HIGH COURT OF AUSTRALIA

FRENCH CJ,
HEYDON, CRENNAN, KIEFEL AND BELL JJ

TRENT KING APPELLANT

AND

THE QUEEN RESPONDENT

King v The Queen [2012] HCA 24
20 June 2012
M129/2011

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

M J Croucher SC with C A Boston for the appellant (instructed by Balmer & Associates)

G J C Silbert SC with B L Sonnet for the respondent (instructed by Office of Public Prosecutions Victoria)

CATCHWORDS

King v The Queen

Criminal law – Appeal against conviction – Jury misdirection – Appellant convicted of two counts of "culpable driving causing death" contrary to s 318(1) of the *Crimes Act* 1958 (Vic) ("the Act") – Jury had power under the Act to return an alternative verdict of "dangerous driving causing death" contrary to s 319(1) if satisfied that accused not guilty of offence charged under s 318 – Trial judge directed jury that dangerous driving established by proof accused drove in way that "significantly increased the risk of harming others" and that Crown did not have to show driving was "deserving of criminal punishment" – Whether trial judge misdirected jury – Whether *R v De Montero* (2009) 25 VR 694 should be followed – Whether departure from trial according to law or miscarriage of justice.

Words and phrases – "culpable driving causing death", "deserving of criminal punishment", "dangerous driving causing death".

Crimes Act 1958 (Vic), ss 318, 319, 422A(1).

FRENCH CJ, CRENNAN AND KIEFEL JJ.

Introduction

1 This appeal against two convictions for culpable driving causing death contrary to s 318(1) of the *Crimes Act* 1958 (Vic) ("the Crimes Act"), concerns the way in which alternative verdicts for the lesser offence of dangerous driving causing death, contrary to s 319(1) of the Crimes Act, were left to the trial jury. In the Court of Appeal of the Supreme Court of Victoria (Buchanan, Redlich and Mandie JJA), the appellant, Trent Nathan King, contended unsuccessfully that the trial judge (Douglas J) had misdirected the jury on the lesser offence. He complained that the trial judge had pitched the standard of dangerous driving, necessary for conviction of the lesser offence, at such an erroneously low level of culpability that the jury would have been less inclined to consider convicting him of that offence. Her Honour told the jury that dangerous driving was established by proof that the accused drove in a way that "significantly increased the risk of harming others." Her Honour's direction accorded with existing authority in Victoria. The subsequent decision of the Court of Appeal in *R v De Montero*[1] construed s 319 as imposing a higher level of culpability than set out in the trial judge's direction. It required driving that created "a considerable risk of serious injury or death to members of the public."[2] It also required conduct by the accused in his manner of driving which was such as to merit punishment by the criminal law. The decision in *De Montero* was applied by the Court of Appeal in this case. For reasons which are set out below, *De Montero* should not be followed.

2 The trial judge's direction was potentially misleading in one respect. Her Honour directed the jury that, in order to establish that Mr King had committed the offence of dangerous driving causing death, it was not necessary for the Crown to prove that the driving said to be dangerous was deserving of criminal punishment. By that direction, which was contrary to the guidelines later set down in *De Montero*, her Honour sought to exclude the criterion of criminal negligence from the jury's consideration of the offence under s 319. As is explained later in these reasons, her Honour's understanding of s 319 in that regard was correct. Insofar as the direction had the potential to mislead the jury, it did not constitute a miscarriage of justice. Such a conclusion is reinforced by the absence of any request for a redirection by defence counsel. The appeal should be dismissed.

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1 (2009) 25 VR 694.

2 *R v De Montero* (2009) 25 VR 694 at 716 [80].

Procedural history

3 On 1 September 2008, Mr King was arraigned in the County Court of Victoria in Melbourne and pleaded not guilty to two counts of culpable driving causing death, contrary to s 318(1) of the Crimes Act. After a trial before a judge and jury he was found guilty on both counts. On 30 October 2008, he was sentenced to a total effective term of imprisonment of seven years and six months, with a non-parole period of four years and six months.

4 On 7 November 2008, Mr King filed applications in the Court of Appeal for leave to appeal against his convictions and sentence. The applications were heard on 9 February 2011. On 17 March 2011, the Court of Appeal dismissed the application for leave to appeal against conviction but allowed the application for leave to appeal against sentence and allowed the appeals against sentence. It reduced his total effective sentence to six years and six months imprisonment with a non-parole period of three years and six months[3].

5 Pursuant to a grant of special leave made on 2 September 2011, Mr King appealed to this Court against the decision of the Court of Appeal dismissing his application for leave to appeal against his convictions. No complaint is made in the appeal to this Court about the trial judge's directions to the jury in relation to the offences of culpable driving causing death of which Mr King was convicted. The sole ground of appeal related to the standard of culpability applied in the direction concerning the alternative verdicts of dangerous driving causing death. The Crown, by notice of contention, challenged the correctness of the decision of the Court of Appeal in *De Montero*.

Factual background

6 On 13 July 2005 at about 1 am Mr King was driving a BMW car north along Evans Road, Cranbourne, approaching the intersection of Evans Road and Thompsons Road, which runs east/west. He was driving two friends to Oakleigh. He drove past a "Give Way" sign at the intersection and collided with a Mitsubishi tray truck entering the intersection on his left from Thompsons Road[4]. The BMW ended up lying on its roof in bushes to one side of the road. Mr King's two passengers died in the collision.

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3 *King v The Queen* (2011) 57 MVR 373.

4 No issue was raised as to whether Mr King had committed an offence in relation to the "Give Way" sign – see eg *Kohn v Sallmann* (1965) 113 CLR 628; [1965] HCA 59.

7 There was evidence from the driver of the Mitsubishi truck and his passengers that the intersection was not well lit. On the other hand, there was evidence of police witnesses that the lighting at the intersection was adequate. The road was in a semi-rural area so that it did not have the same kind of lighting as would be found in a built-up area. There were two yellow signs with a black cross on the left and right hand sides of Evans Road which indicated to vehicles travelling north that they were approaching an intersection. There were also signs at the intersection itself which indicated that the northern extension of Evans Road beyond the intersection was closed for road works.

8 There was no evidence that Mr King had consumed alcohol or that he had been driving irresponsibly prior to the collision. There was, however, evidence of tetrahydrocannabinol in his blood at a level of 13ng/mL, which was characterised by expert witnesses as a "high reading" and which, according to their evidence, would have "significantly impaired" his driving skills at the relevant time. Mr King was travelling within the applicable speed limit, which was 80 kph. His pre-impact speed was estimated by an expert police witness, who examined the vehicles and the collision site, as 75 kph. The same witness described the intersection as having a crash history. He had attended the scene of a fatal accident there in March 2004. There was evidence of a bank of trees near the intersection that would have obscured the vision of a driver travelling north on Evans Road almost to the point at which the driver reached the intersection.

9 Mr King did not give evidence at the trial, nor did he call any witnesses in his defence.

Statutory framework

10 Mr King was charged under s 318 of the Crimes Act which relevantly provided:

> "(1) 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 imprisonment (20 years maximum) or a level 3 fine or both.
>
> (2) For the purposes of subsection (1) a person drives a motor vehicle culpably if he drives the motor vehicle –
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> …
>
> (b) negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a

reasonable man would have observed in all the circumstances of the case; or

…

(d) whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle."

11 The alternative verdict which was left open to the jury, related to the offence of dangerous driving causing death created by s 319 of the Crimes Act. That section relevantly provided[5]:

"(1) 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)."

12 The jury's authority to bring in a verdict of guilty of an offence against s 319 was conferred and conditioned by s 422A(1) which provided:

"If on the trial of a person charged with an offence against section … 318 (culpable driving causing death) the jury are not satisfied that he or she is guilty of the offence charged but are satisfied that he or she is guilty of an offence against section 319 (dangerous driving causing death or serious injury), the jury may acquit the accused of the offence charged and find him or her guilty of the offence against section 319 and he or she is liable to punishment accordingly."

As a matter of construction, the power to deliver an alternative verdict of guilty of the offence under s 319 is conditioned upon the jury not being satisfied that the accused is guilty of the offence charged under s 318. It is only "if" the jury are not so satisfied that their attention is directed to the lesser offence. Consideration of the s 318 offence may therefore be seen as a condition precedent to consideration of the offence under s 319. The word "may" in s 422A(1) is in the nature of a permission, which may be acted upon, when the

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5 Section 319 was amended by s 5 of the *Crimes Amendment (Child Homicide) Act* 2008 (Vic), commencing 19 March 2008, which increased the maximum penalty for dangerous driving causing death contrary to s 319(1) to level 5 imprisonment (10 years maximum), and created a separate provision for dangerous driving causing serious injury in s 319(1A) which retained the penalty of level 6 imprisonment (5 years maximum).

jury is satisfied that the accused is guilty of the offence under s 319. That word governs the composite term "acquit … and find him or her guilty of the offence against section 319". There is no other source of power conferred by the Crimes Act to return a verdict for a lesser offence where culpable driving causing death is charged[6].

The trial judge's directions

13 The trial judge told the jury at the beginning of her charge to them that they would not have to concern themselves with the alternative verdict of dangerous driving causing death unless they acquitted the accused of the offence of culpable driving. That direction was reinforced later in her Honour's charge when she said:

> "Dangerous driving causing death, as I said, is an alternative offence to culpable driving causing death. This means that you only need to consider it if you find the accused not guilty of culpable driving causing death. 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."

14 The trial judge identified the elements of culpable driving causing death. No complaint was made of that aspect of her summing up[7]. The jury was told that "gross negligence" involved a failure "unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in all the circumstances." This required the jury to compare Mr King's conduct with the standard of care that a reasonable person would have exercised in the circumstances. The jury was told, "[p]recisely what that standard of care would have been is for you to decide".

15 The trial judge's direction as to "gross negligence" was qualified by her additional remarks:

> "This is what is meant for the accused's conduct to be grossly negligent. As this is a criminal case it is not enough that his driving was merely negligent to a small degree, which is often in the civil cases of this court,

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6 For authority to deliver alternative verdicts in respect of other classes of offence see ss 4, 6B, 421 and 425-435 of the Crimes Act.

7 The judge correctly directed the jury that they must agree on the kind of culpability, ie gross negligence or driving while affected by drugs.

> people are negligent. It must be so negligent that in your view he deserves to be punished by the criminal law."

16 As is explained later in these reasons, the requirement that criminal negligence be negligence which "deserves to be punished by the criminal law" has its ancestry in the common law relating to involuntary manslaughter[8]. It was a proposition applied by this Court in *Callaghan v The Queen*[9], to the provisions of the *Criminal Code* (WA) relating to involuntary manslaughter involving the negligent driving of a motor vehicle. This Court also held, in that case, that the identical standard of criminal liability applied to the statutory offence of dangerous driving causing death, created by s 291A of the *Criminal Code*.

17 In relation to the alternative verdict of dangerous driving causing death contrary to s 319 of the Crimes Act, her Honour told the jury, inter alia:

> "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."

The requisite risk had to be greater than that ordinarily associated with driving. In that regard her Honour said that the accused must have driven in a manner that significantly increased the risk of harming others.

18 A particular aspect of the direction of which Mr King complains in his appeal to this Court, involved a comparison between the criteria of liability for the offences of culpable driving causing death and dangerous driving causing death. Her Honour said:

> "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

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8 As expounded by Hewart LCJ in *Bateman* (1925) 19 Cr App R 8 and by Lord Atkin in *Andrews v Director of Public Prosecutions* [1937] AC 576.

9 (1952) 87 CLR 115; [1952] HCA 55.

> deserving of criminal punishment. The second element will be met as long as you find that the accused drove in a speed or manner that was dangerous to the public."

No redirection was sought at trial. This is not surprising as the defence counsel's closing address was directed to securing a verdict of acquittal.

The Court of Appeal's decision

19 In dismissing Mr King's application for leave to appeal against conviction, Mandie JA, with whose reasons Buchanan JA and Redlich JA agreed, made the following points:

(a) The trial judge's directions in relation to the charge of culpable driving causing death were correct if taken in isolation and accorded with the decision in *R v De'Zilwa*[10]. Indeed there was no submission to the contrary[11].

(b) However, the trial judge's directions in relation to the alternative charge of dangerous driving causing death were prima facie erroneous having regard to the principles laid down in *De Montero*[12] and the case which followed it, *Guthridge v The Queen*[13]. The correctness of *De Montero* is in issue on this appeal.

(c) One aspect of *De Montero* is its requirement, in respect of the offence of dangerous driving, that there be a direction that the manner of driving must have created "a considerable risk of *serious injury or death* to members of the public", whereas the trial judge said that the manner of driving had to have created a real or significant risk of *harm* to the public[14]. However, the trial judge's directions are to be understood as referring to the degree of risk presented by the manner of driving. It is

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10 (2002) 5 VR 408.

11 *King v R* (2011) 57 MVR 373 at 377 [16].

12 (2009) 25 VR 694.

13 (2010) 27 VR 452.

14 (2011) 57 MVR 373 at 377 [16] (emphasis added).

unlikely that the jury would have regarded the *subject* of the risk as other than death or serious injury[15].

(d) It was "self-evidently illogical and irrelevant … to say", in the direction relating to dangerous driving causing death, that the Crown did not have to satisfy the jury that Mr King's driving was deserving of criminal punishment[16]. But it must have been evident to the jury that the alternative of dangerous driving was an offence and therefore subject to criminal punishment. Indeed the trial judge made reference to, and the jury would have understood that, a person may be criminally liable for the offence[17].

(e) The trial judge's direction had not watered down the elements of the offence of dangerous driving causing death in such a way as to impinge upon or dilute the correct directions that were given in relation to the offence of culpable driving causing death[18].

(f) Moreover, the trial judge had directed the jury 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 alternative offence. It was highly improbable that the jury would not have first considered Mr King'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 they would not have been deflected from a proper consideration of the more serious charges by the directions given in relation to the alternate offence[19].

20 As noted at the outset of these reasons, the principal ground of appeal to this Court concerns the trial judge's direction that it was not necessary for the Crown to prove that the driving said to be dangerous was deserving of criminal punishment. The other ground of appeal raises the question referred to in (c) above, as to the nature or description of the subject of the risk created by the

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15 (2011) 57 MVR 373 at 379-380 [22].

16 (2011) 57 MVR 373 at 377 [16].

17 (2011) 57 MVR 373 at 379-380 [22].

18 (2011) 57 MVR 373 at 379-380 [22].

19 (2011) 57 MVR 373 at 380 [23].

driving. It is sufficient with respect to that ground to state that the Court of Appeal was clearly correct to hold that her Honour's direction is not likely to have misled the jury. The jury is unlikely to have had any doubt about the fact that the offence related to death or serious injury.

21 Before turning to the contentions of the parties on the principal issue, it is necessary to put those contentions and the decision in *De Montero* in context, by reference to the common law relating to criminal negligence and the legislative history of the statutory provisions in question.

Motor vehicle homicide – common law and statute

22 As was pointed out by this Court in *Wilson v The Queen*[20] there are "two categories of involuntary manslaughter at common law: manslaughter by an unlawful and dangerous act carrying with it an appreciable risk of serious injury and manslaughter by criminal negligence."[21] This case is concerned with the interaction between principles of criminal negligence derived from the common law relating to involuntary manslaughter and the statutory offences of culpable driving causing death and dangerous driving causing death.

23 In his *A History of the Criminal Law of England*, published in 1883, Sir James Fitzjames Stephen, drawing on Foster's *Discourse on Homicide*, summarised the common law of unintended homicide caused by a lawful act[22]:

> "Death caused by the unintentional infliction of personal injury is *per infortunium* if the act done was lawful and was done with due caution,

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20 (1992) 174 CLR 313; [1992] HCA 31. See also *R v Lavender* (2005) 222 CLR 67 at 82 [37] and [38] per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2005] HCA 37.

21 (1992) 174 CLR 313 at 333 per Mason CJ, Toohey, Gaudron and McHugh JJ; *Attorney-General (Ceylon) v Pereria* [1953] AC 200 at 205.

22 Stephen, *A History of the Criminal Law of England*, (1883), vol 3 at 76. Stephen said of Foster's work at 78 that he did not think "that any writer subsequent to Foster [had] added much to the subject of the law of homicide." See also Dixon, "The Development of the Law of Homicide", (1935) 9 *Australian Law Journal Supplement* 64 and, relevantly to involuntary manslaughter caused by criminal negligence, *Wilson v The Queen* (1992) 174 CLR 313 at 319-324 per Mason CJ, Toohey, Gaudron and McHugh JJ; Brett, "Manslaughter and the Motorist", (1953) 27 *Australian Law Journal* 6 and 89.

> or was accompanied by only slight negligence. If it was accompanied by culpable negligence, the act is manslaughter."

24 The term "culpable negligence" embodied a distinction between the kind of negligence necessary to establish civil liability and that necessary to establish criminal liability. It was a distinction which could be discerned in cases dating back to the 17th century[23]. It was left to the jury to determine whether the level of negligence deserved a criminal sanction. Stephen recognised and applied the distinction in his own writings and in his judicial role. In 1887, in the case of *R v Doherty*[24], he directed the jury that[25]:

> "Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence, and ought to be punished. As to what act of negligence is culpable, you, gentlemen, have a discretion, and you ought to exercise it as well as you can."

In his *History*, Stephen wrote[26]:

> "In order that homicide by omission [to perform a legal duty] may be criminal, the omission must amount to what is sometimes called gross, and sometimes culpable negligence. There must be more, but no one can say how much more, carelessness than is required in order to create a civil liability … It is a matter of degree determined by the view the jury happen to take in each particular case."

25 The distinction was recognised and applied in Australia. In Victoria, from at least the end of the 19th century, a guilty verdict on a charge of involuntary manslaughter required "a somewhat larger degree of negligence than has to be shown in a civil case."[27] In *R v Gunter*[28], decided in 1921, the Full Court of the

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23 Glanville Williams, *Criminal Law*, 2nd ed (1961) at 108 fn 11; see also Wharton, *The Law of Homicide*, 3rd ed (1907) at 703.

24 (1887) 16 Cox CC 306.

25 (1887) 16 Cox CC 306 at 309.

26 Stephen, *A History of the Criminal Law of England*, (1883), vol 3 at 11.

27 *R v Ah Kin* (1897) 3 ALR (CN) 14 at 14 per Hood J.

28 (1921) 21 SR (NSW) 282.

Supreme Court of New South Wales held that culpable negligence giving rise to criminal responsibility required "a degree of recklessness beyond anything required to make a man liable for damages in a civil action."[29] The most recent decision cited in that case was *Doherty*. The common law position in Australia and the application of the standard of criminal negligence defined at common law to the construction of statutory manslaughter under the Criminal Codes of Queensland and Western Australia were influenced by decisions of the Court of Appeal and the House of Lords in England.

26 In 1925 in *Bateman*[30] Hewart LCJ referred to epithets, including "culpable", "criminal" and "gross", used to describe the degree of negligence necessary to establish criminal liability. He said[31]:

> "whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

In *Andrews v Director of Public Prosecutions*[32] Lord Atkin effectively endorsed that rather instrumental criterion of criminal negligence[33].

27 Culpable negligence giving rise to criminal liability at common law was not the subject of elaboration beyond the kind of directions approved in *Bateman* and *Andrews*. In *Akerele v The King*[34] the Privy Council referred to the impossibility of defining culpable negligence and the impossibility of making the distinction between actionable negligence and criminal negligence "except by means of illustrations drawn from actual judicial opinions."[35]

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29 *R v Gunter* (1921) 21 SR (NSW) 282 at 286.

30 (1925) 19 Cr App R 8, a manslaughter case involving medical negligence.

31 (1925) 19 Cr App R 8 at 11-12.

32 [1937] AC 576.

33 [1937] AC 576 at 582-583.

34 [1943] AC 255.

35 [1943] AC 255 at 262 quoting *R v Noakes* (1866) 4 F & F 920; [176 ER 849].

28 The common law of criminal negligence as enunciated in *Bateman*, *Andrews* and *Akerele*, was considered in Australia in connection with the construction of ss 289 and 266 of the Criminal Codes of Queensland and Western Australia respectively. Those sections imposed a legal duty on persons in charge of dangerous things "to use reasonable care and take reasonable precautions" to avoid danger to the life, safety or health of any person. Section 266 of the *Criminal Code* (WA) was considered by this Court in *Callaghan v The Queen*[36] and s 289 of the *Criminal Code* (Q) by the Supreme Court of Queensland in *R v Scarth*[37]. They were construed as importing the common law of criminal negligence. The common law distinction between criminal and civil negligence was to be maintained[38]. The Court in *Callaghan* referred to *Doherty* and *Andrews*, the derivation of the *Criminal Code* (WA) from the English Criminal Code Bill, and Stephen's discussion, in his *History*, of killing by omission[39].

29 The common law standard of criminal negligence expounded in *Bateman* and *Andrews* was also accepted in Victoria in its application to involuntary manslaughter. In *Nydam v The Queen*[40] a unanimous Full Court of the Supreme Court, in a decision dealing primarily with the question of mens rea, described the requisite standard of negligence as involving[41]:

> "such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment."

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36 (1952) 87 CLR 115.

37 [1945] St R Qd 38.

38 *Callaghan v The Queen* (1952) 87 CLR 115 at 124; *R v Scarth* [1945] St R Qd 38 at 45-46 per Macrossan SPJ, 56 per Stanley AJ. Stanley AJ referred to Sir Samuel Griffith's Explanatory Letter to the draft Code and the identity between s 289 and s 159 of the Criminal Code Bill 1880 (UK), which was based upon s 296 of Stephen's draft Code reflecting the existing common law.

39 (1952) 87 CLR 115 at 122-124.

40 [1977] VR 430.

41 [1977] VR 430 at 445.

The criterion of "a high risk that death or grievous bodily harm would follow" was adopted by the plurality in *Wilson v The Queen*[42].

30 Statutory developments in the Australian States and Territories throughout the 20th century created new offences relating to reckless, dangerous and negligent driving simpliciter and culpable, reckless or dangerous driving causing death.[43] Section 10 of the *Motor Car Act* 1909 (Vic), modelled on s 1 of the *Motor Car Act* 1903 (UK) created, inter alia, the offence of driving "recklessly or negligently or at a speed or in a manner which is dangerous to the public". That offence, absent the reference to negligent driving, was continued by s 318 (1) of the Crimes Act as originally enacted. Although not involving any element of death or injury to any person it was available as an alternative verdict in trials for manslaughter which continued in Victoria as a common law offence punishable by statute[44]. The kind of direction that should be given in a manslaughter trial in relation to an alternative verdict of dangerous driving was set out by Lord Atkin in *Andrews*[45]:

> "the judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in *Bateman's* case and then explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving, and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving." (citation omitted)

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42 (1992) 174 CLR 313 at 333 per Mason CJ, Toohey, Gaudron and McHugh JJ. See also *R v Lavender* (2005) 222 CLR 67 at 75 [17] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

43 Statutory offences relating to culpable or dangerous driving causing death were introduced into South Australia in 1927, Western Australia in 1945, New South Wales in 1951, Queensland in 1964 and Victoria in 1967.

44 *Crimes Act* 1958 (Vic), s 5 preceded by the *Crimes Act* 1915 (Vic), s 5 which in turn was preceded by the *Crimes Act* 1890 (Vic), s 5.

45 *Andrews v Director of Public Prosecutions* [1937] AC 576 at 584-585. See also *Dabholkar v The King* [1948] AC 221 where a statutory offence of criminally negligent conduct was held to establish a lower standard than negligence required for manslaughter. See also the analogy made in the latter case with dangerous driving as an alternative verdict to manslaughter at 224-225.

Taken in context, that passage does not embody or rest upon the premise that negligence is an element of driving "at a speed or in a manner which is dangerous to the public". *Andrews* was ultimately concerned about the appropriate direction to be given in a case of manslaughter involving criminal negligence.

31 In *R v Coventry*[46] this Court considered the offence, created by s 14 of the *Criminal Law Consolidation Act* 1935 (SA), of driving a motor vehicle "in a culpably negligent manner, or recklessly, or at a speed, or in a manner, which is dangerous to the public; and … by such negligence, recklessness, or other conduct" causing the death of a person[47]. The plurality held that driving "at a speed or in a manner which is dangerous to the public" established an objective standard "impersonal and universal, fixed in relation to the safety of other users of the highway."[48] Starke J said "all that is essential is proof that the acts of the driver constitute danger, real or potential, to the public."[49] The test for dangerous driving was thus established as an objective test. That objective test was reflected in this Court's decisions in *McBride v The Queen*[50] and *Jiminez v The Queen*[51], relating to culpable driving causing death under s 52A of the *Crimes Act* 1900 (NSW). That offence was analogous, although not identical, to the offence of dangerous driving causing death created by s 319 of the Crimes Act.

32 Section 52A of the *Crimes Act* 1900 (NSW) was enacted in 1951[52]. It created the offence of culpable driving committed when the death of any person was occasioned through impact with a motor vehicle being driven by a person "at a speed or in a manner which is dangerous to the public"[53]. The quoted criterion

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46 (1938) 59 CLR 633; [1938] HCA 31.

47 (1938) 59 CLR 633 at 637.

48 (1938) 59 CLR 633 at 637-638, quoting Hewart LCJ in *McCrone v Riding* [1938] 1 All ER 157.

49 (1938) 59 CLR 633 at 639.

50 (1966) 115 CLR 44; [1966] HCA 22.

51 (1992) 173 CLR 572; [1992] HCA 14.

52 *Crimes (Amendment) Act* 1951 (NSW), s 2(e). The section was the subject of many amendments and was replaced in 1994 with the enactment of the *Crimes (Dangerous Driving Offences) Amendment Act* 1994 (NSW).

53 Section 52A (1)(b), *Crimes Act* 1900 (NSW).

of liability was, in relevant respects, similar to that used in s 319(1) of the Crimes Act. In *McBride*, Barwick CJ said of the criterion in s 52A[54]:

> "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."

The Chief Justice's observation was expressly approved by the plurality in *Jiminez v The Queen*[55], which was concerned with s 52A of the *Crimes Act* 1900 (NSW).

33 In Barwick CJ's discussion, in *McBride*, of the term "speed or in a manner dangerous to the public" the Chief Justice also said[56]:

> "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)

34 In its decision in *R v Buttsworth*[57] in 1983 the Court of Criminal Appeal of New South Wales treated the offence under s 52A as "a species of negligent driving of less gravity than negligent driving appropriate to manslaughter."[58] *Buttsworth* was referred to in a footnote by the plurality in *Jiminez*, but to support the proposition that the level of risk engendered by dangerous driving must be greater than that ordinarily associated with the driving of a motor vehicle[59].

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54 (1966) 115 CLR 44 at 49-50.

55 (1992) 173 CLR 572 at 579.

56 (1966) 115 CLR 44 at 50.

57 [1983] 1 NSWLR 658.

58 [1983] 1 NSWLR 658 at 674 per O'Brien CJ of Cr D, Street CJ and Nagle CJ at CL agreeing.

59 *Jiminez v The Queen* (1992) 173 CLR 572 at 579 fn 23.

Jiminez does not support the proposition that negligence is an element of driving at a speed or in a manner that is dangerous to the public. Consistently with that view, the Court of Criminal Appeal of New South Wales in *LKP*[60] held that momentary inattention can, depending upon the circumstances of the case, constitute driving in a manner dangerous to the public for the purposes of s 52A. The Court of Criminal Appeal held that *Coventry*, *McBride* and *Jiminez* all stand together. *Buttsworth* was not referred to in that decision. Nor was it referred to by the Court of Criminal Appeal in its decision in *Saunders*[61] in 2002. In that case an appeal against a conviction for dangerous driving causing death was allowed on the basis that the trial judge did not elucidate to the jury "the concept of dangerous driving as distinct from negligent driving"[62]. In *Gillett v The Queen*[63] McClellan CJ at CL, with whom Sully and Hislop JJ agreed, in a case involving an accused who drove while suffering from the medical condition of epilepsy, said[64]:

> "The relevant question is whether the manner of driving, the condition of the vehicle, or the condition of the driver as a matter of objective fact made the driving a danger to the public."

That is not a question which assumes that some species of criminal negligence less than that necessary to make out manslaughter is an element of driving in a manner or at a speed which is dangerous to the public.

Culpable driving causing death and dangerous driving causing death in Victoria

35 In Victoria, the offence of culpable driving causing death under s 318(2) of the Crimes Act was created in 1967 by the *Crimes (Driving Offences) Act* 1967[65]. The degree of negligence to be proven for the purposes of s 318(2)(b)

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60 (1993) 69 A Crim R 159.

61 (2002) 133 A Crim R 104.

62 (2002) 133 A Crim R 104 at 111 [30] per Simpson J, Hodgson JA and Smart AJ agreeing.

63 (2006) 166 A Crim R 419.

64 (2006) 166 A Crim R 419 at 430 [27].

65 A short lived amendment in 1966 imposed a separate penalty for the existing offence of reckless or dangerous driving where death or bodily injury to a person resulted – *Crimes (Dangerous Driving) Act* 1966 (Vic), s 2(b).

was held by the Full Court of the Supreme Court of Victoria in *R v Shields*[66] to be "the same degree as that required to support a charge of manslaughter"[67].

36 In 2002 in *R v De'Zilwa*[68] Charles JA referred to decisions of the Supreme Court of Victoria over a period of more than 30 years setting out the directions which should be given to a jury when s 318 (2)(b) was relied upon by the prosecution. His Honour, with whom Ormiston JA and O'Bryan AJA agreed, applied essentially the same test of criminal negligence as was set out in *Nydam*[69] in 1977. The only relevant difference was that in *De'Zilwa* Charles JA referred to "a high risk" of "death or serious injury"[70] rather than "death or serious bodily harm". *De'Zilwa* was applied by the Court of Appeal in *R v Mitchell*[71]. Callaway JA, with whom Buchanan and Vincent JJA agreed, said[72]:

> "The gross negligence required by s 318(2)(b) of the *Crimes Act* 1958 (culpable driving) … imports a community standard."

Although negligence was made out in that case, the Court of Appeal, applying the common law criterion of criminal negligence, held that the evidence could not have satisfied the jury beyond reasonable doubt that there was[73]:

> "such a great falling short of the standard of care which a reasonable person would have exercised in the circumstances, and which involved such a high risk that death or serious injury would follow, that the driving … merited criminal punishment."

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66 [1981] VR 717.

67 [1981] VR 717 at 724 per Young CJ, Anderson and Brooking JJ, referring to *Akerele v The Queen* [1943] AC 255 at 262; *Callaghan v The Queen* (1952) 87 CLR 115 at 123; *Attorney-General for Ceylon v Perera* [1953] AC 200 at 205.

68 (2002) 5 VR 408.

69 *Nydam v The Queen* [1977] VR 430 at 444-445.

70 [2002] 5 VR 408 at 423 [46].

71 (2005) 44 MVR 567.

72 (2005) 44 MVR 567 at 569 [9].

73 (2005) 44 MVR 567 at 569 [9], quoting *R v De'Zilwa* (2002) 5 VR 408 at 423 [46].

37 The offence of dangerous driving causing death or serious injury was introduced into the Crimes Act in 2004 with the insertion of a new s 319[74]. In the Second Reading Speech for the Crimes (Dangerous Driving) Bill the Attorney-General said[75]:

> "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."

38 The ordinary meaning of "dangerous" is "[f]raught with or causing danger; involving risk; perilous; hazardous; unsafe"[76]. It describes, when applied to driving, a manner or speed of driving which gives rise to a risk to others, including motorists, cyclists, pedestrians and the driver's own passengers. Having regard to the ordinary meaning of the word, its context in s 319 and the purpose of s 319, as explained in the Second Reading Speech, negligence is not a necessary element of dangerous driving causing death or serious injury. Negligence may and, in many if not most cases will, underlie dangerous driving. But a person may drive with care and skill and yet drive dangerously. It is not appropriate to treat dangerousness as covering an interval in the range of negligent driving which is of lesser degree than driving which is "grossly negligent" within the meaning of s 318(2)(b) of the Crimes Act. The offence created by s 319 nevertheless takes its place in a coherent hierarchy of offences relating to death or serious injury arising out of motor vehicle accidents. It is not necessary to that coherence that the terms of the section be embellished by reading into them a requirement for proof of some species of criminal negligence.

The decision in *De Montero*

39 In *De Montero* the Court of Appeal held that a jury should be told "that while dangerous driving necessarily involves criminal negligence, it need not, like culpable driving, be grossly negligent, but … must involve a serious breach

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74 *Crimes (Dangerous Driving) Act* 2004 (Vic).

75 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 2004 at 1798.

76 *The New Shorter Oxford English Dictionary*, 4th ed (1993), vol 1 at 591, sense 2.

of the proper management or control of a vehicle on the roadway."[77] That observation, with respect, misstated the concept of dangerous driving causing death by requiring an element of negligence[78]. As the plurality said in *Jiminez*, in relation to s 52A of the *Crimes Act* 1900 (NSW)[79]:

> "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." (emphasis added)

40 In *De Montero* the Court of Appeal reviewed decisions of State Courts and of this Court relating to statutory offences involving driving at a speed or in a manner dangerous to the public. Their Honours set out a number of matters of which a jury had to be satisfied before they could convict a person of dangerous driving causing death or serious injury. They were[80]:

> "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 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.

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77 (2009) 25 VR 694 at 716 [81].

78 A proposal by the Law Reform Commission of Victoria in 1992 to replace s 318 of the Crimes Act with a dangerous driving offence applying to persons driving "in a manner that falls substantially below the level of care that a competent and careful driver would take in the circumstances" was not adopted because the government believed that the existing culpable driving offence was well understood and had been shown to work: Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 May 1992 at 1457; Law Reform Commission of Victoria, *Death Caused by Dangerous Driving*, Report No 45, (1992) at 36.

79 (1992) 173 CLR 572 at 579.

80 (2009) 25 VR 694 at 716 [80].

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 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." (footnotes omitted)

Their Honours also held that in any case in which dangerous driving causing death is left as an alternative to culpable driving, the offence of dangerous driving must be distinguished adequately from the offence of culpable driving. The jury should be told that dangerous driving, though a serious offence, involves conduct less blameworthy than culpable driving. They should be told that while dangerous driving necessarily involves criminal negligence, it need not, like culpable driving, be grossly negligent, but must involve a serious breach of the proper management or control of the vehicle on the roadway. Unlike culpable driving, it did not require proof of a higher risk of death or serious injury, but only a considerable risk thereof[81]. *De Montero* was applied by the Court of Appeal in *Guthridge v The Queen*[82].

Contentions in relation to *De Montero*

41 The Crown, by notice of contention, challenged the correctness of the analysis in *De Montero* of the elements of the offence created by s 319 of the Crimes Act.

42 It was submitted for the Crown that the decision in *De Montero* was erroneous in a number of respects. In particular, it was submitted that:

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

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81 (2009) 25 VR 694 at 716 [81].

82 (2010) 27 VR 452 at 459 [19].

- as to the level of risk, the jury should be directed in accordance with the test set down by this Court in relation to s 52A of the *Crimes Act* 1900 (NSW) in *McBride* and *Jiminez*;

- there is no need to introduce into s 319 the concept developed in relation to criminal negligence of conduct "meriting criminal punishment".

43 In response, counsel for Mr King pointed to the four tiers of criminal liability created by Victorian law in relation to driving offences, namely: culpable driving causing death, dangerous driving causing death, dangerous driving, and careless driving. These offences, it was said, are different in content from those in other jurisdictions and must co-exist harmoniously. Authorities from other jurisdictions were said to be of limited utility in determining the ambit of the offence under s 319. Reliance upon *McBride* and *Jiminez* was said to be misplaced because:

- both decisions support the view that dangerous driving stands in sharp contrast with civil negligence and, consistently with the test in *De Montero*, must be potentially dangerous in a real sense to other road users;

- both decisions concerned the offence of dangerous driving occasioning death contrary to s 52A of the *Crimes Act* 1900 (NSW) which, unlike s 319, did not require proof that the impugned driving caused death – absence of causation only providing a defence[83];

- section 319 requires proof that the dangerous driving caused death and that in order to distinguish it from culpable driving and the summary offences of dangerous driving and careless driving it is necessary and appropriate that the fault element under s 319 include a considerable risk of death or serious injury.

Counsel for Mr King also argued that the Court of Appeal was correct to conclude that "driving which merits criminal punishment" is apposite to describe the offence of dangerous driving created by s 319 because of its inherent quality, its potential consequences for other road users and the maximum sentences for the two offences in s 319.

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83 Reliance was placed upon *Giorgianni v The Queen* (1985) 156 CLR 473 at 498; [1985] HCA 29.

The correctness of *De Montero*

44 The Crown's submissions should be accepted. The Court of Appeal in *De Montero* erred in treating dangerous driving as a species of the genus of criminal negligence. That error gave rise to the further error that a jury should be directed, in relation to dangerous driving causing death or serious injury, that it must involve negligence deserving of punishment by the criminal law. As discussed earlier in these reasons, the concept of "negligence deserving of punishment by the criminal law" had its origins in attempts by the common law to set a threshold for the level of criminal negligence necessary to establish manslaughter per infortunium. It was transposed to the offence of manslaughter under the Criminal Codes of Queensland and Western Australia and, by the decision of this Court in *Callaghan*, to the offence created by s 291A of the *Criminal Code* (WA).

45 Despite its pedigree, the further transposition of that form of direction to the offence of culpable driving causing death under s 318 of the Crimes Act and similar offences in other States and Territories of Australia is questionable. It assumes that the jury understands the concept of negligence sufficient to ground civil liability. In *Buttsworth* the common law principle that criminal negligence differs in degree from civil negligence mutated into the proposition that "[n]egligence in the criminal sense is … a *different concept* from negligence in civil law."[84] In any event, the direction has no role to play in relation to the offence created by s 319, which is concerned ultimately with the risk creating characteristics of the speed or manner of driving of the accused.

46 The Court of Appeal in *De Montero* considered that the level of risk necessary to support the offence of dangerous driving under s 319 existed if an ordinary or reasonable person in the situation of the driver would recognise the manner of driving as involving an appreciable risk of serious injury or death to other users of the road[85]. Dangerous driving was said to involve "a serious breach" of proper driving standards, which exceeded the everyday lack of care sufficient for a civil negligence claim, but which fell short of the gross negligence required for culpable driving[86]. The formulation of the requisite level of risk rested on the premise that negligence is an element of the offence under s 319. The risk of harm, on the approach taken by the Court of Appeal, was to be

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84 [1983] 1 NSWLR 658 at 677 per O'Bryne CJ of Cr D (emphasis added).

85 (2009) 25 VR 694 at 715 [78].

86 (2009) 25 VR 694 at 715 [78].

assessed according to whether and to what extent the driver had breached a duty of care. That approach was erroneous. It may be that in many if not most cases dangerous driving is a manifestation of negligence in the sense of carelessness. It may also be a manifestation of deliberate risk-taking behaviour. It may be that in some circumstances where particular attention is required to the road and to other road users, momentary inattention will result in a manner of driving that is dangerous within the meaning of the section. The assessment of whether the manner of driving was dangerous depends on whether it gave rise to the degree of risk set out by Barwick CJ in *McBride* and adopted by the plurality in *Jiminez* in relation to s 52A of the *Crimes Act* 1900 (NSW). That is the level of risk which should inform a trial judge's direction to a jury in respect of the offence under s 319.

47 It is a consequence of this conclusion that the increased penalties applicable to offences against s 319 in its present amended form apply to offences which may be committed by transgressing a lower standard of liability than that set out in *De Montero*. There is no doubt that s 319 is capable of encompassing a range of driving behaviours some of which, apart from their tragic consequences, may attract considerably less condemnation than others. The legislature has imposed maximum penalties which, in effect, authorise a range of dispositions capable of encompassing the variety of circumstances in which offences may be committed against s 319. That variety must be reflected in the sentences which are imposed. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen*[87]:

> "Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect." (emphasis in original)

Whether the trial judge erred

48 For the above reasons, and subject to one qualification, the trial judge did not err in her direction to the jury relating to the alternative verdicts of guilty of offences against s 319. The qualification is that it was unnecessary and possibly confusing for her Honour to direct the jury that, in order to prove the commission of offences against s 319, the Crown did not have to satisfy them that the accused's driving was deserving of criminal punishment.

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87 (2001) 207 CLR 584 at 608 [65]; [2001] HCA 64. See also *Green v The Queen* (2011) 86 ALJR 36 at 44 [28] per French CJ, Crennan and Kiefel JJ; 283 ALR 1 at 9; [2011] HCA 49.

49 The common law criterion of criminal negligence as negligence deserving of punishment by the criminal law was instrumental in character. It was designed to impress upon the jury the seriousness of the degree of negligence necessary to support a verdict of guilty. At the same time, as Stephen pointed out, the gravity of the negligence in the particular case was left to the jury to determine "as a matter of degree". The application of that criterion in the Queensland and Western Australian Criminal Codes, effected by the decisions in *Scarth* and *Callaghan*, reflected the same instrumental approach to the statutory formula "to use reasonable care and take reasonable precautions". That view was justified by reference to the draftsman's reliance upon the Criminal Code Bill of 1880 and Stephen's intended incorporation in it of the common law criterion. The correctness of the criterion in its application to "gross negligence" under s 318 is not in issue in this appeal although the necessity for, and desirability of, such a direction may be questionable.

50 In seeking to exclude the common law criterion of criminal negligence from consideration by the jury of verdicts under s 319, the trial judge did not err in law. Properly understood, the direction was correct. Its potential for creating misunderstanding about the seriousness of the offence created by s 319 and the seriousness of the punishment which could be imposed for that offence was plain enough. The question is whether the direction thereby amounted to a miscarriage of justice within the meaning of s 568(1) of the Crimes Act and if so whether the proviso to s 568(1) applied.

Whether there was a miscarriage of justice

51 Section 568(1) of the Crimes Act relevantly provided that the Court of Appeal shall allow an appeal against conviction "if it thinks that … on any ground there was a miscarriage of justice"[88]. This was subject to the proviso that:

> "Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

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88 Section 568 was repealed by s 422(4) of the *Criminal Procedure Act* 2009 (Vic) (as amended by s 54(h) of the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act* 2009 (Vic)) with effect from 1 January 2010. The new provisions relating to the determination of an appeal against conviction are contained in s 276 of the *Criminal Procedure Act* 2009 (Vic).

52 It was submitted for Mr King that the trial judge's direction had the potential to cause the jury to discount the alternative verdict as an inadequate reflection of the seriousness of Mr King's conduct. It was not argued that it could have affected the jurors' understanding of the standard of criminal negligence necessary for a conviction of culpable driving under s 318. The submission was based on the premises that the trial judge erred in relation to the level of risk necessary to support a conviction under s 319 and in not directing the jury that the conduct of the accused in his manner of driving had to be such as was deserving of punishment by the criminal law. For reasons already given, those premises are not made out. The question that remains is whether the potential for misunderstanding of the trial judge's direction that the Crown did not have to prove that Mr King's manner of driving was such as to merit criminal punishment amounted to a miscarriage of justice within the meaning of s 568(1) and if so whether the proviso applied.

53 In *Weiss v The Queen*[89] this Court held that the term "miscarriage of justice" in the opening paragraph of s 568(1) of the Crimes Act referred to "*any* departure from trial according to law, regardless of the nature or importance of that departure."[90] That construction was based upon the historical roots of the term in the "Exchequer rule" derived from the decision of the Court of Exchequer in *Crease v Barrett*[91]. As the Court pointed out, when the term "miscarriage of justice" is so understood, the word "substantial" in the proviso has work to do.

54 As was said in *Weiss* "the legislative objective in enacting the proviso was to do away with the Exchequer rule and the language of the proviso is apt to achieve that objective."[92] The question whether or not by misdirection or error of law or procedure at trial the appellant had lost a fair chance of acquittal, was a matter to be considered under the proviso.

55 In seeking to instruct the jury that the direction, applicable to s 318 of the Crimes Act, about whether the conduct of the driver was deserving of punishment by the criminal law, was not applicable to s 319, the trial judge did not err in law. Defence counsel at the trial did not seek a redirection. That judgment, which may have been made for a variety of reasons, informs consideration of the extent to which, taken in context, the direction was likely to

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89 (2005) 224 CLR 300; [2005] HCA 81.

90 (2005) 224 CLR 300 at 308 [18] (emphasis in original).

91 (1835) 1 Cr M & R 919; [149 ER 1353].

92 (2005) 224 CLR 300 at 315 [38].

confuse or mislead the jury. The direction was infelicitous but did not involve a misstatement of the law. It was not argued that it in any way qualified the correct direction given by the trial judge in relation to s 318. The direction given by the trial judge in relation to s 319 did not constitute a departure from trial according to law. It did not constitute a miscarriage of justice. That being so, no question of the applicability of the proviso arises.

56 The Crown sought to invoke the proviso submitting, consistently with the reasons of the Court of Appeal, that the findings of fact made and the conclusion reached by the jury as to the more serious offences under s 318 meant that any misdirection as to the lesser offences under s 319 could not have affected the outcome in this case. That submission directed attention to the provisions of s 422A of the Crimes Act. That section conditions the jury's power to return a verdict of guilty of an offence against s 319, in relation to a person charged with an offence against s 318, upon their want of satisfaction that the person is guilty of the offence against s 318. That is to say, the jury has no power to return the alternative verdict unless first satisfied that the person is not guilty of the offence against s 318. Had it been necessary to consider the effect of that limitation on the application of the proviso, it would also have been necessary to have regard to the decisions of this Court in *Gilbert v The Queen*[93], *Gillard v The Queen*[94] and *R v Nguyen*[95]. There is, however, no need to consider either the effect of the limitation or its interaction with those decisions in order to dispose of this appeal.

Conclusion

57 For the preceding reasons the appeal should be dismissed.

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93 (2000) 201 CLR 414, especially at 420 [13] and 421 [16] per Gleeson CJ and Gummow J; [2000] HCA 15.

94 (2003) 219 CLR 1, especially at 41-42 [133] per Hayne J; [2003] HCA 64.

95 (2010) 242 CLR 491 especially at 505 [50]; [2010] HCA 38.

58 HEYDON J. This case concerns ss 318 and 319 of the *Crimes Act* 1958 (Vic) ("the Crimes Act").

59 The appellant was convicted of two counts of culpable driving causing death contrary to s 318. Section 319 provided for an alternative offence – dangerous driving causing death. At the relevant time s 422A(1) of the Crimes Act provided:

> "If on the trial of a person charged with an offence against section … 318 (culpable driving causing death) the jury are not satisfied that he or she is guilty of the offence charged but are satisfied that he or she is guilty of an offence against section 319 (dangerous driving causing death or serious injury), the jury may acquit the accused of the offence charged and find him or her guilty of the offence against section 319 and he or she is liable to punishment accordingly."

Thus if the appellant had been acquitted on the s 318 counts, he could have been convicted of two contraventions of s 319, so long as the jury were satisfied beyond reasonable doubt that the factual criteria which s 319 sets out were satisfied.

60 The appellant did not submit that the jury was misdirected in relation to the s 318 charges on which he was convicted. He accepted that the s 318 direction conformed with authority binding on the trial judge[96]. The appellant complained about, among other things, a part of the s 319 direction. The trial judge said that one of the 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 … [is that] 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."

Counsel for the respondent in this Court submitted that the s 319 direction corresponded with the law as it was understood at the time. Counsel for the appellant accepted that it was the practice of at least some judges to direct juries in those terms. But the appellant's complaint was nonetheless that the jury was misdirected in relation to the s 319 charges, and that this misdirection invalidated his conviction under s 318.

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96 *R v De'Zilwa* (2002) 5 VR 408 at 410 [2], 423 [46] and 425 [55].

61 To minds not steeped in a lifetime's experience of the criminal law, this complaint may seem strange. The jury convicted the appellant of two contraventions of s 318 after the trial judge had succeeded in the difficult task of giving a correct direction in relation to that offence. Yet the appellant submits that the convictions should be set aside because of a claimed deficiency in the trial judge's direction about s 319, to which section it was not necessary for the jury to turn.

62 The background to the appellant's complaint is as follows. The maximum sentence of imprisonment for dangerous driving causing death contrary to s 319 was five years. The maximum sentence of imprisonment for culpable driving causing death contrary to s 318 was 20 years. The appellant's submissions in this appeal seemed to assume that a jury is subject to opposing impulses – the impulse to perform its duty and the impulse to grant mercy. Where an accused person is charged with one offence but is open to conviction on an alternative, lesser offence if not convicted on the first, a jury's merciful impulses would tend to sway it to convict on the alternative offence. Of course, it would not necessarily push it as far as an acquittal on both offences. The impulse of duty would tend to push a jury towards conviction on some other offence if it thought the facts justified conviction and that the appellant merited punishment. The greater the gap between the criteria of liability for the offence charged and the criteria of liability for the alternative, lesser offence, the less likely it is that the jury will select the lesser offence as the one on which to convict. Had this jury acquitted of the s 318 offences and convicted of the s 319 offences, the appellant would have had a considerable advantage in terms of sentence. The sentences he received in relation to s 318 were greater than the maximum sentence that attaches to a contravention of s 319.

63 On the appellant's submissions, in cases of this kind there may come a point at which the jurors' perception of a duty to act so as to subject the accused to some punishment causes them to convict under s 318. That point may be reached if the jury directions indicated that the criteria of liability for the s 319 offences were remote from those for the s 318 offences. For if the jurors feel a duty to convict under s 318, that sense of duty may prevail over their instinct to follow the merciful course and convict under s 319.

64 The appellant submitted to the Court of Appeal and to this Court that when s 319 is put to a jury as an alternative to s 318, it must be a "realistic alternative". In the Court of Appeal, Redlich JA more neutrally said[97]:

> "It is desirable that the content of the two offences be accurately stated, in part because the practical content of each offence may be informed not

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97 *King v The Queen* (2011) 57 MVR 373 at 374 [4].

> only by its elements being accurately described, but by the counterpoint of the content of the other offence."

The appellant submitted to the Court of Appeal that one effect of the alleged misdirection on s 319 "was to set the minimum threshold of gross negligence too low, thereby impermissibly increasing the risk of conviction on the counts of culpable driving or, by making the alternate offence appear to be too minor, have had the effect of precluding any serious consideration of it by the jury."[98] In the appellant's submission this meant that as a result the appellant had lost a real chance of acquittal on the culpable driving charges. And the appellant submitted to this Court that the trial judge's direction:

> "that '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'. … was apt to cause the jury to think that dangerous driving causing death was a much less serious offence than culpable driving causing death, something akin to civil negligence, something for which the appellant would not be adequately punished. Again, contrary to the Court of Appeal's reasons, it is not open to exclude the possibility that the jury would have understood the direction to mean that a verdict of guilt of dangerous driving causing death carried with it a conclusion that the driving was not deserving of criminal punishment. This is all the more likely given that, when directing on culpable driving, the judge said that the accused's conduct 'must be so negligent that in your view he deserves to be punished by the criminal law'." (footnotes omitted)

65 Minds not steeped in a lifetime's experience of the criminal law might also think that in a case like the present juries would first decide whether to convict on the crime charged (s 318). Only if not satisfied beyond a reasonable doubt of the accused's guilt on that charge would juries move to consideration of a crime not charged – the alternative charge under s 319. Indeed, that course is contemplated by s 422A(1). That section confers power on the jury to convict the accused under s 319 only if it is not satisfied that the accused is guilty of the offence charged under s 318. Further, in this case the trial judge told the jurors that they did not have to consider any question of the alternative s 319 contraventions unless they acquitted the accused on the s 318 charges. Her instruction was clear, and she gave it at least three times. She also told the jurors that it would be a betrayal of their oaths to arrive at a verdict by way of compromise between the s 318 and the s 319 offences.

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98 *King v The Queen* (2011) 57 MVR 373 at 378 [19].

66 A point in favour of the appellant's approach is that to speak of the "jury" as approaching its task in a particular way is not always realistic. "Trial by jury" is trial by jurors. Different jurors are likely to react to what they hear and see in court in different ways. As time passes, they are likely to reflect, inside and outside the court, about their perceptions in individual ways. It is true that their formal deliberations after the end of the trial, and their informal deliberations before that time, are likely to be structured along lines which the stronger spirits on the jury mark out. But the jury is unlikely to move monolithically, obedient to a single superior will or embodying a unitary will.

67 It is not possible in this appeal to devote any further consideration to the question of overturning the authorities which assume that, whatever statutes say, whatever judges say[99], whatever the order of charges on an indictment, and whatever the order in time of the events to which particular charges relate[100], the jury may convict on a lesser charge without considering whether to convict on the greater charge. There are questions about these authorities. Is it right to extend to other crimes the principles which apply in relation to murder and an alternative verdict of manslaughter? Do those authorities do any more than illustrate one virtue claimed for the jury system: the facility it offers jurors to frustrate laws which they perceive to be unjust[101]? How well do those authorities sit with other authorities to the effect that the entire system of jury trial in criminal cases rests on the assumption that jurors understand and comply with judicial directions? The merits of the assumption were insufficiently debated in this appeal to justify considering whether to overturn the authorities which rest on it.

68 It is necessary now to turn to the appellant's specific complaint. To direct a jury that they should not convict unless the accused's conduct is "deserving of punishment by the criminal law" is curious. Such a direction may have merits in relation to the task which caused it to be developed – distinguishing the type of negligence which is sufficient for civil liability in tort from the type of negligence necessary to establish manslaughter[102]. The merits of that body of law were not argued in this appeal, and what follows is not intended to disturb it. Outside that area, however, it may be said that in modern times it is the legislature which determines what conduct is deserving of punishment. It is not the judiciary. And it is certainly not the jury. It is risky to adopt the course of

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99 *Stanton v The Queen* (2003) 77 ALJR 1151 at 1157 [35]; 198 ALR 41 at 49; [2003] HCA 29.

100 *R v Nguyen* (2010) 242 CLR 491 at 505 [49]; [2010] HCA 38.

101 Devlin, *Trial by Jury*, 1st ed, 3rd impression (1966) at 87-88, 89-91 and 160-162.

102 *Bateman* (1925) 19 Cr App R 8.

leaving to a jury as a criterion of guilt the question of whether particular conduct is deserving of punishment by the criminal law. When this is done with a succession of different juries, there is a risk of like cases being treated differently, and different cases being treated alike. Although it is not always possible, it is desirable for the application of legal rules to depend on clear and comprehensible factual criteria. Once particular facts are found, a conviction will follow. Once a reasonable doubt arises as to particular facts, an acquittal will follow. To say that an accused is not to be convicted of a particular crime unless his or her conduct is deserving of punishment by the criminal law may be to say only that that conduct, once established, amounts to that crime. The words which the Irish Court of Criminal Appeal used for manslaughter in *The People (Attorney-General) v Dunleavy*[103] may be transposed to the s 318 offence:

> "One might reasonably suppose that any jury empanelled to try [a s 318 case] would be aware that the defendant was charged with a crime; that they should not convict him unless they believed him guilty; and that conviction for crime usually entails punishment of some kind. It can add very little to their knowledge to tell them that the negligence established must amount to a crime, must call for a conviction, and must deserve punishment."

As the respondent submitted, it is implicit in a provision contained in the Crimes Act that it merits criminal punishment. And as the respondent also submitted, negligence is not an element of s 318 or s 319, and there is not present any need to distinguish between some form of statutory negligence and negligence for the purpose of civil liability at common law.

69 With respect to those of a contrary opinion, it is not a necessary condition for conviction of an accused person under either s 318 or s 319 that the jury considers that the accused person's conduct merits criminal punishment, and juries should not be directed that it is. Even if, contrary to that view, it is a necessary condition for conviction under s 318, I agree with Bell J that to suggest that the necessary condition exists for s 318 but not s 319 carries the risk that the jury will conclude that s 319 is an offence of a minor character not meriting imprisonment[104]. That is what the direction under consideration in this appeal did.

70 The trial judge's adoption of that course was a "wrong decision on [a] question of law" within the meaning of s 568(1) of the Crimes Act. Should the proviso to s 568(1) be applied? The proviso is that the relevant appellate court

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103 [1948] IR 95 at 100 per Gavan Duffy P, Black and Davitt JJ.

104 See below at [106]-[107] and [114].

"may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." The appellant submitted that the prosecution case on s 318 was "weak" or "very weak". The respondent denied this. The respondent was correct in that denial. The respondent submitted: "In light of the fact-finding, any misdirection on the lesser offence could not have affected the outcome in this case." (footnote omitted) But the respondent did not engage in a detailed factual analysis sufficient to demonstrate that the prosecution case was so strong as to justify the application of the proviso.

71 I agree with the orders Bell J proposes.

72 BELL J. The facts and the procedural history are set out in the plurality reasons and need not be repeated here.

73 Mr King appeals against his convictions on two counts of culpable driving causing death contrary to s 318(1) of the *Crimes Act* 1958 (Vic) ("the Act") on the ground that the trial judge misdirected the jury as to the elements of the statutory alternative offence of dangerous driving causing death contrary to s 319(1) of the Act[105]. He complains that it was wrong to direct the jury that, in the case of dangerous driving, the manner of driving need only have "significantly" increased the risk of "hurting or harming others" and that it "need not be deserving of criminal punishment". The directions did not conform to the guideline respecting the elements of dangerous driving formulated by the Victorian Court of Appeal in *R v De Montero*[106], a decision that was delivered after Mr King's trial. The correctness of that guideline is the subject of the Crown's Notice of Contention.

74 I agree with French CJ, Crennan and Kiefel JJ that proof that an accused's manner of driving created a "considerable risk of serious injury or death to members of the public" is not an element of dangerous driving causing death. I also agree that there is no requirement for the jury to be directed that the manner of driving must have been such as to "merit criminal punishment". The trial judge's directions as to the elements of the offence of dangerous driving causing death were not wrong in either of these respects. However, this conclusion is not determinative of the appeal. The gravamen of Mr King's challenge is that the directions failed to discriminate accurately between the culpable driving and dangerous driving offences. In particular, he asserts that the trial judge's direction that, in the case of dangerous driving, it was not incumbent on the Crown to establish that Mr King's driving was deserving of criminal punishment, wrongly conveyed that dangerous driving is an offence of a relatively minor character. I accept that is so. Since, in the view that I take, proof of each offence required that the jury form a judgment as to the degree to which Mr King's driving departed from the objective standard that the law imposes on all who drive motor vehicles on or near public roads, this was a significant misdirection. I would allow the appeal.

75 In what follows, the discussion of proof of the offence of culpable driving causing death is confined to those cases in which the form of culpability alleged is negligence. Section 318(2)(b) of the Act provides that a person drives a motor

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105 Section 422A(1) of the Act provides that the offence of dangerous driving causing death is an alternative verdict on a presentment for the offence of culpable driving causing death.

106 (2009) 25 VR 694 at 716 [80] per Ashley, Redlich and Weinberg JJA.

vehicle in a culpably negligent manner if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case. The requirement that the departure from the standard be "to a gross degree" is a statement of the same high degree of negligence required to support conviction for manslaughter[107]. The offence of culpable driving causing death, as enacted, was a misdemeanour punishable by a maximum of seven years' imprisonment[108]. At that time, manslaughter was punishable by a maximum sentence of 15 years' imprisonment[109]. Although the elements of the two offences overlapped, manslaughter was the more serious offence.

76 The maximum penalty for culpable driving causing death has been increased from time to time. It was increased to 15 years' imprisonment in 1992[110]. This brought culpable driving causing death into line with manslaughter. In 1997, the maximum sentence for both offences was increased to 20 years' imprisonment[111]. The difference between the objective seriousness of the two offences as gauged by the maximum sentence has, since 1992, been removed. It was the recognition of this circumstance that appears to have led the Victorian Court of Appeal to characterise culpable driving causing death as a species of involuntary manslaughter[112]. Subsequently, in *R v De'Zilwa*, the Court of Appeal said that, on the trial of a presentment charging negligent culpable

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107 See, eg, *R v Williamson* (1807) 3 C & P 635 [172 ER 579]; *Bateman* (1925) 19 Cr App R 8 at 10-12 per Lord Hewart CJ; *Andrews v Director of Public Prosecutions* [1937] AC 576; *Callaghan v The Queen* (1952) 87 CLR 115; [1952] HCA 55; *Nydam v The Queen* [1977] VR 430 at 445; *Wilson v The Queen* (1992) 174 CLR 313 at 333 per Mason CJ, Toohey, Gaudron and McHugh JJ; [1992] HCA 31.

108 *Crimes (Driving Offences) Act* 1967 (Vic), s 3.

109 See *Crimes Act* 1958 (Vic), s 5 as enacted. As explained in the paragraph below, this was the maximum penalty until 1997.

110 *Crimes (Culpable Driving) Act* 1992 (Vic), s 3(1); *Sentencing Act* 1991 (Vic), s 109.

111 *Sentencing and Other Acts (Amendment) Act* 1997 (Vic), s 27, Sched 1 items [3] and [89].

112 *R v Franks* [1999] 1 VR 518 at 520 [5]; *R v O'Connor* [1999] VSCA 55 at [19]; *R v Wright* [1999] 3 VR 355 at 358 [9]; *R v Guariglia* (2001) 33 MVR 543 at 544 [3]; *R v Tran* (2002) 4 VR 457 at 458 [1]; *Director of Public Prosecutions (Vic) v Solomon* (2002) 36 MVR 425 at 429 [18]; *Director of Public Prosecutions v Wareham* (2002) 5 VR 439 at 442 [11].

driving causing death, the judge should direct the jury that guilt required proof that the accused's driving involved such a great falling short of the standard of care, and such a high risk that death or serious injury would follow, that it merited criminal punishment[113]. This assimilated the directions on a prosecution for culpable driving causing death with the standard directions on a prosecution for manslaughter by criminal negligence[114]. *De'Zilwa* was decided before dangerous driving causing death was introduced into the Act as an alternative verdict on the trial of a count of culpable driving. There was no occasion to consider whether the direction that the accused's driving had to be such as to "merit criminal punishment" might mislead by comparison with the statement of the elements of the alternative offence.

77 The offence of dangerous driving was introduced into the Act in 2004[115]. The central concept on which liability depends, driving in a manner dangerous to the public, was one with an established meaning in the context of driving offences. In *Jiminez v The Queen*, six Justices approved Barwick CJ's encapsulation of that meaning in *McBride v The Queen*[116]:

> "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."

78 *Jiminez* and *McBride* were each concerned with the offence under the New South Wales statute that broadly equates to the offence of dangerous driving provided by s 319(1) of the Act[117]. New South Wales did not have a

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113 (2002) 5 VR 408 at 410 [2] per Ormiston JA, 423 [46] per Charles JA, 425 [55] per O'Bryan AJA.

114 *Nydam v The Queen* [1977] VR 430 at 445.

115 *Crimes (Dangerous Driving) Act* 2004 (Vic).

116 *Jiminez v The Queen* (1992) 173 CLR 572 at 579 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ; [1992] HCA 14, citing *McBride v The Queen* (1966) 115 CLR 44 at 49-50; [1966] HCA 22.

117 *Crimes Act* 1900 (NSW), s 52A(1). Section 52A, as enacted by s 2(e) of the *Crimes (Amendment) Act* 1951 (NSW) and until its replacement by the *Crimes (Dangerous Driving Offences) Amendment Act* 1994 (NSW), was entitled "Culpable driving" but described the offence in terms of driving "in a manner

(Footnote continues on next page)

statutory equivalent to the offence of culpable driving causing death provided by s 318 of the Act. Grossly negligent driving occasioning death was susceptible of prosecution for manslaughter in New South Wales. However, in neither *McBride* nor *Jiminez* was the accused charged with manslaughter and no question arose in either case of discriminating between proof of driving in a manner dangerous and proof of gross negligence. The distinction between these two forms of liability for driving conduct was the question with which the Victorian Court of Appeal was concerned in *De Montero*.

79 In *De Montero*, in his report to the Court of Appeal, the trial judge drew attention to the absence of guidance as to the directions to be given in a case in which dangerous driving was left as an alternative verdict on a presentment charging culpable driving[118]. The guideline that the Court of Appeal formulated in *De Montero* was designed to address this deficiency. It is set out in the reasons of French CJ, Crennan and Kiefel JJ[119]. In contention are the

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which is dangerous to the public". At the time of *Jiminez*, s 52A was entitled "Culpable driving", but relevantly provided that:

> "(1) Where the death of, or grievous bodily harm to, any person is occasioned through:
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> (a) the impact with any object of a motor vehicle in or on which that person was being conveyed (whether as a passenger or otherwise), ...
>
> and the motor vehicle was at the time of the impact... being driven by another person: ...
>
> (f) at a speed or in a manner dangerous to the public,
>
> the person who was so driving the motor vehicle shall be guilty of the misdemeanour of culpable driving. ...
>
> (3) It shall be a defence to any charge under this section that the death or the grievous bodily harm occasioned, as the case may be, was not in any way attributable to ... the speed at which or the manner in which the vehicle was driven."

In 1994, the Amendment Act reformulated the offence, renaming it "Dangerous driving" and providing for the offence of "dangerous driving occasioning death" in s 52A(1).

118 *R v De Montero* (2009) 25 VR 694 at 719 [89].

119 See above at [40].

requirements that the manner of driving "merit criminal punishment" and create "a considerable risk of serious injury or death to members of the public".

80 The direction that the accused's conduct must merit criminal punishment derives from *Bateman*[120], in which a medical practitioner appealed to the English Court of Criminal Appeal against his conviction for the negligent manslaughter of a patient. The direction proposed in *Bateman* was designed to impress upon the jury the distinction between liability in tort and the higher degree of negligence required to support liability for manslaughter[121].

81 Driving that is culpably negligent within the meaning of s 318(2)(b), or dangerous within the meaning of s 319(1), is in each case conduct that warrants punishment under the criminal law. Both sections create serious criminal offences for which substantial terms of imprisonment may be imposed. To direct the jury that, to convict an accused of culpable driving causing death, the driving must have been such as to warrant criminal punishment, and not to give a like direction with respect to dangerous driving, may suggest that the latter offence encompasses conduct that does not warrant such punishment. It was with a view to avoiding this misconception that the Court of Appeal in *De Montero* said that a "meriting criminal punishment" direction should be given with respect to dangerous driving.

82 The logic of a direction on the trial of a criminal offence that the accused's conduct must "merit criminal punishment" has been questioned[122]. The elements of manslaughter by criminal negligence stated by the Full Court in *Nydam v The Queen*[123] include that the accused's conduct must warrant punishment under the criminal law. This appeal does not provide the occasion to consider the continued usefulness of the direction in the case of negligent manslaughter. However, I agree with French CJ, Crennan and Kiefel JJ that there is no warrant for transposing the direction to the trial of a count of dangerous driving causing death.

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120 (1925) 19 Cr App R 8.

121 *Bateman* (1925) 19 Cr App R 8 at 10-12 per Lord Hewart CJ.

122 *Andrews v Director of Public Prosecutions* [1937] AC 576 at 583 per Lord Atkin; *The People v Dunleavy* [1948] IR 95 at 100-101.

123 [1977] VR 430 at 445, approved in *Wilson v The Queen* (1992) 174 CLR 313 at 333 per Mason CJ, Toohey, Gaudron and McHugh JJ; *R v Lavender* (2005) 222 CLR 67 at 75 [17] per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2005] HCA 37.

83 Neither party challenged *De'Zilwa* in their written submissions. However, on the hearing of the appeal, the utility on the trial of a count of culpable driving causing death of the "merit criminal punishment" direction was in issue. The direction does not aid the jury's appreciation of what extent of departure from the standard of care amounts to a "gross degree" since departure from the standard of a lesser degree is also punishable as a serious criminal offence. The direction is likely to mislead in any case in which the alternative verdict is left, given that the difference between the offences does not turn on proof that culpable driving merits criminal punishment. In my opinion, the direction should be confined to the offence of manslaughter by criminal negligence.

84 The principal concern of the Court of Appeal in *De Montero* was the need to contrast the quality of the conduct required for proof of each offence in a case in which dangerous driving causing death is left as an alternative to culpable driving[124]. The Court distinguished the offences by reference to the degree of risk of harm and the extent of potential harm[125]. The Court concluded that the distinction was between proof of driving conduct involving a "high" risk of serious injury or death in the case of culpable driving, and a "considerable" risk of that outcome in the case of dangerous driving[126]. Its assessment of the degree of risk of harm drew on the test for determining whether an act is "dangerous" in the context of manslaughter by unlawful and dangerous act[127]. The Court's assessment of the extent of potential harm paid regard to the circumstance that, where a charge is laid under s 319, there will have been death or serious injury[128].

85 Mr King supported the reasoning in *De Montero*. He acknowledged that the requirement that the manner of driving create a "considerable risk of serious injury or death to members of the public" is a more demanding test than is stated in *Jiminez* and *McBride*. He submitted that those cases are to be distinguished because the New South Wales offence with which each was concerned did not require proof that the manner of driving caused the death (or grievous bodily harm); rather, it was a defence that it did not[129]. More generally, Mr King urged caution in applying decisions from other jurisdictions to the offence of dangerous driving causing death under the Act because Victorian law makes provision for a

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124 (2009) 25 VR 694 at 710 [57].

125 (2009) 25 VR 694 at 710 [55], 711-712 [63]-[65], 715 [78].

126 (2009) 25 VR 694 at 716 [81].

127 (2009) 25 VR 694 at 703 [35].

128 (2009) 25 VR 694 at 711-712 [64].

129 See above at fn 117.

greater number of tiers of statutory liability for driving offences. In particular, it was said that other jurisdictions do not have an "intermediate tier" that equates to the offence provided by s 319(1) of the Act[130].

86 Neither of Mr King's submissions should be accepted. The difference in the number of tiers of statutory driving offences is not a relevant distinction. In other jurisdictions, conduct prosecuted in Victoria as culpable driving causing death under s 318 is prosecuted as negligent manslaughter. Nor is the requirement of a causal link between the driving and death (or serious injury in the case of an offence of negligently causing serious injury under s 24 of the Act) material to the content of driving in a manner dangerous to the public.

87 Driving a motor vehicle on or near a public road is attended by risk of injury to persons in the vicinity. In the event of a collision with another vehicle or with a pedestrian, it is likely that at least serious injury will result. There is no need to import a variant of the test of whether an unlawful act is also a "dangerous act" in the context of manslaughter into the determination of whether the manner of driving a motor vehicle is dangerous. The content of the adverbial phrase "in a manner dangerous to the public" was one with a well understood meaning in the context of driving offences at the date Parliament enacted the offence of dangerous driving causing death. Proof of the offence in accordance with the statements in *McBride* does not require that the manner of driving create a "considerable risk of serious injury or death to members of the public".

88 A test which discriminates between the culpable driving and dangerous driving offences by reference to whether the risk of serious injury or death to members of the public is "high" or "considerable" is not, in any event, well suited to its intended purpose. In the context of driving a motor vehicle on or near a public road, it calls for a judgment of excessive refinement. In my opinion, the Court of Appeal's statement in *De Montero* of the further directions to be given in a case in which dangerous driving is left as an alternative verdict accurately captures the difference between the offences in a way that is likely to be readily understood by a jury. The Court of Appeal said[131]:

> "The jury should further be told that dangerous driving, though a serious offence, involves conduct which is less blameworthy than culpable driving. They should be told that while dangerous driving necessarily involves criminal negligence, it need not, like culpable driving, be grossly

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130 See *Crimes Act* 1900 (NSW), s 52A; *Criminal Code* (Q), s 328A(4); *Criminal Law Consolidation Act* 1935 (SA), s 19A; *Criminal Code* (Tas), s 167A; *Road Traffic Act* 1974 (WA), s 59; *Crimes Act* 1900 (ACT), s 29; *Criminal Code* (NT), s 174F.

131 *R v De Montero* (2009) 25 VR 694 at 716 [81].

> negligent, but … it must involve a serious breach of the proper management or control of the vehicle on the roadway."

89 The Crown was critical of this analysis in the written submissions filed in support of its Notice of Contention. It said that the analysis "seeks to introduce the concept of fault rather than an objective test of criminal liability" and that it wrongly "treats dangerous driving as a lesser species of criminal negligence", whereas liability for the offence "is to be treated as determined by statute".

90 The statute makes it an offence to drive a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances of the case. Driving a motor vehicle is an inherently dangerous activity. However, as *Jiminez* makes clear, the prohibition on driving in a manner dangerous to the public has never been an absolute one in this country[132]. Thus, as is explained in that case, the liability of a driver who falls asleep at the wheel depends upon whether she *ought to have known* that she was running a real risk of falling asleep at the wheel[133].

91 To the extent that the Crown's written submissions may be thought to propose a dichotomy between dangerous driving and negligence, they raise an issue concerning the effect of the decision in *Jiminez*. In the joint reasons in that case, driving in a manner dangerous was said to involve "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"[134]. The statement echoes that of Barwick CJ in *McBride* that the quality of being dangerous to the public is in "sharp contrast to the concept of negligence" and "requires some serious breach of the proper conduct of a vehicle upon the

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132 *Jiminez v The Queen* (1992) 173 CLR 572 at 580-581. In *Ball and Loughlin* (1966) 50 Cr App R 266 at 270, Lord Parker CJ in the Court of Criminal Appeal held that the offence of driving in a manner dangerous and thereby causing death contrary to s 1 of the *Road Traffic Act* 1960 (UK) was an offence of absolute liability. His Lordship relied on passages in *R v Evans* [1963] 1 QB 412 and *R v Spurge* [1961] 2 QB 205 for this conclusion. In *R v Gosney* [1971] 2 QB 674 at 679F, the Court of Appeal, Criminal Division, disapproved *Ball and Loughlin*, holding that the offence of dangerous driving was not one of absolute liability and concluding that the better view of the decisions in *Spurge* and *Evans* was that fault was an element of proof of the offence.

133 (1992) 173 CLR 572 at 581 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

134 (1992) 173 CLR 572 at 579 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

highway"[135]. The contrast drawn in each case is between proof of a manner of driving amounting to a serious departure from the proper conduct of the vehicle, with the attendant risk of harm to the public, on the one hand, and liability in tort, on the other. It is the point that was made by Lord Hewart CJ in *Bateman* respecting liability for negligent manslaughter. His Lordship observed that, in a civil action, it does not matter how far short of the standard of reasonable care the defendant falls, "[t]he extent of his liability depends not on the degree of negligence, but on the amount of damage done"[136]; whereas, in a criminal court, "the amount and degree of negligence are the determining question."[137]

92 The offences of negligent culpable driving and dangerous driving are each subject to an objective test of liability. Neither requires proof that the accused possessed a subjective awareness of, and indifference to, the risk created by his or her driving. The mens rea for each is no more than the intention to do the acts involved in driving the motor vehicle. In neither case is it incumbent on the prosecution to prove a subjective "intention to drive badly."[138]

93 The law imposes on all who drive motor vehicles a duty to exercise reasonable care for the safety of others who may be on or near the roadway. In *McCrone v Riding*, this standard was described as "impersonal and universal, fixed in relation to the safety of other users of the highway."[139] In *McCrone*, a charge of careless driving had been dismissed by the justices of the peace after taking into account the youthful defendant's lack of driving experience. The appellate Court identified the error in this approach as allowing the existence of two standards[140]. The statement of the standard formulated with respect to careless driving was adopted by this Court in *R v Coventry*[141], a case concerned with driving in a manner dangerous. As this Court explained, the standard is impersonal in that it does not vary with individuals and universal in that it applies

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135 *McBride v The Queen* (1966) 115 CLR 44 at 50.

136 (1925) 19 Cr App R 8 at 11.

137 (1925) 19 Cr App R 8 at 11. See also Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (2011) at 558: "Even dangerous driving causing death is not necessarily manslaughter. There are degrees of *criminal* negligence, and manslaughter requires a very high degree." (emphasis in original)

138 *R v Gosney* [1971] 2 QB 674 at 679.

139 [1938] 1 All ER 157 at 158.

140 *McCrone v Riding* [1938] 1 All ER 157 at 158.

141 (1938) 59 CLR 633; [1938] HCA 31.

to all who drive motor vehicles[142]. Nothing in the decision in *Coventry*, in which special leave to appeal from the order of the South Australian Court of Criminal Appeal was refused, suggests that this Court considered the standard to be other than "the full standard of care which is due by anyone who undertakes to handle a dangerous instrument."[143]

94 In my opinion, the decisions of this Court in *Coventry*, *McBride* and *Jiminez* do not require or support a distinction, other than of degree, between proof of driving in a manner dangerous and proof of negligent culpable driving. This is not to say that driving in a manner dangerous incorporates proof of negligence *as an element*. If it did, no doubt it would be necessary to prove the gross departure from the standard of care necessary to support liability for an offence of criminal negligence[144]. Liability for driving in a manner dangerous to the public depends upon proof of a serious breach of the proper conduct of the vehicle. The determination of whether a feature, or features, of the accused's driving answers that description requires a comparison between that manner of driving and the standard of care which the law demands of all who drive a motor vehicle on or near a public road. It is that standard that gives content to the concept of "the proper conduct of a vehicle upon the highway"[145]. I do not agree that dangerous driving and negligence are to be distinguished upon a view that not all dangerous driving involves negligence. Any serious breach of the proper conduct of a vehicle on or near a public road that exposes the public to risk of harm is negligent, regardless of the skill with which the manoeuvre is executed. Whether the breach departs from the standard of care to a gross degree, such as to be culpably negligent within the meaning of s 318(2)(b) of the Act, is a matter for judgment.

95 In *R v Buttsworth*[146], the New South Wales Court of Criminal Appeal considered the relationship between negligent manslaughter and driving in a manner dangerous to the public in the context of a challenge to the adequacy of the directions respecting the distinction between the offences. The jury had been directed that the distinction was essentially one of degree. O'Brien CJ of Cr D, who gave the leading judgment, undertook a comprehensive review of the history

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142 *R v Coventry* (1938) 59 CLR 633 at 638 per Latham CJ, Rich, Dixon and McTiernan JJ.

143 *R v Coventry* [1938] SASR 79 at 88 per Murray CJ, Angas Parsons and Napier JJ.

144 See *Callaghan v The Queen* (1952) 87 CLR 115; *R v Shields* [1981] VR 717.

145 *McBride v The Queen* (1966) 115 CLR 44 at 50 per Barwick CJ.

146 [1983] 1 NSWLR 658.

of negligent manslaughter and of the statutory driving offences before concluding that the directions were consistent with authority[147].

96 A footnote in the plurality reasons in *Jiminez* refers with apparent approval to the following passage in O'Brien CJ of Cr D's judgment[148]:

> "It is, of course, true to say that it is not sufficient or appropriate simply to describe driving in a manner dangerous to the public as a degree of negligent driving. A direction to that effect would fail because it does not set out the specifics of the degree of fault appropriate to the offence of culpable driving. But to describe the driving as being of that degree of negligence which amounts to a manner of driving which is dangerous to the public, as those terms are explained in *McBride's case* and those which precede it, is, I think, correct, both logically and according to authority."

97 O'Brien CJ of Cr D's account of the distinction between criminal liability for both negligent manslaughter and dangerous driving, and civil liability, is pertinent[149]:

> "What has always been made clear is that these offences are to penalize the offending quality of the driving according to the degree of its departure from the standard reasonably to be expected; and whether or not they also involved an element of harm to be caused or associated with the driving they are not concerned with the concept of an action on the case which looks to the compensation of an individual who sustains injury by reason of the existence of a legal duty to him which recognizes only one standard for the measurement of its breach".

98 The analysis in *Buttsworth* draws on Lord Atkin's account of the distinction between driving in a manner dangerous and negligent manslaughter in *Andrews v Director of Public Prosecutions*[150]. The South Australian Supreme Court has analysed the relationship between driving in a manner dangerous and

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147 [1983] 1 NSWLR 658 at 660-661.

148 *Jiminez v The Queen* (1992) 173 CLR 572 at 579 fn 23 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ, citing *R v Buttsworth* [1983] 1 NSWLR 658 at 686-687.

149 [1983] 1 NSWLR 658 at 677.

150 [1983] 1 NSWLR 658 at 672, citing [1937] AC 576 at 584-585.

the concept of negligence in the same way. The decisions are summarised in *De Montero*[151].

99 Nothing in the decisions of the New South Wales Court of Criminal Appeal in *LKP*[152] or *Gillett*[153] departs from the analysis in *Buttsworth*. In *Saunders*[154], Simpson J, who gave the leading judgment, extracted a lengthy passage from the judgment of Spigelman CJ in *Hopton*[155]. The Chief Justice said, of those cases in which inattentiveness is the feature of the manner of driving particularised, that the jury would not be properly instructed if left to speculate as to "the level of negligence" which may be appropriate. More recently, in *R v Borkowski*, Howie J, in giving the leading judgment of the New South Wales Court of Criminal Appeal, observed[156]:

> "As the law presently stands, there is a rational, logical and cohesive hierarchy of offences concerned with the infliction of death or serious injury by the use of a motor vehicle. The offences range from negligent driving causing grievous bodily harm ... through the driving offences in the *Crimes Act* [1900 (NSW)] to manslaughter by gross criminal negligence. All of these offences involve varying degrees of negligence, however the actual conduct may be described, ranging from a lack of care and proceeding through dangerousness to culpable negligence: *R v Buttsworth* ... . This structure is acknowledged by s 52AA(4) that provides that on a trial for an offence of manslaughter … a jury can return a verdict of guilty of an offence under s 52A."

100 In my opinion, this is an accurate statement of the relationship between the hierarchy of offences in Victoria ranging from dangerous driving causing death to culpable driving causing death (and negligent manslaughter).

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151 (2009) 25 VR 694 at 708-709 [52]-[54], citing *R v Duncan* (1953) 11 SASR 592; *R v Mayne* (1975) 11 SASR 583; *Pope v Hall* (1982) 30 SASR 78.

152 (1993) 69 A Crim R 159.

153 (2006) 166 A Crim R 419.

154 (2002) 133 A Crim R 104.

155 (2002) 133 A Crim R 104 at 108-109 [19], citing *Hopton* unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 8 October 1998.

156 (2009) 195 A Crim R 1 at 15 [56] per Howie J, McClellan CJ at CL and Simpson J concurring.

101 To drive a motor vehicle into an intersection without giving way to traffic, as required by the road rules, is in all circumstances a dangerous thing to do. Depending upon the circumstances in which it occurs, that manner of driving may amount to culpable driving or dangerous driving. In some circumstances, it may not support conviction for either offence. The question for the jury in determining whether the prosecution has proved culpable driving or the lesser offence involves an assessment of the degree to which the driving conduct departed from the standard which the law imposes on all who drive.

102 The experience in Victoria has been that juries frequently seek assistance with the scope of the gross degree of departure from the standard of care needed to establish guilt of negligent culpable driving[157]. The provision of the statutory alternative verdict of dangerous driving causing death is a recent development. Judges will frequently be required to leave the alternative verdict on a presentment charging negligent culpable driving. In such a case, it is necessary to give directions which meaningfully convey to the jury the distinction between the two offences. I agree with the substance of the observation in *Buttsworth* that an exposition of the law which does not convey that dangerous driving involves a degree of negligence that is less than that required to establish guilt of the more serious offence of culpable driving is unlikely to make practical sense to a jury. The directions need not involve a disquisition on proof of negligence in a civil action. However, they should make clear, consistently with *McBride*[158], that criminal liability does not attach for every failure to adhere to the standard of care.

Mr King's trial

103 The features of Mr King's driving that the prosecution relied upon to establish his culpable negligence were his ingestion of cannabis; his failure to give way at a "Give Way" sign; and his conduct in proceeding into the intersection at a speed of around 75 kph, heading in the direction of the closed-off portion of Evans Road. The same features were relied upon in the alternative to establish that Mr King's manner of driving was dangerous to the public.

104 There were two prominent factual issues at the trial: the sufficiency of the lighting at the intersection, and the extent to which the ingestion of cannabis had impaired Mr King's driving ability. The Crown relied upon the evidence of the police officers who described the lighting at the intersection as adequate. The Crown submitted that the high level of tetrahydrocannabinol (the active

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157 *R v De'Zilwa* (2002) 5 VR 408 at 410 [3] per Ormiston JA, 422 [44] per Charles JA.

158 (1966) 115 CLR 44 at 50 per Barwick CJ.

substance in cannabis) detected in Mr King's blood would inevitably have impaired his capacity to drive. Mr King's counsel relied on the evidence of the civilian witnesses who agreed that the lighting at the intersection was bad. He relied on the unchallenged evidence that Mr King had driven a distance of about 60 kilometres in an unremarkable fashion in the period immediately preceding the collision as tending against a conclusion that the ingestion of cannabis had impaired his ability to drive.

105 The Crown Prosecutor addressed the jury on the alternative verdict, submitting that "the absolute baseline case would be the alternative of dangerous driving causing death." While Mr King's counsel submitted that the jury should acquit Mr King of either offence, his closing submission that, "at its highest, the evidence in this case might permit you to say, we think in all the circumstances it was dangerous", is eloquent of the real ground on which this trial was fought.

106 At this point, the direction of which Mr King complains should be set out in full. The trial judge directed the jury that:

> "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. The second element will be met [as] long as you find that the accused drove in a speed or manner that was dangerous to the public."

107 In my view, the penultimate sentence of this direction is more than infelicitous; it is wrong. Although the prosecution was not required to prove, as an element of the offence of dangerous driving causing death, that Mr King's conduct merited criminal punishment, it is not correct to identify that circumstance as an important difference between the two offences.

108 Mandie JA, giving the leading judgment in the Court of Appeal, thought it "most unlikely" that the jury would have considered that the lesser offence was not deserving of criminal punishment since it *was* an offence and therefore necessarily subject to criminal punishment[159]. Given that the jury were told that

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159 *King v The Queen* (2011) 57 MVR 373 at 380 [22].

the need to establish that Mr King's driving warranted criminal punishment was one of two important differences between the offences, I would not draw that conclusion. In my view, there is a significant risk that the jury may have understood the directions to convey that culpable driving causing death is a serious criminal offence deserving of criminal punishment, in the sense that a person convicted of it may be sentenced to a term of imprisonment, whereas dangerous driving causing death is an offence of a regulatory character, punishable by a fine and licence disqualification or the like.

109 The Crown submitted that any error in the statement of the alternate offence was not material because the jury were directed to consider Mr King's guilt of culpable driving causing death and only in the event that they were not satisfied that guilt had been proved beyond reasonable doubt were they to consider the lesser offence. That submission should be rejected for two reasons. The first is that, to the extent that the directions wrongly diminished the seriousness of the alternative offence, they might be thought to have enlarged the scope of conduct which the jury assessed as departing "to a gross degree" from the standard that the law imposes on the drivers of motor vehicles. The point was made by Redlich JA in his concurring judgment. His Honour observed that "the practical content of each offence may be informed not only by its elements being accurately described, but by the counterpoint of the content of the other offence."[160]

110 The second reason for rejecting the Crown's submission is that Mr King was in the jury's charge for both the culpable driving and dangerous driving offences. The jurors were at liberty to organise their discussion in whatever manner appeared to them to be convenient[161]. This appeal does not raise the application of the principles stated in *Gilbert v The Queen*[162] to circumstances in which the failure to leave an alternative count on a presentment for an offence other than murder is suggested to amount to a miscarriage of justice. However, there are statements in *Gilbert* that are apt to the issue raised in the present appeal. In their joint reasons, Gleeson CJ and Gummow J observed[163]:

> "Indeed, juries are ordinarily asked to return a general verdict. They make their findings of fact in the context of instructions as to the consequences

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160 *King v The Queen* (2011) 57 MVR 373 at 374 [4].

161 *Stanton v The Queen* (2003) 77 ALJR 1151 at 1157 [35] per Gleeson CJ, McHugh and Hayne JJ; 198 ALR 41 at 49; [2003] HCA 29; *R v Nguyen* (2010) 242 CLR 491 at 505 [49] per Hayne, Heydon, Crennan, Kiefel and Bell JJ; [2010] HCA 38.

162 (2000) 201 CLR 414; [2000] HCA 15.

163 (2000) 201 CLR 414 at 421 [16].

> of such findings, and for the purpose of returning a verdict which expresses those consequences."

And Callinan J said[164]:

> "The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice."

111 In their joint reasons, Gleeson CJ and Gummow J referred to the decision of the Supreme Court of Canada in *R v Jackson*[165]. In *Jackson*, the Crown's appeal against a decision of the Court of Appeal setting aside the prisoner's conviction and directing a new trial was dismissed, notwithstanding that the prisoner had been convicted of murder at a trial at which the elements of that offence had been correctly stated. The Court was unable to be satisfied that the verdict was just, in circumstances in which the directions respecting the alternative count were inadequate[166].

112 In *R v Coutts*[167], Lord Bingham of Cornhill made a statement reminiscent of those in *Gilbert*, in the context of the failure to leave manslaughter on the trial of a count of murder. His Lordship said[168]:

> "The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it."

113 The Victorian Court of Appeal was divided in *R v Kane*[169] on the application of the principle in *Gilbert* to a presentment for an offence other than

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164 (2000) 201 CLR 414 at 441 [101].

165 [1993] 4 SCR 573.

166 *R v Jackson* [1993] 4 SCR 573 at 593 per McLachlin J for the majority, Lamer CJ agreeing.

167 [2006] 1 WLR 2154; [2006] 4 All ER 353.

168 [2006] 1 WLR 2154 at 2159F [12]; [2006] 4 All ER 353 at 359-360.

169 (2001) 3 VR 542.

murder. Of present relevance is the statement of Ormiston JA, dissenting as to the outcome, that[170]:

> "I see a significant distinction between cases in which an alternative verdict has not been put and those in which an alternative verdict has been put to the jury but about which the judge has given incorrect directions. There it may be over-simplistic in every case to say that the jury must have accepted those directions of the judge relating to the primary count and therefore the directions in relation to the alternative count should always be treated as irrelevant."

114 As earlier stated, in my opinion, the directions respecting the difference between the principal and alternative offences were misleading. This involves no criticism of the trial judge, since they were in accord with the practice following *De'Zilwa*[171]. That circumstance may explain counsel's failure to apply for a redirection. The issue for the jury required an evaluative judgment as to the degree to which Mr King's driving departed from the objective standard. In this context, the failure to correctly distinguish the gravity of the two offences assumes significance. Mr King's driving cannot be said to have so clearly involved a departure "to a gross degree" from the standard as to render the misdirection of no consequence[172]. In my opinion, there is a risk that the directions deprived Mr King of a real chance that the jury might have returned a verdict for the lesser offence. For this reason, and notwithstanding the failure to seek a redirection, I would allow the appeal.

115 Counsel for Mr King submitted that, in the event the appeal was allowed, an appropriate order would be one substituting a verdict of guilt for the lesser offence. The Crown did not demur to this submission. Taking into account the interval since the date of the collision and the circumstance that Mr King has now served the custodial portion of the sentence imposed for the more serious offence, I would allow the appeal, quash the order of the Court of Appeal, and in lieu thereof quash the conviction for culpable driving causing death and substitute a conviction for dangerous driving causing death, and remit the proceedings to the Court of Appeal for re-sentencing.

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170 (2001) 3 VR 542 at 545 [6].

171 The potential for a *De'Zilwa* direction respecting the need to establish that the driving conduct merited criminal punishment at a trial at which the alternative count is to be left was noted by Cummins J in *Director of Public Prosecutions v Towle* [2008] VSC 101 at [14] fn 5.

172 See *R v De'Zilwa* (2002) 5 VR 408, in which a case bearing some factual similarity to the present was characterised by Ormiston JA as "as weak a case of causing death by culpable driving as one might see": at 412 [8].