24 July 2024

To Mr Tom Bathurst
Chairperson
NSW Law Reform Commission

CC: NSW Road Trauma Support Group, and Mr Hoerr

Re: Law Reform Commission on Serious Road Crime

Sir,

I have only recently been made aware of the current review into Serious Road Crime when a friend sent me an article written by Mr Hoerr[1]. I have no affiliation with any of the organisations who might have become aware during their normal course of business, so I am disappointed that publicity of this review did not reach the broader public, such as myself, who may have views. I acknowledge that submissions to this review closed some months ago, but note that even Mr Hoerr's article was published after the closing date. I hope that you might consider my submission despite the date.

Background

On 14 July 1991 my 25 year old wife, her sister, and I were returning home to Sydney from my wife's parent's home in Shoalhaven Heads. After only about 15 minutes of driving, an oncoming vehicle swerved across our path and collided head on with us. and were both killed in the accident and I was severely injured. A passenger in the other car was also injured, but the driver was, I believe, only lightly injured.

The incident was witnessed by numerous other motorists and the crash site and vehicles were analysed by police to confirm what occurred. The physical sequence of events was not disputed. The driver, , was charged with culpable driving and the matter was initially heard in the Nowra District Court on 10 June 1992 where the case against her was dismissed. received no penalty for killing two people.

It transpired that on 6 May 1992 (only one month prior) a case was heard in the Supreme Court – Jiminez v. The Queen. In this matter, the court judged that "If the applicant did fall asleep, even momentarily, it is clear that while he was asleep his actions were not conscious or voluntary (an act committed while unconscious is necessarily involuntary) and he could not be criminally responsible for driving the car in a manner dangerous to the public."
's Defence cited this ruling and asserted that she was (or may have been) momentarily asleep and therefore not technically "driving".

The DPP chose to pursue the matter and a second hearing occurred on 25 May 1993. In the second instance, witnesses were called, including her son, a passenger, who stated he did not know whether she was asleep because he was rummaging in the glove box at the time. The

[1] https://lsj.com.au/articles/crossing-the-line/?fbclid=IwY2xjawEGaolleHRuA2FlbQIxMQABHYp9F2NmdJbOjvVXkKE56RWMO5GanWU36fRHNvqrlXrrKkPr8GYTKd2wtg_aem_88iYVXb348RNROiC8pJ7uQ&sfnsn=mo

magistrate determined that no new evidence had been presented and that the original dismissal be upheld. That is, the prosecution had failed to establish that she was either awake or was aware she was tired.

At no point was given an opportunity to express any remorse. In fact, when the magistrate made his decision, and her lawyer embraced with joy, while I and my wife's father looked on, dismayed. The family received no apology or empathy for how we might feel at such a display.

Some years later (2020), I tried to find out more about what had happened in the court in order to understand the ruling and if the law had been changed.

The Nowra district court was not able to provide me with any transcripts or any other details. Fortunately, the DPP did agree to meet with me and allowed me to view the evidence they had collected, but no other information. They were not able to tell me if that 1992 outcome would still be likely in 2020.

Since then, I have been unable to find any data or statistics on how many times the "Jiminez" sleep defence has been applied or whether it has been challenged. District court records are not publicly available.

The principle of "innocent until proven guilty" is an important foundation of the legal system. However, the principle that "a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter" is also important.

The normal expectation is that someone behind the wheel of a motor vehicle is in fact "driving" and therefore subject to charges associated with the consequences of their driving. On the balance of probability, based on the only relevant witness, was more likely to have been momentarily distracted by her son rummaging in the glove box than to have spontaneously fallen asleep.

The assertion that the driver may have been asleep, with no prior indication that they were tired, is both impossible for the prosecution to refute, and sufficiently unlikely that some form of evidence ought to be provided by the defence to support the claim. Further, if the defendant did have evidence of a medical condition that caused them to spontaneously fall asleep, that ought to be, at a minimum, grounds for exclusion of a licence to drive.

Whether the existing provisions of the Crimes Act 1900 (NSW) dealing with serious road and dangerous driving offences (in particular in Part 3 Division 6 and manslaughter) (serious road crime) and accessorial liability provisions remain fit for purpose.

My concern is not with the provisions for serious road crime, but with the imbalance between serious *intent* and serious *consequences*.

It appears to me that one of the mitigating factors in the case I described is the severity of the offence. Culpable driving is a crime with serious consequences including potentially a goal sentence. I believe this inclined the court to be lenient towards the defendant, to the detriment of the victims and society at large.

This leniency, while somewhat appropriate in this case (see comments below) creates a precedent that undermines many other cases where such lenience is not appropriate. It is clear that did not intend to kill or injure anyone and that a charge synonymous with manslaughter is not appropriate. Nor, however, is absolution of responsibility.

If had merely been charged with not "keeping to the left of oncoming vehicles"[2], such a defence would probably not have been mounted. A police officer observing such behaviour, in the absence of an oncoming vehicle, might charge her with that offence. Should she have challenged it in court, I would be surprised if a magistrate accepted the defence of spontaneous sleep without some form of evidence.

In case, having been charged with culpable driving and exonerated on the basis she was not driving, there was no possibility of being charged with a lesser offence because it had been determined she was not technically driving.

However, the strict definition of "driving" applies in both cases. The law should not treat the act differently because of the consequences to the defendant. All driving charges are potentially at risk because of the strict definition of "driving" and the burden of evidence being solely assigned to the prosecution.

I understand that NSW (and other jurisdictions) have attempted to introduce lesser charges, such as "negligent driving where death is occasioned"[3] that may now be applied in similar circumstances. However, these are still "driving" offences and subject to the same "Jiminez" interpretation of when someone is or isn't "driving".

As I have said, I am unable to find any data on how often that interpretation is used to dismiss charges. Unless the law has in fact changed, it would be negligent of a defence not to raise the possibility that their client spontaneously fell asleep. If that defence is not applied when it could be, because the charge is not serious enough, then that undermines the credibility and equality of the law.

The consequences of falling asleep while driving, as well as the many other causes of momentary distraction, are well known. There are numerous campaigns promoting "driver reviver" fatigue management. Yet, if someone not only does fall asleep, but can use the possibility they "may have" been asleep to absolve them of any consequences, then these campaigns are futile.

It may be that a court does now respond with the requirement for medical testing and/ or exclusion if a driver is subject to spontaneous sleep. I have not been able to find that direction in any legal documentation. However, if it is the case, why was it not applied in 1992? I also ask, is it consistently applied now?

The judicial system needs to be kept in step with the societal expectations road safety campaigns reflect. No one I have ever told this story can believe the outcome. It is simply not in tune with societal expectation that a driver who kills two people should receive no penalty at all. Falling asleep at the wheel, however involuntary and momentary, ought to be treated

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[2] As in Rule 131 of the current NSW road rules.

[3] https://www.nsw.gov.au/driving-boating-and-transport/demerits-penalties-and-offences/offences/serious-driving-offences-and-penalties#toc-list-of-serious-driving-offences.

with considerable seriousness by the courts. That would then dissuade defendants from attempting to argue spontaneous slumber as an excuse. Sentences for genuine accidents can be lenient, but the court should not dismiss the matter out of hand.

Rather than seek to justify why the incident could be excused, it would be better to ask, ought it have been prevented.

This perspective suggests that all needed to do was maintain her concentration on driving. She failed to do that for whatever reason, which is essentially a breach of contract with respect to her licence. She did not do so maliciously, but never the less, she did fail to maintain control of a lethal weapon and should be held responsible for her actions and omissions. That would likely be the case if the deaths of my wife and sister-in-law in 1992 had been a consequence of negligent misuse of a different weapon. Why is a motor vehicle treated differently?

The basis of the sleep defence is that it is involuntary. However, the preceding voluntary act is the decision to get in the vehicle and start the engine. All following events are a consequence of that action and the voluntary acceptance of the risk and responsibility of operating a vehicle. The degree of the intent of the consequences, the manner in which the driver did operate the vehicle and other aggravating circumstances should affect the seriousness of any charge and subsequent sentence arising from failure to exercise the required control of such a weapon. They do not absolve the driver of the responsibility to maintain control.

Other offences, such as those involving drugs and alcohol, rely on the voluntary nature of preceding behaviour. That is, a drunk may arguably be said to no longer be in control of a vehicle, but it is asserted that the offence and consequences arise from their prior deliberate decision to drink and then drive.

I agree with Kerry King's[4] conclusion that "deaths occasioned by the use of motor vehicles *have* been treated as a much lesser species of homicide ... not only have charges, if laid, and sentences imposed been distressing to victims' families, they have been detrimental to efforts to elevate the seriousness of the wrong, the duty of care of *all* drivers." Having been established in case law, the definition of "driving" can only be changed in legislation. A definition that recognises the privilege and consequent responsibility of driving needs to be introduced and consistently applied.

Whether the maximum sentences available for serious road crimes remain appropriate.

I have no view on sentencing for genuinely serious road crime, by which I mean road crime where deliberate intent is a factor.

As above, I believe that road crimes that have serious consequences, but do not involve malicious intent, should incur some penalty to demonstrate the importance of accepting responsibility for controlling what is in effect a lethal weapon. The victims and families are left with a life sentence that is compounded if the perpetrator simply walks free without having to accept and/or demonstrate any sense of responsibility.

[4] Kerry King. 2020. A Lesser Species of Homicide. UWAP. p273. Italics in original.

Relevant sentencing principles in statute and the common law for serious road crimes.

Sentencing should match both the consequences of an incident and the perpetrator's intent.

If it is the case that a charge, such as negligent driving, is mitigated by an involuntary state, such as sleep, then the judicial system ought to have recourse to impose a lesser charge and penalty, rather than dismiss the matter entirely. As noted above, the excuse of spontaneous sleep precludes any possibility of reducing the severity of the charge because it relies on the determination that the driver is not technically driving and therefore not responsible for *any* driving offence.

A gaol sentence for what no one disputes was an accident is not appropriate. However, no penalty at all is also not appropriate. The law, and its execution within the judicial system, needs to reflect much greater nuance.

It is not only the defendant who potentially receives a sentence. I received a life sentence of grief, confusion, emotional and physical pain. I did nothing to deserve my sentence.
did nothing to deserve frightening and painful deaths. The only person whose actions can be said to have caused the outcome was . Yet, she received no formal sentence. I am left with the hope that she spent her life feeling guilty as her only form of "sentence". That is not an acceptable outcome and could be avoided through better procedures.

The experiences and rights of victims of serious road crime and their families within the criminal justice system.

I acknowledge that my experience occurred in 1991-2 and I hope that matters have improved since then. I also stress that the investigating police officer (Constable Clay if I recall correctly) and the DPP at the time and since were as helpful and supportive as could be expected.

My experience in the court was appalling. I was given no support as a survivor and relative of the deceased victims. I was subjected to the horrific sight of the defendant jumping from her seat and embracing her lawyer when the magistrate made his determination. The magistrate did not intervene or show any concern for the onlookers. I feel I ought to have shouted "how dare you!" but was too shocked and numbed by my experience to have any reaction at the time. The image is seared into my mind.

The magistrate also did not explain his determination so that a layperson, such as myself, could understand what was observed. Legal language can be difficult to understand and words often do not mean what they mean in everyday speech. No attempt was made to translate that legalese into plain English in a manner comprehensible to the non-legal trained person. Thus, the absurdity that the defendant was not responsible because she was asleep, instead of driving, was not explained.

As a victim I was offered no support or counselling. I imagine that I could have requested it under the civil insurance matter, but the judicial system made no such suggestion. There was certainly no "victim impact statement" or any other process that made me feel that the court was representing the victims. The process seemed focused on finding any means to exonerate the defendant.

I presume was not offered any psychological support either.

The court's decision implied that the defendant was not at fault. While that may be the legal position, it is not really the moral or societal expectation. The defendant was not given an opportunity to apologise or express any remorse, and the cold way in which the matter was legally dealt with made her seem as if she took no responsibility.

To this day, my anger is more focused on the defendant's deliberate refusal to accept responsibility, and reliance on legal trickery, than on her driving and the unintended consequences. The court case provided no closure for family.

The lack of any finding of "fault" leaves me with the lingering guilt of wondering if I could have done something to prevent the accident. Was it partly my fault? The police assured me that given the relative speed and conditions, there was nothing I could have safely done. The court process, however, leaves that open.

That is another aspect of *my* sentence.

Any other matter of relevance to the Commission.

I would like to add that I have tried to find evidence of how often the Jiminez sleep defence is applied. It is impossible for me to view any court records to find that evidence and matters in lower courts that cite the High Court case are not included in databases such as Jade. In fact, despite being a victim in this case, the Nowra District Court refused to provide me with any records as I was "not a party to the matter."

It seems very likely that the defence lawyers concerned in the above case would have sought to apply that ruling whenever possible and that the local magistrates would have been consistent in their interpretation. How many other families have had similar experiences to mine because of that interpretation?

While I understand the privacy concerns, the importance of the Jiminez ruling is such that data ought to be collected on just how often it is applied and in what circumstances. As I have argued, it seems to me to potentially undermine *every* driving offence, but I imagine it is only ever actually applied when the potential sentence warrants it. If that assumption is true, and the excuse is dependent on the charge, then the principle of legal equality is vacuous.

I therefore ask that the Law Reform Commission also investigate the actual and potential implications of the Jiminez ruling and ascertain if it is correct, consistent and in line with community expectation.

Thank you for your consideration of my views.

Todd Mason