being a motor vehicle as defined. If the vehicle is suited for 'off road' driving on both public and private land, it does not matter that a particular user might only intend it for use on private land: it is nonetheless a 'motor vehicle'.

> 39. For these reasons, applying the concept of 'intended' use to the attributes of the Polaris quad bike in question, in the context of 'road related area' the Polaris is a motor vehicle under the Act....

Per Redlich and Priest JJA and Macaulay AJA in *Transport Accident Commission v Hogan* [2013] VSCA 335; MC 44/2013, 27 November 2013.

Patrick Street LL B, Dip Crim
19 March 2014