IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M129 of 2011

ON APPEAL FROM THE COURT OF APPEAL, SUPREME COURT OF VICTORIA

BETWEEN:

10

TRENT NATHAN KING

Appellant

and

THE QUEEN

Respondent

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RESPONDENT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. The Respondent certifies that this submission is in a form suitable for publication on the internet.

30 **PART II: CONCISE STATEMENT OF THE ISSUES PRESENTED**

2. This appeal and notice of contention raises the following questions -

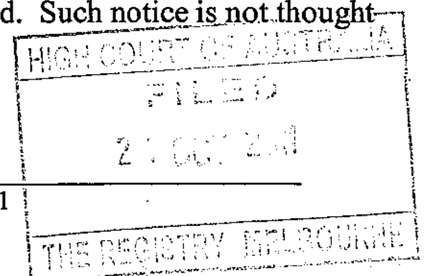
(a) what are the elements of the offence of dangerous driving causing death contrary to section 319 of the Crimes Act 1958 (Vic)?;

(b) if the elements of dangerous driving causing death are diluted in any jury direction, does the principle articulated by this Court in ***Gilbert v The Queen***[1] apply?; and

40 (c) in the circumstances of this case, did the Appellant suffer a substantial miscarriage of justice within the meaning of section 568(1) of the Crimes Act 1958?

PART III: NOTICES UNDER *SECTION 78B OF THE JUDICIARY ACT 1903*(CTH)

3. The Respondent certifies that the question of whether any notice should be given under section 78B of the Judiciary Act 1903 (Cth) has been considered. Such notice is not thought to be necessary.



[1] (2000) 201 CLR 414

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Part IV: CONTESTED FACTS

4.1 Subject to paragraph [6.31] below and footnote 2, the Respondent does not contest any of the material facts set out in the Appellant's Narrative of Facts or Chronology.[2]

4.2 The trial judge summarized the evidence at 298-321, 326-327 of the Charge. In addition, a summary of the circumstances of the offending was set out by the sentencing judge at [1]-[6], [12]-[55] in her Reasons for Sentence.[3]

10 4.3 The Court of Appeal summarised the circumstances of the offending at [7], [26]-[28] in their Judgment.[4]

Part V: STATEMENT REGARDING APPLICABLE PROVISIONS

5. The Respondent accepts the Appellant's Statement of Applicable Constitutional Provisions, Statutes and Regulations.

20 Part VI: ARGUMENT IN ANSWER TO THE APPELLANT

The charges

6.1 The Appellant was charged on Presentment U00919908 with 2 counts of culpable driving causing death with the following particulars –

Count 1 The Director of Public Prosecutions presents that TRENT NATHAN KING at Cranbourne West in the said State on the 13th day of July 2005 by the culpable driving of a motor vehicle caused the death of
30 Michael James Rendall in that TRENT NATHAN KING drove the said motor vehicle :-
(a) negligently; or
(b) whilst under the influence of a drug to such an extent as to be incapable of having proper control of the said motor vehicle.

Count 2 The Director of Public Prosecutions presents that TRENT NATHAN KING at Cranbourne West in the said State on the 13th day of July 2005 by the culpable driving of a motor vehicle caused the death of Ashley Frank Pearce in that TRENT NATHAN KING drove the
40 said motor vehicle :-
(c) negligently; or
(d) whilst under the influence of a drug to such an extent as to be incapable of having proper control of the said motor vehicle.

6.2 The above counts were laid pursuant to section 318(1) of the Crimes Act 1958 which provides -

> Any person who by the culpable driving of a motor vehicle causes the death of another person shall be guilty of an indictable offence and shall be liable to level 3
50 imprisonment (20 years maximum) or a level 3 fine or both.

[2] The intersection in question had not been officially designated a "Black Spot" and signed accordingly
[3] See *R v King* [2011] VCC 1374
[4] See *R v King* [2001] VSCA 69

6.3 Each count alleged particulars in the alternative - (i) negligence, or (ii) driving under the influence of a drug to such an extent as to being incapable of having proper control of the motor vehicle.

6.4 The above particulars were laid respectively under sections 318(2)(b) and (c) of the Act. Importantly, section 318(3) of the Act provides that the "evidence of the whole of the circumstances shall be admissible on the hearing of the presentment". In short, the practical effect of this provision is that the Appellant's ingestion of cannabis was relevant to the proof of both particulars.

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6.5 As a consequence of laying a charge of culpable driving causing death, section 422A(1) of the Crimes Act 1958 is enlivened – that section provides for an alternative verdict, namely dangerous driving causing death or serious injury.

6.6 Section 319(1) of the Crimes Act 1958 deals with the offence of dangerous driving causing death or serious injury. That section provides –

> A person who, by driving 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, causes the death of, or serious injury to, another person is guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum).

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6.7 The above section was in operation at the time of the offences. On 19 March 2008, the Victorian Parliament amended section 319 to increase the maximum penalty to 10 years imprisonment in circumstances where the driving caused the death of another person (the maximum penalty for causing serious injury to another person remained fixed at 5 years).[5]

The trial

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6.8 The trial commenced in the County Court before Judge Douglas on 1 September 2008. The Appellant pleaded Not Guilty. On 9 September 2008, the trial judge commenced her Charge after the close of evidence.

6.9 At the outset, the judge directed the jury as follows[6] -

> Each counsel has mentioned the alternative charge of dangerous driving causing death which is a statutory alternative to culpable driving causing death, so it is not on the presentment. But I will tell you about that later. So you have two counts of culpable driving causing death and you do not have to concern yourself with the alternative charge unless you acquit the accused of culpable driving. (emphasis added)

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6.10 After discussing a number of topics, the judge turned to the elements of the offences. The judge instructed the jury they were bound to accept the directions as they related to the law.[7]

6.11 The judge charged first on the crime of culpable driving causing death, with such directions escaping criticism by Counsel for the Appellant.[8] Those directions are not challenged by the Appellant in this appeal. In respect of the counts, the only issue in dispute at trial was the element of "culpable". The evidence touching on this issue was summarised by the trial judge at 282-291 of her Charge.

[5] See section 5, Crimes Amendment (Child Homicide) Act 2008
[6] See *R v King* [2011] VCC 1374, at 258
[7] See *R v King* [2011] VCC 1374, at 273
[8] See *R v King* [2011] VCC 1374, at 273-281, 292

Alternative charge

6.12 The trial judge then moved to the alternative offence of dangerous driving causing death. The judge directed the jury as follows[9] –

> Now I will move to the statutory alternative charge of dangerous driving causing death. As I have told you, and you are aware, Count 1 and Count 2 charges the accused with the offence of culpable driving causing death. If you are not satisfied beyond reasonable doubt as to Count 1 and Count 2 the law provides that in those circumstances you are entitled to find the accused not guilty of the crime of culpable driving causing death but guilty of the lesser crime of dangerous driving causing death only if you are so satisfied of the other elements.
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> ... Dangerous driving causing death is an alternative to each of the charges on the presentment, so if you are not satisfied beyond reasonable doubt as to Count 1 then you move to dangerous driving causing death and the same in relation to Count 2, so in those circumstances you are entitled to find the accused not guilty of the crime of culpable driving causing death, but guilty of the lesser crime of dangerous driving causing death only if you are satisfied of the other elements.

6.13 The judge administered a "separate consideration" direction in relation to the two offences as follows[10] –

> I remind you that the accused man and the Crown is entitled to a separate consideration of each count on the presentment which is culpable driving causing death, and the lesser alternative of dangerous driving causing death which is available to you by law, that lesser effect. It would be a betrayal of your oath to arrive at a verdict by compromise between these two offences. That is culpable driving causing death and dangerous driving causing death. You may only find the accused guilty of either of them if you are unanimously satisfied beyond reasonable doubt of the elements of the offence of which you propose to find the accused guilty.

6.14 Before spelling out the elements of the crime of dangerous driving causing death, the judge again reminded the jury as to the alternative nature of the offence as follows[11] –

> Dangerous driving causing death, as I said, is an alternative offence to culpable driving casing death. <u>This means that you only need to consider it if you find the accused not guilty of culpable driving causing death</u>. If you find the accused guilty of culpable driving causing death you do not need to make a determination of whether he is also guilty of dangerous driving causing death; it is an alternative. (emphasis added)

6.15 In short, the judge in her charge to the jury repeatedly emphasized the <u>alternative</u> nature of the two offences in question, and the order in which to approach their task.

6.16 The judge then charged the jury on the crime of dangerous driving causing death.[12] The only issue in dispute was the element of "dangerousness". The evidence touching on this issue was summarised by the judge at 298 of her Charge.

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[9] See *R v King* [2011] VCC 1374, at 294
[10] See *R v King* [2011] VCC 1374, at 294
[11] See *R v King* [2011] VCC 1374, at 295
[12] See *R v King* [2011] VCC 1374, at 295-297

6.17 Finally, the judge instructed the judge as to the important differences between the offence of culpable driving causing death and dangerous driving causing death as follows[13] –

> There are two important differences between the offence of culpable driving causing death, and dangerous driving causing death that reflect the fact that the offence of culpable driving causing death is a more serious offence. First, the Crown must prove beyond reasonable doubt that the accused drove in a way that significantly increased the risk of harming others. There does not have to be a high risk of death or serious injury. That is only a requirement for culpable driving causing death by gross negligence. And secondly, unlike the offence of culpable driving causing death by gross negligence, in relation to the offence of dangerous driving causing death the Crown does not have to satisfy you that the driving is deserving of criminal punishment.

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6.18 After the judge had provided a comprehensive overview of the evidence in the case, the jury retired to consider its verdict on 10 September 2008. After approximately 3 hours of deliberation, the jury returned verdicts of Guilty on the two counts of culpable driving causing death (limb (a) - negligence as the proven particular).

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6.19 On 30 October 2008 the Appellant was sentenced to 7 years 6 months imprisonment with a non-parole period of 4 years 6 months imprisonment fixed.

Leave to appeal to Court of Appeal

6.20 The Appellant sought leave to appeal against conviction and sentence. On 17 March 2011 the Court of Appeal refused leave in respect of the conviction appeal but allowed the appeal against sentence.[14] The sentence was reduced to 6 years 6 months imprisonment with a non-parole period of 3 years 6 months fixed.

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Impugned directions on dangerous driving causing death

6.21 The directions administered by the judge on dangerous driving causing death were in conformity with authority extant at the time of the trial. However, in the judgment of ***R v De Montero***[15] handed down by the Court of Appeal on 29 October 2009, the Court laid down a series of principles which was said to govern the minimum conduct necessary for a conviction on dangerous driving causing death. In short, the judgment highlighted the need for any direction on dangerous driving causing death direction to include the following[16] –

- that the manner of driving created a considerable risk of serious injury or death to members of the public, and
- that the conduct merited criminal punishment.

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6.22 In this appeal, the Appellant contends the trial judge has diluted the directions on dangerous driving causing death. First, the judge directed the jury that they need not be satisfied that the conduct merited criminal punishment; and secondly, the judge directed the jury that the driving in question need only to have significantly increased the risk of harming others rather than create a considerable risk of serious injury or death to members of the public.[17]

[13] See Trial Transcript, 9/9/2008, at 297-298
[14] See *King v R* [2011] VSCA 69
[15] (2009) 25 VR 694
[16] Ibid, at 716
[17] See *King v R* [2011] VSCA 69, at [16]

Has the diluted direction resulted in a substantial miscarriage of justice?

6.23 In answering this question, the Respondent proceeds on the assumption that the decision in ***R v De Montero*** is correct – however, the Respondent challenged the correctness of this decision in the court below[18] and seeks to maintain that challenge in this Court through the notice of contention.

6.24 As identified by Redlich JA in the court below, the complaint is that the errors in the directions on dangerous driving causing death so diminished the seriousness of the alternative count that it was not a "realistic" alternative. His Honour found that there was "no error of substance" in the directions given; but in any event, any error so identified could not have affected the jury's verdict on the counts of culpable driving causing death.[19]

6.25 Likewise, Mandie JA (with whom Buchanan JA agreed) rejected the argument that the directions on dangerous driving causing death were so deficient as to dilute the correct directions that were given in relation to the offence of culpable driving causing death. In short, his Honour concluded that the substance of the directions on dangerous driving causing death conveyed to the jury the necessary elements of the offence as required by the decision in ***R v De Montero***.[20] The Respondent supports that conclusion.

6.26 Importantly, Mandie JA went on to add[21] –

> Furthermore, and in any event, the way in which the judge directed the jury made it clear that they should first consider the offence of culpable driving and only if they were not satisfied beyond reasonable doubt in relation to those charges should they turn to consider the alternate offence. It is true that it should not be assumed that a jury proceeds in a mechanistic fashion in the course of its deliberations but I consider it to be highly improbable in the present case that the jury would not have first considered the applicant's guilt or innocence of the actual charges in the presentment in accordance with the directions of law given to them, before giving consideration to the alternate offence. In any event, I do not consider that they would have been deflected from a proper consideration of the more serious charges by the directions given in relation to the alternate offence. (emphasis added)

6.27 A similar argument now advanced by the Appellant was rejected by the Court of Appeal in ***R v De Montero*** – for as the Court pointed out, once the jury were satisfied as to the offender's guilt on the more serious charge, the statutory alternative did not fall for consideration. And, with respect, that analysis is apposite to this case.

6.28 In this case, the trial judge repeatedly instructed the jury that the alternative counts of dangerous driving causing death were not to be considered until the jury had concluded the Appellant was not guilty of the more serious counts of culpable driving causing death. In short, there is nothing in the transcript or in the particular circumstances of the trial which suggests that the jury would not have followed that direction.

6.29 A direction to consider the more serious offence first is routinely given in criminal trials where there is an alternative verdict available. In such circumstances, it is not the function of the jury to assess which offence "best" fits the evidence, but rather to consider the

[18] See *King v R* [2011] VSCA 69, at [5], [21]
[19] See *King v R* [2011] VSCA 69, at [3]-[4]
[20] See *King v R* [2011] VSCA 69, at [22]
[21] See *King v R* [2011] VSCA 69, at [23]

evidence and determine whether an accused has committed the criminal offence as charged on the presentment – if not so satisfied, the law provides for the consideration by the jury of an alternative offence (lesser in criminal gravity) rather than proceed direct to an acquittal.

Strength of prosecution case

6.30 At the outset, the Respondent does not accept that the case for culpable driving causing death was a "weak" one. On the contrary, there was ample evidence demonstrating guilt.

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6.31 In brief, the evidence in this case included the following features –

- the intersection in question was well illuminated by lighting emanating from overhead street lights and stood out visibly in the rural setting;[22]
- the intersection was visible from 700 metres back on Evans Road[23]
- but for the collision the Appellant's vehicle would have entered into signed roadworks and barricades on the northern side of the intersection (Evans Road)[24]
- there were 2 warning signs (80 metres back) and 2 traffic island signs (50 metres back) erected on Evans Road (with no obstruction) prior to the intersection[25]
- the intersection was marked with Give Way signs[26]
- the Appellant entered the intersection at 75 km/p/h[27]
- there was no evidence of pre-collision braking at all by the Appellant's vehicle[28]
- the Appellant was advised of the upcoming intersection just minutes earlier by a friend (had been directed to look for and turn left at the intersection in question)[29]
- 0.013 ug/ml of THC (cannabis) detected in the Appellant's blood after the collision, but the reading would have been considerably higher at the time of the collision[30]
- THC (cannabis) at the above level indicates that the Appellant had ingested cannabis within previous 1 – 3 hours (Appellant's account quite implausible)
- THC (cannabis) at the above level would have impaired a person's ability to drive.[31]

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An unrealistic alternative?

6.31 The Appellant's arguments proceed on the basis that the deficient directions on dangerous driving causing death so diluted the requirements as to render the offence an "unrealistic" alternative. As to the primary argument that the deficiencies in the directions on dangerous driving causing death in reality only left the jury with the unpalatable option of acquitting the Appellant versus convicting on culpable driving causing death, the Respondent rhetorically asks what is it about the impugned directions on dangerous driving causing death that enabled the jury to undertake such a "qualitative" assessment of the lesser crime?

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6.32 First, it is said that the jury would not have considered the lesser offence a viable option because it only involved a requirement of a real risk of harm (rather than a risk of serious injury or death); and secondly, because the prosecution did not have to prove that the driving merited criminal punishment, such a crime would attract inadequate punishment.

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[22] See *R v King* [2011] VCC 1374, at 104-106, 207-208, 22-221, 233-235
[23] See *R v King* [2011] VCC 1374, at 210-211
[24] See *R v King* [2011] VCC 1374, at 107, 129
[25] See *R v King* [2011] VCC 1374, at 106-109, 211-212
[26] See *R v King* [2011] VCC 1374, at 208
[27] See *R v King* [2011] VCC 1374, at 131
[28] See *R v King* [2011] VCC 1374, at 110, 129, 206
[29] See *R v King* [2011] VCC 1374, at 81-82
[30] See *R v King* [2011] VCC 1374, at 152, 157-158, 168, 174-175
[31] See *R v King* [2011] VCC 1374, at 158, 175-178, 186-188

6.33 The above factors were relied upon by the trial judge to distinguish the two crimes – and in a real sense, to drive home to the jury that the crime of culpable driving causing death was a much more serious offence than dangerous driving causing death. If so, it is difficult to understand how a jury would then reason that because the elements are different, the lesser offence was simply not a viable alternative in circumstances where a death occurred.

6.34 Furthermore, as noted by Mandie JA, the trial judge pointed out to the jury that "genuine accidents happen for which no one will be criminally liable", and thus the jury were provided with a contrast between convicting (on either offence) and altogether acquitting the Appellant.

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6.35 The jury had been instructed that dangerous driving causing death was a statutory alternative – given that each of the particulars (going through a Give Way sign, and driving whilst under the influence of a drug) constituted particular offences carrying criminal punishment, the jury would have well understood that the statutory alternative was a serious crime.

6.36 Finally, history shows that juries routinely returned alternative verdicts of dangerous driving causing death in culpable driving causing death cases even with pre- ***R v De Montero*** directions. The case of ***R v Towle*** is a notorious example. The offender was charged with, inter alia, 6 counts of culpable driving causing death and 4 counts of negligently causing serious injury. The facts involved a driver colliding into a group of teenagers primarily as a result of inattention. The trial attracted extensive media attention in this State.

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6.37 The trial judge directed the jury in that case as follows[32] –

> In law there are alternative verdicts on the first ten counts. If you find the accused guilty on Counts 1 to 10, you do not go further and consider an alternative verdict. So if you find him guilty of Counts 1 to 6, culpable driving causing death, and guilty on Counts 7 to 10, negligently causing serious injury, you do not concern yourself at all with any alternative verdicts. If, however, you found him not guilty on those counts, or any of them, you would then consider an alternative verdict, which is dangerous driving. Dangerous driving is less than criminal negligence, it is less than culpable driving, it is dangerous driving, and in law it is an alternative.
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> So what is the alternative in law? On Counts 1 to 6, the counts of causing death, the alternative in law is dangerous driving causing death; and on Counts 7 to 10, the counts of causing serious injury, the alternative is dangerous driving causing serious injury....
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> For a conviction on any of the alternative counts of dangerous driving causing death or serious injury, the prosecution must prove that the accused, by driving the vehicle at a speed or in a manner that was dangerous to the public, having regard to all the circumstances of the case, caused death or serious injury to the person named in the count. So that is the first element the prosecution must prove for a conviction on the alternative to any of the Counts 1 to 10, dangerous.
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> ... Dangerous driving means that the accused created an objective risk of death or serious injury to others which a reasonable person in his situation ought to have recognised as a real danger to the public. That is what dangerous driving means.
>
> Dangerous driving means that the accused created an objective risk of death or serious injury to others which a reasonable person in his situation ought to have

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[32] See *R v Towle*, Trial Transcript, 4/3/2008, at 1923-1926 (Sentence reported in [2008] VSC 101)

realised - ought to have recognised as a real danger to the public. So you will see, ladies and gentlemen, that that is different to culpable driving with criminal negligence, or causing serious injury by criminal negligence, because criminal negligence is failing unjustifiably and to a gross degree, whereas dangerous driving is less than that; it is that the accused created that an objective risk, not a gross degree and a high risk, but a risk objectively of death or serious injury to others which a reasonable person in his situation ought to have recognised as a real danger to the public. So it does not involve the degree of risk, the gross degree and the high risk that is involved in culpable driving, and it does not involve the element that the driving merited criminal punishment. It is less than that, dangerous driving causing death or serious injury....

I will not say any more about the dangerous driving alternative, ladies and gentlemen, except this: The charge on Counts 1 to 10 is criminal negligence. That is what the prosecution has charged the accused with and that is what it has to prove beyond reasonable doubt. Mr Gamble has put to you that the prosecution has proved those charges beyond reasonable doubt and he does not suggest to you that you should find the accused not guilty of those and guilty of the lesser alternatives. He does not suggest that at all. He says this is criminal negligence, no less.

Mr Richter, although he did not refer to the alternatives, puts to you that you should acquit the accused: you should not find him not guilty of Counts 1 to 10 but guilty of the alternatives. Mr Richter has said you would find him not guilty at all. Not guilty Counts 1 to 10, not guilty on the alternatives, not guilty at all. That is how the two sides put their cases, ladies and gentlemen.

The reason I have referred to the alternative verdicts is because in law they exist, and therefore if you found the accused not guilty of any of Counts 1 to 10, you would then go on and look at the alternatives. But if you convicted him of Counts 1 to 10, you would not go on and consider the alternatives. That is the procedure you must follow, ladies and gentlemen.

6.38 Thus, three things can be said about the above directions –

(i) the judge directed that the dangerous driving need only create <u>an objective risk</u> of death or serious injury – whilst the direction adverted to the risk as one greater than mere harm, the direction did not state that the risk had to be a "considerable" one as required by ***R v De Montero***;
(ii) the direction specifically omits any reference to the dangerous driving meriting criminal punishment; and
(iii) the trial was not fought on the basis of the alternative counts of dangerous driving causing death being viable options, whereas the contrary occurred in this case.[33]

6.39 Despite the above, the jury in ***R v Towle*** returned alternative verdicts of dangerous driving causing death on the culpable driving causing death counts; and alternative verdicts of dangerous driving causing serious injury on the negligently causing serious injury counts.

6.40 In short, the pre- ***R v De Montero*** directions in the ***R v Towle*** trial did not result in the jury regarding the alternative counts as sufficiently diluted as to be "unrealistic" verdicts in all the circumstances.[34]

[33] See *King v R* [2010] VSCA 69, at [17]
[34] Towle subsequently appealed against his sentence only – see *R v Towle* [2009] VSCA 280

Application of *Gilbert v The Queen*

6.41 The Respondent submits the decision of this Court in ***Gilbert v The Queen***[35] does not arise for examination here – that case stands for the proposition that where there is sufficient evidence justifying a verdict on a lesser offence, the lesser offence should be left to the jury in their deliberations on the more serious offence. Such a principle is now particularly well-settled in homicide cases; but it can only avail the Appellant in this case if it can be shown that the lesser offence of dangerous driving causing death was not "in substance" left to the jury.[36] In light of the fact-finding, any misdirection on the lesser offence could not have affected the outcome in this case.[37]

Conclusion on appeal

6.42 As identified above, any perceived deficiency in the directions on dangerous driving causing death did not deflect the jury from a proper consideration of the evidence in support of the counts of culpable driving causing death. The directions as to these latter offences conformed to conventional authority in this State.

6.43 Importantly, the Respondent notes that there is no suggestion that there is insufficient evidence to sustain the verdicts.

6.44 In short, the Appellant must show that the jury engaged in a "qualitative" assessment of the alternative offence of dangerous driving causing death and rejected it absolutely as a possible verdict – how the jury was to do this remains uncertain, but more importantly, why the jury would do so in contravention of the judge's direction remains hitherto unexplained. Of course, added to the last is the observation that counsel for the Appellant in his closing address to the jury conceded that such a verdict was indeed open to them on the evidence.[38]

Part VII: RESPONDENT'S ARGUMENT ON THE NOTICE OF CONTENTION

Directions on dangerous driving causing death

7.1 The trial judge directed the jury on the elements of dangerous driving causing death as follows[39] –

> The issue in relation to the alternative to Count 1 and the alternative to Count 2 of dangerous driving causing death is whether the accused was driving dangerously, which is the second element, and I am now going to define that for you. And when I say "must prove" I always mean beyond reasonable doubt. The Crown must prove beyond reasonable doubt that the accused was driving dangerously. That is, he was not properly controlling his vehicle, thereby creating a real risk that somebody would be hurt. I will say that again. The Crown must prove beyond reasonable doubt that the accused was driving dangerously, that is, he was not properly controlling his vehicle thereby creating a real risk that somebody would be hurt.
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> This element will be met if you find beyond reasonable doubt the accused's manner

[35] (2000) 201 CLR 414; contra *Ross v The King* (1922) 30 CLR 246, at 254
[36] See *R v Kane* (2001) 3 VR 542; *Gillard v The Queen* (2003) 219 CLR 1; *R v Makin* (2004) 8 VR 262; *R v Christy* (2007) 16 VR 647; *R v DD* (2007) 19 VR 272
[37] See *R v Schaeffer* (2005) 13 VR 227; *R v Nguyen & Ors* [2010] VSCA 23
[38] See Extract of Closing Addresses, at 40-42
[39] See *R v King* [2011] VCC 1374, at 296-297

of driving was dangerous to the public. Manner of driving includes all matters concerned with the management and control of the vehicle, including his driving skill. The law says that the risk of harm created by the accused's driving must have been greater than the risk of harm ordinarily associated with driving. This recognises the fact that driving is always a risky activity. Even [where (sic)] a person drives perfectly there is a chance that he will have an accident and hurt somebody, and as you will be aware people do not always drive perfectly. Even the best drivers occasionally lose attention for a moment or make minor mistakes, increasing the risk to other road users. These ordinary risks of the road are not the
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focus of this element. For this element to be satisfied the accused must have driven in a manner that significantly increased the risk of harming others. This could be because it increased the likelihood of a collision. For this element to be satisfied you do not need to find that the accused's driving put a specific identifiable person at risk of harm. It will be sufficient if you find that any actual or potential road users, including the passengers, would have been put at real risk by his manner of driving. Also you do not need to find that the accused realised that he was driving dangerously. This element will be satisfied if a reasonable person in the accused's situation would have considered that his manner of driving to be dangerous regardless of what the accused himself believed.

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7.2 The above direction was routinely administered in this State until a similar direction was recently struck down by the Court of Appeal in ***R v De Montero***.[40] In that decision, the Court stated[41] –

> It must be made clear to the jury, in appropriate language, that before they can convict of dangerous driving, they must be satisfied:
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> 1. That the accused was driving in a manner that involved a serious breach of the proper management or control of his vehicle on the roadway such as to merit
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> criminal punishment. It must involve conduct more blameworthy than a mere lack of reasonable care that could render a driver liable to damages in civil law.
> 2. That the breach must be so serious as to be in reality, and not just speculatively, potentially dangerous to others who, as members of the public, may at the time be upon or in the vicinity of the roadway.
> 3. That the manner of driving created a considerable risk of serious injury or death to members of the public.
> 4. That the risk so created significantly exceeded that which is ordinarily associated with being on or near a highway.
> 5. That in determining whether the manner of driving was "dangerous" the test is
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> an objective one. Would a reasonable driver in the circumstances of the accused have realised that the manner of driving involved a breach of the kind discussed in paras 1 and 2, and also gave rise to the risk identified in paras 3 and 4.

7.3 The decision in ***R v De Montero*** has been subsequently applied in ***Guthridge v R***,[42] ***King v R*** (this matter) and ***Ogden v R***.[43] To the best of the Respondent's searches, the decision has not been considered, followed or applied in any other Australian jurisdiction.

7.4 The deficiencies in the directions on dangerous driving causing death in this case according to ***R v De Montero*** are two-fold –

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[40] (2009) 25 VR 694
[41] Ibid, at 716 [80]
[42] (2010) 27 VR 452
[43] (2011) 58 MVR 419

(i) the trial judge failed to instruct the jury that the manner of driving need to create a considerable risk of serious injury or death to members of the public, and

(ii) the trial judge failed to instruct the jury that the conduct in question must merit criminal punishment.

7.5 The Respondent contends that the trial judge's directions in relation to dangerous driving causing death in this case were in accordance with the decisions of this Court in ***McBride v The Queen***[44] and ***Jiminez v The Queen***;[45] and that this Court should affirm the directions administered by the trial judge as conforming to law. In other words, this Court should reject the decision of the Court of Appeal in ***R v De Montero*** as contrary to precedent.

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History of offence of dangerous driving in Victoria

7.6 The original "dangerous driving" provision was section 1 of the Motor Car Act 1903 (UK). That provision was copied into this State by virtue of section 10 of the Motor Car Act 1909 (Vic). Over the last 100 years the "dangerous driving" provisions in Victoria have been transferred to and from the Motor Car Act 1958, Road Safety Act 1958 and the Crimes Act 1958.

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7.7 The current version of the "dangerous driving" provision is to be found in section 64(1) of the Road Safety Act 1986 which provides –

> 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.

Test for dangerous driving

7.8 The test for dangerous driving has always been held by the courts as an objective assessment of the driving in question.[46]

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7.9 In refusing a special leave application, this Court's decision in ***The King v Coventry***[47] sets out early statements as to what constitutes driving in a manner dangerous to the public. Starke J observed[48] –

> The offence is established if it be proved that the acts of the driver create a danger, real or potential, to the public.

7.10 This area of the law was revisited by this Court in ***McBride v The Queen***.[49] Speaking in relation to section 52A of the Crimes Act 1900 (NSW), a provision drafted in similar terms to that of section 319(1) of the Crimes Act 1958 (Vic), Barwick CJ stated[50] –

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> 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

[44] (1966) 115 CLR 44
[45] (1992) 173 CLR 572
[46] See *The King v Coventry* (1938) 59 CLR 633; *McBride v The Queen* (1966) 115 CLR 44; *Jiminez v The Queen* (1992) 173 CLR 572
[47] (1938) 59 CLR 633
[48] Ibid, at 639
[49] (1966) 115 CLR 44
[50] Ibid, at 49-50

member or as members of the public may be upon or in the vicinity of the roadway on which the driving is taking place...

> This quality of being dangerous to the public in the speed or manner of driving does not depend upon resultant damage, though to complete the offence under the section, impact causing damage must occur during that driving. Whilst the immediate result of the driving may afford evidence from which the quality of the driving may be inferred, it is not that result which gives it that quality. A person may drive at a speed or in a manner dangerous to the public without causing any actual injury: it is the potentiality in fact of danger to the public in the manner of driving, whether realized by the accused or not, which makes it dangerous to the public within the meaning of the section.
>
> This concept is in sharp contrast to the concept of negligence. The concept with which the section deals requires some serious breach of the proper conduct of a vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others. This does not involve a mere breach of duty however grave, to a particular person, having significance only if damage is caused thereby. (emphasis added)

7.11 Finally, in ***Jiminez v The Queen***,[51] this Court approved of its earlier decision in ***McBride v The Queen.*** In relation to the conduct required to sustain a conviction, Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ stated[52] –

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

Introduction of dangerous driving causing death or serious injury provision in Victoria

7.12 In 2004, the Victorian Parliament decided to introduce a new offence of dangerous driving causing death or serious injury. When introducing the *Crimes (Dangerous Driving) Bill*, the Attorney-General made the following points in the Second Reading Speech[53] -

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[51] (1992) 173 CLR 572

[52] Ibid, at 579

[53] See *VicHansard*, Hulls, 3 June 2004, at page 1797-1798

Currently, our courts and prosecutors have two main options when it comes to serious driving offences:

culpable driving causing death, which carries a maximum penalty of 20 years imprisonment and a minimum license disqualification period of two years; and

dangerous driving, which carries out a maximum penalty of two years imprisonment and a minimum license disqualification period of six months.

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Many in the community, particularly those whose lives have been affected by fatal road collisions, have expressed concerns that there is a gap in the seriousness between these offences.

This bill will fill that gap by creating a new offence which lies between the two existing offences. This amendment creates a new indictable offence of dangerous driving causing death or serious injury. To establish this offence the prosecution will not be required to prove criminal negligence, which is required to prove culpable driving causing death. Rather, to establish the new offence, the prosecution will have to prove that the accused drove at a speed or in a manner dangerous to the public having regard to all the circumstances of the case, and by doing so, caused the death of or serious injury to another person.

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7.13 On the basis of the legislative changes made in Victoria there is no warrant for moving away from the generally accepted test for dangerous driving as laid down in ***McBride v The Queen*** and ***Jiminez v The Queen***. To the contrary, it is clear that the amendments of 2004 were intended to retain the existing test.

<u>Direction to jury in accordance with *McBride v The Queen*</u>

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7.14 In accordance with ***McBride v The Queen*** a charge to the jury on dangerous driving under section 319 of the <u>Crimes Act</u> 1958 must contain the following requirements –

- an identification of what is charged as the manner of driving;
- was that manner of driving in itself or in its circumstances dangerous to the public?;
- did the impact which caused the death or serious injury occur while the vehicle was being driven in that manner?;

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- speed or manner dangerous to the public imports a quality in the speed or manner of driving which either intrinsically in all circumstances, or because of the particular circumstances, is in a real sense potentially dangerous to a human being or human being who as a member or member of the public may be upon or in the vicinity of the roadway on which the driving is taking place;
- it is the potentiality of danger to the public in the manner of driving, whether realised or not, which makes it dangerous to the public; and

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- the concept is in sharp contrast to the concept of negligence.

7.15 In short, as set down in ***Jiminez v The Queen***, the question for the jury can be posed in the following manner – does the driving of the motor vehicle in the particular manner pose a real danger (something over and above that ordinarily associated with the driving of a motor vehicle) to the public?

7.16 In this case the trial judge who adapted the model charge met the above requirements in her directions to the jury; and therefore the charge was in accordance with binding law. The judge instructed the jury –

- that the law says that the risk of harm created by the accused's driving must have been greater than the risk of harm ordinarily associated with driving;
- for this element to be satisfied the accused must have driven in a manner that significantly increased the risk of harming others; and
- it will be sufficient if you find that any actual or potential road users, including the passengers, would have been put at real risk by his manner of driving.

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Decision in *R v De Montero* is erroneous

7.17 The Respondent submits that the Court of Appeal has fallen into error in this matter by following ***R v De Montero***.[54]

7.18 The decision is erroneous because –

- it seeks to introduce the concept of fault rather than an objective test of criminal liability;

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- it treats dangerous driving as a lesser species of criminal negligence; in other words, it creates a second tier of criminal liability for negligence below that of the test set down in ***Nydam v R***[55] and ***R v Shields***[56] in this State;

- whilst acknowledging that dangerous driving is less serious than manslaughter, it imposed the test of "considerable risk of serious injury or death to members of the public", a test exceeding that which is set down for manslaughter by unlawful and dangerous act; and

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- required that the jury be told that the breach merited criminal punishment.

7.19 The Respondent submits that –

- dangerous driving is not a species of criminal negligence but is to be treated as determined by statute;

- the jury is to be directed in accordance with the test set down by this Court in ***McBride v The Queen*** and ***Jiminez v The Queen***;

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- by using the above test there is sufficient distinction between manslaughter and dangerous driving; and

- there is no requirement to introduce the notion found in criminal negligence of "an offence meriting criminal punishment" because (i) the offence does not import any concept of negligence requiring a contrast with the civil standard of liability,[57] and (ii) that is implicit in a provision contained in the Crimes Act 1958.

7.20 The effect of creating a test that requires a "considerable risk" of serious injury or death is to exceed the test that applies to manslaughter by unlawful and dangerous act. In particular, in

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[54] [2009] VSCA 255
[55] [1977] VR 430, at 444
[56] [1981] VR 717, at 723
[57] For example, the offence of unlawful and dangerous act manslaughter does not contain such a requirement

Wilson v The Queen,[58] in setting the test for dangerous and unlawful act manslaughter, this Court stated[59] -

> However, the utility of a qualifier such as "really" is very questionable. "Serious" and "really serious" may have quiet different connotations in some situations (2). While the *Holzer* direction does not seem to have given rise to difficulties in this regard, the emphasis on really serious injury brings manslaughter perilously close to murder in this respect. The distinction between the two may be easily blurred in the minds of the jury. It is better to speak of an unlawful and dangerous act carrying with it an appreciable risk of serious injury. A direction in those terms gives adequate recognition to the seriousness of manslaughter and to respect for human life, while preserving a clear distinction from murder. The approach in *Holzer* takes away the idea of unexpectedness to a large extent. It does not remove it entirely but then we are not in the area of murder (and its relevant intent) but in the area of manslaughter.

7.21 In relation to the test, there is no requirement for "death" at common law for either negligent or unlawful and dangerous act manslaughter - "high risk that grievous bodily injury would follow" for negligent manslaughter,[60] and "appreciable risk of serious injury" for unlawful and dangerous act manslaughter.[61] To therefore describe the culpability for dangerous driving by including "a considerable risk of death" is to create a degree of culpability higher that that prescribed for manslaughter.

7.22 It is submitted therefore that the test in ***R v De Montero*** which was applied by the Court of Appeal is not consistent with the law as outlined by this Court - and that which applies in other jurisdictions in Australia.

Comparison with other Australian jurisdictions

7.23 Most jurisdictions in Australia have an offence of dangerous driving causing death or serious injury which is categorised as a lesser offence than those of negligently causing death or serious injury by driving. Until the decision of ***R v De Montero***, the test applied in all jurisdictions was that prescribed by ***McBride v The Queen*** and ***Jiminez v The Queen***. A comparison of the Australian jurisdictions follows.

Australian Capital Territory

7.24 In the Australian Capital Territory, there is a summary offence of furious, reckless or dangerous driving in section 7 of the Road Transport (Safety and Traffic Management) Act 1999. Section 7(2) sets out the circumstances to which the court must have regard in deciding whether an offence has been committed. In addition, there is a summary offence of negligent driving occasioning death in section 6 of the Road Transport (Safety and Traffic Management) Act 1999; and an indictable offence of culpable driving causing death in section 29(2) of the Crimes Act 1900.

7.25 Section 7(1) of the Act provides for dangerous driving as follows –

> A person must not drive a motor vehicle furiously, recklessly, or at a speed or in a way that is dangerous to the public, on a road or road related area.

[58] (1992) 174 CLR 313
[59] Ibid, at 333
[60] *R v Shields* [1981] VR 717, 723
[61] *R v Wilson* (1992) 174 CLR 313

7.26 In so far as the definition of "dangerous" driving is concerned, ACT courts have followed ***Jiminez v The Queen*** – see for example, ***Ahadizad v Emerton***.[62]

New South Wales

7.27 Dangerous driving occasioning death is dealt with in section 52A(1) of the Crimes Act 1900. The maximum penalty is 10 years imprisonment. That section provides –

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> A person is guilty of the offence of dangerous driving occasioning death if the vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the vehicle:
>
> (a) under the influence of intoxicating liquor or of a drug, or
> (b) at a speed dangerous to another person or persons, or
> (c) in a manner dangerous to another person or persons.

7.28 The section was discussed in ***R v Saunders***.[63] In that case, the NSW Court of Criminal Appeal applied the test set down by this Court in ***McBride v The Queen***.[64]

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7.29 The following direction is drawn from the NSW Trial Bench Book[65] –

> The manner of driving will be dangerous if the Crown has established that there has been some serious breach of the proper conduct of a vehicle – so serious as to be in reality, and not merely as a matter of speculation, potentially dangerous to another person or to other persons ...

Northern Territory

7.30 The Northern Territory provision regarding dangerous driving causing death is created by section 174F of the Criminal Code.

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7.31 Prior to the introduction of section 174F in 2006, offences involving dangerous driving causing death was prosecuted under the now repealed section 154.[66] That section was discussed by this Court in ***Baumer v The Queen***.[67]

7.32 Section 174F(1) is drafted in the following terms –

> A person is guilty of a crime if:
>
> (a) the person drives a motor vehicle dangerously; and
> (b) that conduct causes the death of any person.

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Section 174F(3) provides for a further definition of "driving a motor vehicle dangerously" and section 174F(4) states that the offence is one of strict liability.

7.33 Section 174F has not as yet received any consideration by the NT Court of Criminal Appeal.

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[62] [2002] ACTSC 20
[63] (2002) 133 A Crim R 104
[64] See also *R v Buttsworth* [1983] 1 NSLR 658; *Warner v R* (1991) 25 NSWLR 382; *R v Goodman*, unreported, NSW CCA, 10/12/1991; *R v LKP* (1993) 69 A Crim R 159; *R v Nolan*, unreported, NSWCCA, 3/2/1994; *R v Hopton*, unreported, NSWCCA, 8/10/1998; *Gillett v R* (2006) 166 A Crim R 419
[65] Criminal Trial Courts, Bench Book, Offences – Dangerous Driving, at 5 (published by NSW Judicial Commission)
[66] See also *R v Ashley* (1991) 1 NTLR 81
[67] (1988) 166 CLR 1

Queensland

7.34 The Queensland provision dealing with dangerous operation of a vehicle is found in section 328A of the Criminal Code 1899. Section 328A(4) relevantly provides –

> A person who operates, or in any way interferes with the operation of, a vehicle dangerously in any place and causes the death of or grievous bodily harm to another person commits a crime … .

10 The phrase "operates, or in any way interferes with the operation of, a vehicle dangerously" is further defined in section 328A(6) of the Act.

7.35 The above section was considered by the Queensland Court of Appeal in ***R v Wilson***.[68] There the Court held that fault was not an element of the offence of dangerous driving; and that only the manner of driving and the objective danger to the public are elements of the offence. The decision of this Court in ***Jiminez v The Queen*** was applied.[69]

South Australia

20 7.36 The offence of reckless and dangerous driving is contained in section 46 of the Road Traffic Act 1961; and the offence of causing death or harm by dangerous use of vehicle or vessel is contained in section 19A of the Criminal Law Consolidation Act 1935.

7.37 Section 19A(1) of the Criminal Law Consolidation Act 1935 provides –

> A person who –
>
> (a) drives a vehicle or operates a vessel in a culpably negligent manner, recklessly, or at a speed or in a manner dangerous to the public; and
>
> 30 (b) by that culpable negligence, recklessness or other conduct, causes the death of another,
>
> is guilty of an indictable offence.

7.38 The offence of driving in a manner dangerous to the public is discussed in a number of authorities.[70] In ***R v Jaeschke***,[71] the SA Court of Criminal Appeal stated the practice in South Australia was for judges to direct juries in accordance with the principles laid down by this Court in ***McBride v The Queen*** and ***Jiminez v The Queen***.[72] In ***R v Hendriksen***,[73] Layton J discusses the test for dangerous driving; in analysing the authorities her Honour
40 refers to the abovementioned High Court decisions.[74]

7.39 In the decision of ***R v Duryea***,[75] White J (Anderson and Kelly JJ agreeing) observed[76] -

> The question whether particular driving is to be characterised as "driving in a manner dangerous to the public" is to be determined objectively. It is a question of

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[68] (2009) 1 Qd R 476; (2008) 189 A Crim R 511
[69] See also *R v Douglas; ex parte A-G* [1991] Qd R 386
[70] See also *Kroon v R* (1990) 55 SASR 476; (1990) 52 A Crim R 15; *R v Rowlson* (1996) 67 SASR 96; *R v Clarke* (2003) 87 SASR 203; *R v Allen* (2003) 142 A Crim R 467
[71] (2007) 99 SASR 300
[72] Ibid, at [32]-[35]
[73] (2007) 98 SASR 571; (2007) 173 A Crim R 512
[74] Ibid, at [25]-[61]
[75] (2008) 103 SASR 70; (2008) 192 A Crim R 286
[76] Ibid, at [13]

whether a reasonable person would regard the accused's manner of driving as involving a risk of injury to other road users which exceeds the risks arising from the ordinary incidents of road use. At least since *R v Coventry*, it has generally been considered that the objective test should be applied by inquiring whether an ordinary person in the situation of the driver would have recognised that his or her driving was dangerous to the public. (emphasis added)

7.40 In ***R v Pearse***,[77] the meaning of driving in a manner dangerous to the public was again canvassed. In this case, the appellant had been convicted of causing death by dangerous driving. In appealing his conviction, the appellant argued, inter alia, the jury must be directed that they are required to be satisfied beyond reasonable doubt that the driving was such that a reasonable person in the situation of the driver would understand that the conduct would give rise to a serious risk of injury to members of the public going beyond the ordinary risks of the road.

7.41 In dismissing this ground, Sulan J (Vanstone and Kourakis JJ agreeing) stated[78] –

> To constitute driving in a manner dangerous to the public, the prosecution must prove beyond reasonable doubt that the act of driving was such that a reasonable person in the situation of the accused would recognise the driving as dangerous, in that it involves a risk of injury to others which exceeds the ordinary risks of the road and amounts to a real danger to the public. (emphasis added)

Tasmania

7.42 The offence of causing death by dangerous driving is contained in section 167A of the Criminal Code Act 1924. In addition, section 32(2A) of the Traffic Act 1925 creates an offence of causing death by negligent driving.

7.43 Section 167A of the Criminal Code Act 1924 provides –

> Any person who causes the death of another person by the driving of a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case ... is guilty of a crime.

7.44 The test as set down by this Court in ***McBride v The Queen*** and ***Jiminez v The Queen*** represents binding authority in Tasmania.[79]

Western Australia

7.45 In Western Australia the offence of dangerous driving causing death is provided for in section 59(1) of the Road Traffic Act 1974. That section relevantly states –

> If a motor vehicle driven by a person (the driver) is involved in an incident occasioning the death of, or grievous bodily harm to, another person and the driver was, at the time of the incident, driving the motor vehicle –
>
> ...

[77] (2011) 58 MVR 435; [2011] SASCFC 65
[78] Ibid, at [20]
[79] See *R v Smith* [1969] SR 159; *Wynwood v Williams* (2000) 111 A Crim R 435; *State of Tasmania v Wahl* [2011] TASSC 40; (2011) 58 MVR 447

(b) in a manner (which expression includes speed) that is, having regard to all of the circumstances of the case, dangerous to the public or to any other person,

the driver commits a crime ...

7.46 The Act also provides for the offence of dangerous driving causing bodily harm (see section 59A(1)(b)), dangerous driving (see section 61) and careless driving (see section 62).

10 7.47 The leading authority interpreting these provisions is ***McPherson v Lucas***,[80] which specifically considered the offence of dangerous driving causing bodily harm.[81] The judgment of the WA Court of Appeal expressly relies upon both ***McBride v The Queen*** and ***Jiminez v The Queen***, and notably does so when discussing the distinction between dangerous driving and careless driving. This distinction was also considered in ***Ansell v Crook***,[82] with Hasluck J again noting the application of the reasoning of the High Court in ***Jiminez v The Queen***.

Conclusion on notice of contention

20 7.48 The culpability attaching to dangerous driving offences falls between careless driving offences and driving offences based on criminal negligence or manslaughter. The ***R v De Montero*** test introduces the notion that culpability is based on "considerable risk of serious injury or death". The test therefore departs from the law as previously understood and applied in Victoria, and all other jurisdictions in Australia.

7.49 This appeal therefore raises two questions of general importance to Victoria -

(1) Is the test for dangerous driving as set down by this Court in ***McBride v The Queen*** (the driving in all the circumstances is, in a real sense, potentially dangerous to
30 members of the public) or as set down by the Court of Appeal in ***R v De Montero*** (the manner of driving created a considerable risk of serious injury or death to members of the public)?; and

(2) Is it necessary for a trial judge when charging a jury on dangerous driving to instruct that the jury has to be satisfied that the driving merited criminal punishment (as required by ***R v De Montero***)?

7.49 The Respondent submits both questions should be answered in the negative.

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Dated: this 21st day of October 2011

Gavin J.C. Silbert S.C.

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[80] [2008] WASCA 56; (2008) 181 A Crim R 587

[81] See also *Daniels v Bilessuris* (1985) 2 MVR 492; *Kitson v R* (1987) 5 MVR 228; *McLuckie v Williams* (1995) 82 A Crim R 118; *Hedge v Thurstun* [2001] WASCA 43; *Hasani v Read* [2003] WASCA 40

[82] [2009] WASC 82