

IN THE COUNTY COURT OF VICTORIA  
AT MELBOURNE  
CRIMINAL DIVISION  
GENERAL LIST

Revised  
Not Restricted  
Suitable for Publication

Case No. CR:19:00978

THE DIRECTOR OF PUBLIC PROSECUTIONS

Prosecution

v

THOMAS JAMES BELL

Accused

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JUDGE: LACAVA  
WHERE HELD: Melbourne  
DATE OF HEARING: 21-22, 25 & 27 January 2021  
DATE OF JUDGMENT: 23 February 2021  
CASE MAY BE CITED AS: DPP v Thomas Bell  
MEDIUM NEUTRAL CITATION: [2021] VCC 114

**REASONS FOR JUDGMENT**

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Subject: Judge Alone Trial; Two Charges of Dangerous Driving Causing Serious Injury

Catchwords: Circumstantial Case; Inferences;

Legislation Cited: *Crimes Act 1958 s.319(1A)*; *Criminal Procedure Act 2009*; *Jury Directions Act 2015*;

Cases Cited: *R v Coventry* (1938) 59 CLR 633; *R v Burnside* [1962] VR 96; *R v De Montero* (2009) 25 VR 694; *McBride v The Queen* (1966) 115 CLR 44; *King v The Queen* (2012) 245 CLR 588; *R v Smith* [2006] VSCA 92; *R v Jiminez* (1992) 173 CLR 572

Judgment: Verdict of acquittal be entered on each charge

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
Prosecution	Mr S Devlin	Solicitor for Public Prosecutions
For the Accused	Ms R Shann with Ms C Marcs	Galbally Parker Lawyers

HIS HONOUR:

## Background

- 1 The accused has pleaded not guilty before me to each of two charges alleging dangerous driving causing serious injury. At the request of both the prosecution, and the accused, on 11 November 2020 Judge Gamble ordered that each of the charges be heard and determined by a judge alone, without a jury. That order was made pursuant to section 420D of the *Criminal Procedure Act 2009*.
- 2 I have now conducted the trial of the accused. After closely examining all of the evidence I have reached the decision that the prosecution has failed to prove both charges beyond reasonable doubt. A verdict of the accused having being found "Not Guilty" on each charge will be recorded. These are the my reasons.
- 3 The legislation that amended the *Criminal Procedure Act 2009* to provide for the introduction of judge alone trials in this state made clear that such a trial is to be held in such a way that notwithstanding that it is a judge alone trial the provisions of the *Jury Directions Act 2015* apply. See section 420ZF of the *Criminal Procedure Act 2009* that amended section 4A of the *Jury Directions Act 2015* to include a judge alone trial. Accordingly, I have conducted this trial, applying where necessary the relevant provisions of the *Jury Directions Act 2015*. Both the prosecution, and the defence, agreed that this was the correct approach.
- 4 Both charges arise out of the one incident of the accused driving on the 12<sup>th</sup> June 2017. On that day, shortly after 10.30am, a motor vehicle being driven by the accused collided with three cyclists on Black Forrest Drive Macedon.

As a result of the collision, one of the cyclists Mr Nguyen, received what can only be described as catastrophic injuries from which he will never fully recover (Charge 1). He has never been able to make a statement and was not called as a witness.<sup>1</sup> Another of the cyclists Mr Fox, was also seriously injured in the collision (Charge 2). Fortunately, he has made a recovery from his injuries.

### Elements of the Offence

- 5 In order to obtain a conviction on each charge the prosecution must prove each of three elements beyond reasonable doubt. Relevantly here, those elements of each charge are:

**One**, that at the time of the alleged offence, the accused was driving a motor vehicle; and

**Two**, the accused was driving in a manner that was dangerous to the public; and

**Three**, the dangerous driving caused the victim to be seriously injured.

- 6 In this trial there is no dispute between the parties that the prosecution has established the proof of each of elements one, and three, beyond reasonable doubt.<sup>2</sup> Accordingly, this trial was about whether on the evidence the prosecution has proved beyond reasonable doubt that at the relevant time the accused manner of driving was dangerous. I am not satisfied the prosecution has proved this element of each charge beyond reasonable doubt.

- 7 Having laid the charges the prosecution bears the onus of proving each element of the offence to the criminal standard of proof, namely, proof beyond

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<sup>1</sup> T3  
<sup>2</sup> T247

reasonable doubt. Those words, “proof beyond reasonable doubt”, mean exactly what they say – proof beyond reasonable doubt. This is the highest standard of proof that our law demands. It can be compared with the lower standard of proof that is required in a civil case, such as where one person sues another for breach of contract. In that situation, matters only need to be proved on what is called the “balance of probabilities”. That is, they need to be shown to be more likely than not. It is only if I find that the prosecution has proven all of the elements of a charge beyond reasonable doubt that I may find the accused guilty of that charge. If I am not satisfied that the prosecution has done this, my decision in relation to that charge must be “Not Guilty”.

- 8 The second element of each charge that the prosecution must prove is that at the time of the alleged commission of the offence the accused was driving in a manner that was dangerous to the public.

#### Legal Principles

- 9 There is no controversy between the parties as to what legal principles apply to deciding these charges that derive from allegations that the accused breached section 319(1A) of the *Crimes Act 1958*. The principles and case law are discussed in the relevant case notes found in the Criminal Charge Book on the website of the Judicial College of Victoria at 7.2.6.
- 10 All matters concerned with the control and management of the vehicle are part of the accused’s “manner of driving”. “Manner of driving” covers all of the acts and omissions of a driver, including casual or transitory acts. A single dangerous act is sufficient.<sup>3</sup>
- 11 To prove each charge the manner of the accused driving must be shown by

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<sup>3</sup> *R v Coventry* (1938) 59 CLR 633; *R v Burnside* [1962] VR 96

the evidence to have involved a serious breach of the proper management or control of his vehicle which created a real, and not just speculative, risk that members of the public in the vicinity would be seriously injured.<sup>4</sup>

- 12 In determining whether the prosecution has proved this element, I must keep in mind that people do not always drive as they should. Even the best drivers occasionally lose attention, or concentration, for a moment, or make minor mistakes. The mere fact that a collision has occurred is not conclusive evidence of a serious breach. The law does not require drivers to act with perfect hindsight, or assume that for every accident there must be a remedy.<sup>5</sup>
- 13 A mere error of judgment in a situation of sudden crisis, or a failure to successfully take evasive action, will not constitute a sufficiently serious breach.<sup>6</sup>
- 14 For this second element to be proved, the accused must have driven in a manner that significantly increased the risk of serious injury, over and above the ordinary risks of the road. This could be because the accused driving increased the likelihood of a collision, or because it made it more likely that any injuries suffered in a collision would be serious.
- 15 The accused manner of driving includes all matters concerned with the management and control of the vehicle, such as the accused technical driving skill. As part of this I must consider the condition of his vehicle. Here, the evidence is that there was nothing about the condition of the vehicle that contributed to or caused the collision to occur. This is common ground.
- 16 In determining whether the accused driving was dangerous, I must consider

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<sup>4</sup> *R v De Montero* (2009) 25 VR 694; *McBride v The Queen* (1966) 115 CLR 44; *King v The Queen* (2012) 245 CLR 588

<sup>5</sup> *R v Smith* [2006] VSCA 92

<sup>6</sup> *R v Jiminez* (1992) 173 CLR 572; *R v Coventry* (supra)

all of the circumstances in which he was driving at the time.

17 In this case, that includes a number of factors such as the condition of the roadway, the time of the day that the collision occurred, the state of the weather, the condition of the accused, the presence of other vehicles on the roadway at the time, the type of bicycles being ridden by the cyclists and whether the bicycles were illuminated in any, and if so, what way. Also the type and colour of clothing that may have been worn by the cyclists at the time the collision occurred. Further, in this case I must consider whether the accused vision of the road, and the cyclists, in front of his vehicle immediately before the collision was blocked or obscured in any way by a slight left hand bend in the roadway a short distance north of the area of impact. Similarly, I must have regard to whether a crest in the roadway a short distance north of the area of impact blocked or obscured in any way the accused vision of the road and of the cyclists in front of his vehicle. Further, there is a question on the evidence as to whether or not shadowing from trees along the eastern side of the roadway, or conversely sunlight filtered by the presence of trees, contributed to the accused not being able to see the cyclists in question until immediately before impact.

18 Importantly, I must not assume that simply because there was a collision between the vehicle being driven by the accused and one or more of the cyclists, that the accused driving must have been dangerous. Sometimes accidents happen for which no one will be criminally responsible.

#### Prosecution Case in Outline

19 Mr Devlin who appeared on behalf of the Director submits that the evidence shows that at all relevant times the accused driving involved a serious breach of control of the vehicle he was driving creating a real risk that members of the

- public in the vicinity would be injured. He submitted the evidence shows the accused was driving his vehicle in a way that lacked attention to his driving, and there was a period of inattention in his driving that caused the accused to drive into the cyclists without seeing them, and not braking and not taking any steps to avoid the cyclists.
- 20 I will come to the evidence shortly. The prosecution tendered a DVD of a recorded interview with the accused on the day of the collision. In that interview the accused said that he was watching the road at all relevant times apart from when he glanced at the dashboard clock in his vehicle. He said that he did not see the cyclists until just before the collision.
- 21 This is not a case where the prosecution alleges the accused driving caused his vehicle to wander all over the roadway. It is not a case where the prosecution alleges the accused was driving too fast. It is not a case where the prosecution alleges that the accused driving was affected by drugs or alcohol. It is not a case where the prosecution alleges that the accused was distracted in the driving of his vehicle because of use of a mobile phone, or for any other reason.
- 22 The prosecution case here is a circumstantial one. The prosecution argues that shortly before the collision, another driver travelling in the same direction as the accused, and a short distance ahead of the accused, observed the cyclists on the roadway and was able to safely pass them after moving into the right-hand lane. Another witness who was a passenger in the same vehicle also observed the three cyclists on the roadway a short time prior to the collision. That driver and witness gave evidence that notwithstanding the presence of shadowing on the roadway, they were both able to see the cyclists. The prosecution case asserts that the evidence shows that the

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accused had an uninterrupted view of the cyclists on the roadway for a distance of at least 250 metres leading up to the area of impact. It argues that I should draw an inference from all of the evidence that if the accused was indeed keeping a proper lookout whilst driving his vehicle he would have seen the cyclists on the roadway and had time to avoid them. Just as the other driver had. The prosecution case, by implication, invites me to reason that the fact of the collision itself, in all of the circumstances, is proof beyond reasonable doubt that the accused was driving in a manner dangerous.

23 The prosecution called a number of witnesses. Some of these witnesses gave evidence of their observations of the cyclists on the day shortly prior to the collision, and after the collision. The informant gave evidence about being called to the scene of the collision, and of his observations and photographs taken at the scene of the collision. Some witnesses expressed opinions.

24 I remind myself in making this judgement from all of the evidence, that it is the answers which witnesses give that is the evidence and not the questions they are asked. In addition, a number of documents were produced in evidence and I must take these into account.

25 I further remind myself that is my duty to decide this case only on the basis of the evidence and I must ignore all other considerations particularly feelings of sympathy or prejudice for or against the accused or anyone else. I acknowledge that such emotion has no part to play in my decision. I must dispassionately weigh the evidence, logically and with an open mind and not according to my passion or feelings.

#### Evidence on View

26 I was asked by the parties to conduct a view of the scene of the collision and I

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acceded to that request. On 10 December 2020 I conducted a view of the scene of the collision and the surrounding area. The purpose of the view was to assist me to better understand the evidence of the witnesses. Having conducted a view I am able to use my observations as evidence in the case. I am entitled to draw any reasonable inferences from what I have seen on the view. Whilst on the view there were two drive throughs of the collision scene conducted whilst I was seated in the front seat of a police vehicle. Each was recorded by video. Both videos were admitted into evidence as Exhibit C. I will have more to say about this evidence later.

#### Circumstantial Case - Inferences

- 27 As I have said, the prosecution case against the accused is a circumstantial one. It invites the drawing of conclusions, or inferences, from all of the evidence. In making my decision I am conscious that I must consider all of the evidence in the case, and only draw reasonable conclusions based on the evidence that I accept. I am not permitted to guess. In determining whether a conclusion is reasonable I must look at all the evidence together. I must take care not to jump to conclusions. I must keep an open mind until I've considered all of the evidence. I acknowledge that I can only convict the accused of the charges if I am satisfied that his guilt is the only reasonable conclusion to be drawn from the whole of the evidence both direct and indirect. If there is another reasonable view of the facts which is consistent with the accused innocence then the prosecution will not have proved his guilt beyond reasonable doubt and I must acquit him.
- 28 Here, it seems implicit in the prosecution reasoning, that because the evidence may show that Mr Grannas, another driver who was travelling in the

same direction as the accused a short distance ahead, clearly saw the cyclists on the roadway and passed them safely, then I should infer that had the accused been keeping a proper look out, then he too should have seen the cyclists. I can only draw that inference if I am satisfied it is the only reasonable inference that can be drawn from the evidence that I accept.

Character Evidence

29 Ms Shann, who appeared with Ms Marcs for the accused, submits that the accused is a man of impeccable character. She relies upon the evidence of the informant Detective Sergeant Amos that the accused has never before recorded a traffic infringement, and nor does he have any prior convictions for anything, he having been licensed to drive since November 2008.<sup>7</sup>

30 At the time of the collision the accused was a recently admitted legal practitioner. As such he is presumed to be a person of good character, and as being totally honest.

31 Ms Shann relies upon the general good character evidence of the accused led from his former employer, Mr Robert Galbally. Mr Galbally gave evidence that the accused is an honest person of impeccable character. Mr Galbally's evidence was impressive, and of course unchallenged. I accept his evidence.

32 Ms Shann relies upon what the accused told police in his recorded interview that he was keeping a proper lookout but he just did not see the cyclists on the roadway until just immediately before impact with one or more of them. She submits that the accused, being an honest person, I should accept his explanation.

33 I remind myself that the evidence of the accused's good character can be

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<sup>7</sup> T229-230

taken into account by me in assessing his credibility of his denials of the prosecution case. A person of good character is generally thought to be more trustworthy than other people. Because of that fact, I may be less willing to accept the prosecution's evidence than if the accused was not a person of good character. I also remind myself that I can use the evidence as to the accused's good character when determining the likelihood that the accused committed the offences charged. It's generally believed that a person of good character is unlikely to commit a criminal offence, and I may be less willing to accept the prosecution allegations, than if he was not a person of good character. Of course, this does not mean that I must find the accused not guilty, even if I accept that he is a person of good character. The mere fact of the accused's good character cannot alter proven facts. It can only help me to determine whether or not those facts have been proven. In addition, I keep in mind the fact that a person who has previously been of good character, or who previously had an impeccable driving record, can commit a crime of this type the first time. I am also cognizant of the fact that this kind of offence can be committed by any driver.

#### The Accused Right to Remain Silent

- 34 The only evidence that was called by the defence was the evidence of Mr Galbally. The accused himself did not give evidence. That is his right. It is for the prosecution to prove its' case beyond reasonable doubt. The accused is not required to call any witnesses or to give evidence. The onus of proving the accused guilt on each charge always remains on the prosecution regardless of whether the accused chooses to give evidence or not call any evidence. This means that the fact that the accused did not give evidence cannot of itself be used as evidence against him. That fact is not evidence in the case, and as I have reminded myself, I must decide the case only on the basis of

the evidence presented before me in the court. So the fact that the accused did not give evidence does not constitute an admission by him, and may not be used to fill gaps in the evidence led by the prosecution. It does not add to or strengthen the prosecution case in any way. It proves nothing at all. I therefore must not draw any conclusions against the accused because he did not give evidence, or even consider the fact that he did not give evidence, when deciding whether the prosecution has proved its' case beyond reasonable doubt. Further, I must not speculate about what the accused might have said had he given evidence. I must decide the case solely on the evidence that has been given before me in court.

#### Defence Case in Outline

35 Ms Shann submitted that when all of the evidence is closely examined there are a number of inconsistencies in the evidence which undermine the conclusions or inferences that the prosecution is asking me to draw. In effect, she submits that it is not safe to draw the inferences as to the accused manner of driving which the prosecution invites. Because of the inconsistencies, she submits no reasonable inferences about the accused manner of driving can be drawn. She submits that because of some inconsistencies raised by the evidence, and because there are a number of evidentiary aspects of the collision that were not explored by investigators, there is no safe evidentiary basis to enable the safe drawing of reasonable inferences. She submits there are possibilities that are consistent with the innocence of the accused that cannot be disproved by the evidence presented by the prosecution. Ms Shann therefore submits the prosecution has not proved the second element of each charge beyond reasonable doubt, and I must acquit the accused on each charge.

## Opinion Evidence

- 36 The prosecution called Dr Janelle Hardiman an expert accident reconstructionist to express her opinion about the point of first impact for the collision, and the mechanism of the collision, and the speed of the accused vehicle at impact. The defence sought to lead evidence from her as to reaction and response times available to the accused after he first saw one of the cyclists. The qualifications of Dr Hardiman as an expert witness were not in question.
- 37 Some other witnesses were asked to give opinions about various matters without being qualified as experts. There was no objection taken to opinion evidence being given in this way.
- 38 Ordinarily, witnesses are not allowed to give their opinions in court. They must confine their evidence to their own observations. This is because, as the Judge of the facts, it is my opinion of the factual evidence that is relevant. However, the law says that people with specialised knowledge or training are allowed to give their opinions about matters within their field of expertise, if that will assist me as the fact finder in making a decision.
- 39 I'll have more to say about some of the evidence of Dr Hardiman a little later. At this stage I say that I found her evidence of little assistance in this particular case. That was because when she went to the collision scene more than two hours after the collision, critical evidence relevant to her findings had had been altered. In particular, the bikes had been moved from their original resting position after impact. That made her task in trying to reconstruct the collision more difficult, if not impossible. Further, in this case, there were no skid marks left by the accused's vehicle on the roadway, making the task of estimating the speed of the accused vehicle at impact more difficult. Also, Dr

Hardiman had been given some incorrect information as to the position where each of the riders had come to rest after the collision. Again, that made her task more difficult.

40 Having set out by way of introduction how the issues arise in this trial, I now turn to discuss the evidence.

#### Evidence of Agreed Facts

41 The parties agreed a number of relevant facts which were admitted into evidence as Exhibit J. It is convenient to commence with setting out evidence and facts agreed between the prosecution and the defence.

42 On 12 June 2017 at approximately 10:41 AM the accused was driving a motor vehicle that collided with cyclists on Black Forest Drive, Macedon. Mr Nguyen (charge 1) and Mr Fox (charge 2) were both injured as a result of the collision.<sup>8</sup>

43 On the evening of Sunday, 11 June 2017, the accused (a resident of Melbourne) had been in Woodend singing in a classical music concert. He attended a function following the concert and later stayed the night with friends in Ashbourne, near Woodend.<sup>9</sup>

44 The following morning (12 June 2017 which was the Monday Queen's Birthday public holiday) the accused awoke and got up at approximately 10 AM in order to return to Melbourne. He stopped in Woodend on the way where he purchased a coffee and croissant which he ate in his car before setting off to Melbourne.<sup>10</sup>

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<sup>8</sup> Exhibit J [1]

<sup>9</sup> Exhibit J [2]

<sup>10</sup> Exhibit J [3]

- 45 Whilst travelling to Melbourne, the accused stopped to refuel at the United Service Station at 313 Black Forest Drive Macedon. The service station is located on the corner of Black Forest Drive and McBean Avenue, Macedon.<sup>11</sup>
- 46 The accused entered the service station at 10:36:14AM. He cleared some rubbish from his vehicle and refuelled. After paying, he returned to his car at 10:38:32 AM, and then left the service station at 10:39:15 AM.<sup>12</sup>
- 47 On the same morning of 12 June 2017, three cyclists met for a bike ride in the Gisborne – Mt Macedon area. The three riders were Andrew Fox aged 27, Mark Lynch aged 29 and Phong Nguyen aged 44. Mr Fox was riding a white and navy coloured bicycle with “Specialised” written down the side. That bicycle is depicted in a booklet of agreed photographs at photograph 41. Mr Lynch was riding a black and green bicycle also with “Specialised” written down the side depicted in photograph 43. Mr Nguyen was riding a black, red and white bicycle with “Avanti” written down the side depicted in photograph 40.<sup>13</sup>
- 48 The accused left the service station in his car by driving onto a small road abutting the service station from which he turned right into Black Forest Drive.<sup>14</sup>
- 49 For the purposes of the trial, it was agreed that Black Forest Drive runs in approximately a North – South direction. The relevant part of Black Forest Drive is depicted in an aerial photograph that went into evidence unopposed as exhibit B. When the accused drove his vehicle from the service station to travel south, at about the same time the three cyclists were also riding south

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<sup>11</sup> Exhibit J [4]  
<sup>12</sup> Exhibit J [5]  
<sup>13</sup> Exhibit J [6]  
<sup>14</sup> Exhibit J [7]

along Black Forest Drive. At that point they were some distance further south of the accused car.<sup>15</sup>

50 Immediately to the north of where the accused turned right, after leaving the service station, is a road to the north-east called McBean Avenue. Two witnesses, namely Mr Grannas, and Ms Delacey, at different times respectively turned vehicles they were each driving left from McBean Avenue into Black Forest Drive, and proceeded in a southerly direction.<sup>16</sup>

51 Southbound vehicles travelling along Black Forest Drive from the area of the service station, and the intersection with McBean Avenue, negotiate first a bend in the road to the right, and then a bend to the left.<sup>17</sup>

52 The estimated point of collision between the accused vehicle and the cyclists, is south of the left hand bend and just past the driveway to the property located at 196 Black Forest Drive owned by Mr Stibbard who was a witness in the trial.<sup>18</sup> The area where the collision occurred is in a semi-rural setting.<sup>19</sup>

53 The section of Black Forest Drive between McBean Avenue and the estimated point of collision is lined with trees and foliage on the left-hand (south bound) side of the road. When the sun is to the east of the trees and shining through them it creates shadowing on the southbound left-hand lane.<sup>20</sup>

54 Black Forest Drive is a two-way road with four lanes that generally run north – South. The road has two lanes for traffic in each direction. Each respective two lanes has a left lane, nearest the road verge, and a right overtaking lane to the right of the left lane. The oncoming traffic also has two lanes. The two

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15 Exhibit J [8]

16 Exhibit J [9]

17 Exhibit J [10]

18 Exhibit J [11]

19 Exhibit J [12]

20 Exhibit J [13]



lanes southbound were divided from the two lanes northbound by a single broken painted line. The eastern and western lanes respectively closest to the road verge had "fog lines" painted along the edge of the road, with a narrow bitumen shoulder outside of the fog line, abutted by a wider grassed and vegetated shoulder.<sup>21</sup>

55 The road is marked as a 90 km/h speed zone.<sup>22</sup>

56 At the time of the collision the weather was fine and sunny and the road surface was dry.<sup>23</sup>

57 After the accused travelled around the left hand bend in the road he recalled that at some point, he glanced at the clock on the dashboard of his car.<sup>24</sup>

58 Mr Phong Nguyen was riding to the rear of the group of cyclists. He was dressed in black lycra riding gear. The accused collided with him from the rear.<sup>25</sup>

59 The other two cyclists were also impacted in the collision.<sup>26</sup>

60 The accused vehicle came to a stop after the collision.<sup>27</sup>

61 The accused got out of the car and called 000 at 10:42am but stopped when Mr Grannas (who had also stopped) said he had connected to 000.<sup>28</sup>

62 The accused remained at the scene and, along with civilians Mr Grannas, Ms

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<sup>21</sup> Exhibit J [14]  
<sup>22</sup> Exhibit J [15]  
<sup>23</sup> Exhibit J [16]  
<sup>24</sup> Exhibit J [17]  
<sup>25</sup> Exhibit J [18]  
<sup>26</sup> Exhibit J [19]  
<sup>27</sup> Exhibit J [20]  
<sup>28</sup> Exhibit J [21]

Barnes, Mr Lebbink and Mr Stibbard, assisted the injured cyclists.<sup>29</sup>

63 Mr Hayden Lebbink made a statement to the police on 12 June 2017. He stated that:

- a. He was a chiropractor.
- b. He was driving down Black Forest Drive towards Woodend at approximately 10:50 AM.
- c. He noticed that it was a sunny day with clear skies and the road was dry.
- d. He observed the damaged vehicle and the cyclists on the road and he stopped to assist at the scene of the collision.
- e. He stayed with Mr Nguyen until ambulance arrived.
- f. While at the scene, he recalls seeing lights on the bicycles, some of which were broken and some were flashing.<sup>30</sup>

64 Leading senior Constable Ken Oakley made a statement on 15 June 2017. He stated:

- a. He was on duty at the Woodend police station on the morning of 12 June 2017.
- b. He responded to a call to assist at the scene of the collision.
- c. He was the first police member to arrive at the scene at 11 AM.
- d. He observed at the time that the southbound lanes of Black Forest

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<sup>29</sup> Exhibit J [22]

<sup>30</sup> Exhibit J [23]

Drive were shaded by the roadside trees on that side of the road whilst the northbound lanes were in the sunshine.

- e. L.S.C. Oakley observed that a bicycle with a black frame was further away from the injured cyclists and appeared to have little, if any, damage. He observed a red rear light flashing on this bicycle. He noted that it stopped flashing at 12:40 PM.
- f. L.S.C. Oakley spoke with the accused at the scene. The accused explained that he was the driver of the vehicle involved in the collision which occurred as he was returning to Melbourne after singing in Woodend the previous evening.
- g. The accused produced his valid driver's licence when requested and underwent a preliminary breath test which resulted was a reading of 0.000.
- h. As he was directing traffic and securing the scene, L.S.C. Oakley directed the accused to stand over on the west side of the road and stay in the sun in order to keep warm (because the accused had provided his coat to cover Mr Nguyen). The accused complied with this request.<sup>31</sup>

65 Sgt Brad Hall made a statement on 14 June 2017. He stated:

- a. He was performing patrol duties in the Macedon area on the morning of the collision.
- b. He attended the scene at approximately 11AM and assumed the role of incident controller.

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<sup>31</sup> Exhibit J [24]

- c. He had the following conversation with the accused at the scene:
1. Sgt Hall said. "Hello, are you ok."
  2. The accused said: "yes, a bit shaken up"
- d. Sgt Hall then asked if the accused would provide a sample of his breath and accompany police to Kyneton Hospital in order to provide a sample of his blood. The accused replied, "yes, I will" to both requests.
- e. The accused was then cautioned and indicated he did not wish to exercise any of his rights at that time.
- f. The accused was taken to Kyneton Hospital where he provided a sample of his blood at 12:27 PM.
- g. Whilst at the hospital, the accused asked Sgt Hall about the condition of the cyclists.
- h. Sgt Hall then escorted the accused from the hospital to Kyneton police station and placed him in an interview room.<sup>32</sup>
- 66 The results of both breath and blood samples taken from the accused were negative for alcohol and any other drugs.<sup>33</sup>
- 67 The accused gave a record of interview in which he answered each question asked of him. This commenced at 1:37 PM and concluded at 5:52 PM with a number of lengthy breaks.<sup>34</sup>
- 68 Mr Nguyen was seriously injured as a result of the collision.<sup>35</sup>

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<sup>32</sup> Exhibit J [25]  
<sup>33</sup> Exhibit J [26]  
<sup>34</sup> Exhibit J [27]  
<sup>35</sup> Exhibit J [28]

69 Dr Richard Clements from Austin Health assessed Mr Nguyen and provided a statement dated 22 August 2017. Dr Clements stated that:

- a. Mr Nguyen sustained a significant traumatic brain injury which resulted in profound cognitive impairment.
- b. Mr Nguyen also sustained a serious spinal cord injury resulting in quadriplegia. His injuries include:
  - i. Severe diffused axonal injury.
  - ii. thin right anterolateral upper cervical epidural haematoma.
  - iii. small right internal capsule infarct.
  - iv. three extensive ligamentous disruptions to column C-4 and C-5.
  - v. Mild multilevel T2-T6 vertebral compression fractures.<sup>36</sup>

70 Mr Andrew Fox was also seriously injured as a result of the collision.<sup>37</sup>

71 Dr Jason Wong from the Royal Melbourne Hospital did not assess Mr Fox but reviewed his medical file from the four days that Mr Fox was in hospital and stated that he had:

- a. Multiple spine injuries.
- b. Rib fractures with underlying pneumothorax and lung contusion.
- c. Treatment and follow-up.
- d. Posterior fusion T6-10 on 14 June 2017 - orthopaedic clinic follow-up on 26 July 2017.

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<sup>36</sup> Exhibit J [29]

<sup>37</sup> Exhibit J [30]

e. Washout and debridement of bilateral knee/elbow/right upper limb/face on 15 June 2017.

f. C-spine fracture managed non-operatively.<sup>38</sup>

72 The vehicle driven by the accused was a white 2001 Holden Commodore sedan, registration RDH – 705.<sup>39</sup>

73 The vehicle was mechanically inspected on 3 August 2017 by acting Sgt Nick Brickley. A/Sgt Brickley prepared a report dated 22 August 2017. He stated that:

a. His inspection did not identify any mechanical fault that would have caused or contributed to the collision.

b. The vehicle was fitted with ABS brakes which performed satisfactorily when road tested at speeds of up to 40 km/h.<sup>40</sup>

74 As can be seen from the facts agreed between the prosecution and the defence, immediately before the collision three cyclists were proceeding south along Black Forest Drive. It is not contested they were riding in the left hand, or south bound, lane. Mr Fox and Mr Lynch were riding along side by side with Mr Nguyen following along behind them. The accused vehicle collided with one, or other, of the cyclists from behind as he was driving in the same direction. What this trial is really about is what view of the roadway in a southerly direction the accused had in the few seconds leading up to the collision.

### Factual Disputes

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<sup>38</sup> Exhibit J [31]

<sup>39</sup> Exhibit J [32]

<sup>40</sup> Exhibit J [33] to [35]

75 As is the case in any trial, notwithstanding there has been substantial agreement between the prosecution and the defence on factual evidence, there nonetheless remains a number of factual issues to resolve.

- a. What was the approximate position of the three riders in the left hand lane immediately prior to the collision? It is agreed that Mr Fox and Mr Lynch were riding side by side in front of Mr Nguyen, but how far were the riders from the left fog line, and how much of the space of the left lane were they taking up immediately before the collision? How far behind was Mr Nguyen and approximately how far out from the left fog line was he? What view of the three riders on the roadway actually confronted the accused?
- b. Did any of the cyclists have rear lights fitted and operating at the time of the collision? Did the position of Mr Nguyen's bike, being behind the bike being ridden by Mr Lynch, obstruct the accused from seeing any light that may have been illuminated on Mr Lynch's bike?
- c. The identity of the bicycle being ridden by each rider is admitted. But what colour clothing were they each wearing?
- d. Was the accused view of the cyclists in the left hand obscured in any way by the presence of shadowing? Conversely, was there any dazzling effect caused by sunlight being filtered through the trees?
- e. Was the accused view of the cyclists in the left hand lane obscured in any way by the presence of a small crest in the road a short distance to the north of the area of impact?
- f. Where did Mr Grannas overtake the cyclists? This goes to an apparent inconsistency in the evidence given by Mr Grannas as the driver of his

vehicle, and Ms Barnes who was a front seat passenger in the same vehicle? Is there a possibility the accused view of the cyclists in the left hand lane was obscured in any way by the presence and/or movement on the roadway of a vehicle driven by the witness Mr Grannas? If so, does the evidence permit me to dismiss that as a possibility for the cause of this collision beyond reasonable doubt?

- 76 These questions raise some critical issues because they address the issue of what view of the riders would have confronted the accused in the moments before the collision, and whether or not the prosecution has proved beyond reasonable doubt that the accused was driving in a manner dangerous because he failed to pay proper attention to his driving, and because of this he failed to observe the cyclists, and then failed to take evasive action to avoid a collision.

#### Photographs of the Collision Scene

- 77 As well as the agreed facts there was further evidence that was not challenged. Exhibit A is a booklet of 43 photographs taken at the collision scene mostly on the day. The photographs were taken by Detective Senior Constable Howie. Also tendered as Exhibit H was part of a statement made by Howie forming part of the depositions. The Exhibit includes paragraphs numbered 8 to 10 inclusive of his statement which give a description of each photograph.
- 78 There is no evidence as to what time of the day the photographs were taken. There is evidence that Howie did not arrive at the collision scene until about 12.45pm,<sup>41</sup> so that the photographs were taken at least more than two hours after the collision had occurred. Whilst many of the photographs depict

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<sup>41</sup> T209



shadowing on the roadway from trees on the left verge, they cannot be taken as an exact replication of the view that was facing the accused in the immediate lead up to the collision. I cannot speculate as to the extent of shadowing confronted by the accused. However, at the time of collision the sun would have been lower in the sky than it was at the time that Howie took the photographs.

79 Detective Senior Constable Howie was instructed by detective Amos to take photographs of the collision scene. In Exhibit H, he says that he utilised a calibrated "walking" wheel measuring device to mark from the area of impact to outside visual range of the vehicle involved. He said he measured out 300 m in a northerly direction to where he was unable to see the collision location. He said that it was at this distance that he commenced photographing the scene walking south towards it and taking photos at varying distances.

80 The photographs commence from 300 m north of the assumed area of impact between the accused vehicle and one or other of the cyclists. Each photograph looks in approximately a southerly direction.

81 Photograph 1 is a view facing north along Black Forest Drive from the area of impact back in the direction from which the accused car approached the collision. Photograph 2 is the converse of photograph 1. It gives a view from 300 m towards the area of collision impact in a southerly direction. It is noteworthy that the accused vehicle, which was still stationary on the roadway, and predominantly in the right south bound lane, cannot be seen in photograph 2. I infer that at 300 m north from the area of impact at the accused would not then have had a view of the cyclists.

82 Photograph 3 is a view facing south from 250 m north of the area of impact. The accused vehicle can be seen in the distance in this photo. It is

noteworthy that the photograph taken more than two hours after the collision depicts a mixture of sunlight and heavy shadowing on the roadway from the adjacent tree line on the left. As will be seen from the evidence, and submissions, what is depicted in photo 3 is critical to the prosecution case. The prosecution submits that what is seen in this photograph shows that the accused would have had an uninterrupted view of the cyclists at this point had he been paying proper attention to the manner in which he was driving his vehicle.

83 I am not convinced that such a conclusion or inference can be drawn from photo 3. There are at least three things about this photograph that in my view do not assist the prosecution case. First, it is clear that at the point from which this photograph was taken, it is before the apex of the bend to the left. Second, it can be seen from the photograph that there are police vehicles present on the right-hand side of the road. Other evidence shows they were parked approximately adjacent to the area of impact. The presence of those vehicles unwittingly I think draws one's mind to the area of impact. But those vehicles were not present at the time of the collision. Third, the photograph does not properly reflect, in my opinion the crest in the roadway shortly after the left hand bend.

84 Photograph 4 is a closer view taken from 200 m north of the area of collision impact. In my opinion this photograph shows that there is a rise in the elevation of the roadway up to the point of collision which is a short distance beyond the 90 km/h sign, seen in the distance at about the centre of the photograph.

85 Photograph 5 is a view facing south approximately 175 m north of the area of impact. It better shows the road falling away or dropping at about the 90 km/h

sign.

- 86 Photograph 6 is a view south taken 100 m north of the area of impact. Photograph 7 is a closer view 50 m north of the area of impact designated by the witches hat seen in the left-hand lane at about the centre of the photograph. Photograph 8 is a view taken 25 m north of the area of impact.
- 87 A feature in all of these photographs, and especially the photos taken over the last 100 m of travel to the point of impact, is the presence of areas of sunlight and heavy shadowing on the left-hand side of the roadway. It was a clear sunny morning. In my opinion, the photographs show the conditions for driving, and riding a cycle were ideal.
- 88 I'll return to some of the photographs in more detail a little later. But I do not want to leave them at this point without also referring to photograph 22 which is described by Detective Senior Constable Howie as a view facing north along Black Forest Drive showing the white Holden Commodore sedan, and two of the three road bicycles involved in the collision, situated on the eastern side grass verge. The photograph is interesting because it gives another view of the bend in the roadway to the left (from the opposite direction) looking back from beyond the approximate point of impact of the collision. Photo 22 appears to capture a small crest in the road approximately adjacent to the 90 km/h sign depicted, and a short distance north of the witches hat located on the roadway and seen approximately in the centre of the photograph. There is no direct evidence as to what (if any) role this small crest may have played in the lead up to the collision save that it may in part account for the accused explanation that he was looking ahead and he did not see the cyclists until immediately before impact with one of them. The onus rests on the prosecution to exclude inferences that may reasonably be drawn consistent

with innocence.

89 Another piece of uncontested evidence are to “drive throughs” of the scene taken by Detective Senior Constable Howie and recorded on a video in a police car. Those videos went into evidence as Exhibit F. Detective Senior Constable Howie conducted one drive-through from the service station to the point of impact at 80 km/h, and the second drive-through at 90 km/h. Again, there is no evidence as to when this evidence was prepared. It must have been later in the day. As can be seen from each video drive-through, at the time that it was made the collision scene had been cleared and the road reopened for public use. There are no police or other emergency vehicles parked at or near the point of impact. Both videos depict that at that time there was not a cloud in the sky, and the weather was perfect. Further, unlike that which is depicted in the photographs, at the presumed point of impact in the drive-through videos there is little or no shadowing on the roadway suggesting that at that time the sun was at a very different angle to what would have been its’ position at the time of the collision.

#### Assessment of Witnesses

90 Two of the cyclists, Andrew Fox and Mark Lynch were called to give evidence and there were other witnesses. In a trial of this kind the assessment of the evidence given by witnesses is a matter for me to judge. It is up to me to decide how much or how little of the testimony of any witness I will believe or rely on. I may believe all, some or none of a witness’s evidence. It is also for me to decide what weight should be attached to any particular evidence, that is, the extent to which the evidence helps me to determine the relevant issues.

91 In assessing witnesses’ evidence, matters which may concern me include their credibility and reliability. Credibility concerns honesty – is the witness

telling you the truth? Reliability may be different. A witness may be perfectly honest, but have a poor memory or be mistaken. In this case there is no suggestion that any witnesses has given dishonest evidence. They were all doing their best to tell the truth. There are issues about reliability of the evidence of one or two of the witnesses given that the events in question happened in a matter of seconds, and more than three and a half years ago. It is common ground that time can fade memory.

- 92 It is for me to judge whether the witnesses are telling the truth, and whether they correctly recall the facts about which they are giving evidence.

#### The Position of the Cyclists on the Roadway/Inconsistency between Mr Grannas and his passenger Ms Barnes

- 93 Resolution of these issues is an important factor in deciding this case. The prosecution case against the accused substantially relies upon me accepting the evidence of Mr Grannas. In summary, his evidence is that he had the cyclists in his vision for 300 to 500 metres before passing them from the right hand lane at or about the left hand bend shown in the photographs.
- 94 Andrew Fox gave evidence that shortly before the collision he was close to the fog line, and Lynch was to the left of him in the hard shoulder, left of the fog line. He said:

I was on the, um, left-hand lane, the slow lane, and I was very close to the, you know, I followed, I think it was the white line, maybe the fog-line. Um, my friend, Mark Lynch, was on the - to the left of me. He was

VCC:

cycling in the hard shoulder, and um, Phong was behind me, but I'm not sure exactly where he was, because he was out of my vision.<sup>42</sup>

95 He said shortly before the collision he had a conversation with Lynch about whether Lynch who was riding in the shoulder would like to change places.<sup>43</sup> Later by reference to photo 6 he said he would have been half way between the centre of the left lane and the fog line.<sup>44</sup> His memory was that Mr Lynch would have been on the left hand side of the fog line.<sup>45</sup>

96 In cross examination he was asked about evidence to be called from Mr Grannas that he observed the cyclists taking up most of the left hand lane. He maintained his recollection of the position of his bicycle on the roadway.<sup>46</sup>

97 Mark Lynch gave evidence confirming the evidence of Fox as to the position of his bike on the roadway. He said he was left of the fog line tight in on the left. He said this:

Now, when you're riding back towards Gisborne, this is towards the end of the bike ride, can you remember what position you were in - - -?---  
Yep.

on the road?---Yeah, I was actually not even on the road, I was over the white line, over the rumble track, and Fox was to my right, both of us tight in against the side, and Phong would have been behind. We were - me and Foxy were parallel, like, side by side.

I'll just break that up?---Yeah.

And make sure I understand. So you were on which side of the road?--  
-I was on the left-hand side of the white line for the road.

Yes?---So in a way not on the road.

And Mr Fox is where?---And so in - in - just over the line to the right, so tight up against each other.<sup>47</sup>

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42 T29  
43 T29  
44 T30-31  
45 T31  
46 T38  
47 T51-52

VCC:

98 By reference to photo 5 he said he was to the left of the left fog line and Fox was to the right of it.<sup>48</sup> Mr Lynch agreed in cross examination that in an earlier written statement to police he had told them he and Fox were in front riding side by side but he had not included any reference to riding to the left of the fog line.<sup>49</sup> He added:

A non-fact?---Which is where it was. We were side by side, so we weren't out far at all.

I'm sorry?---I just know I cycle on the left-hand side. That's just where I cycle.

That's your routine?---Yeah, 'cause I don't like being on the road as a person.

And you think you may just not have told the police?---Well, looking back on the statement, evidently not.

And that's a matter, I'd suggest to you, that you've discussed with Mr Fox - - -?---Ah yeah.---since? Yes.<sup>50</sup>

99 He too disagreed with the evidence anticipated to be called from Mr Grannas. He disagreed that he and Fox were taking up the left hand lane:

All right. Now, we are going to hear evidence in this trial from a witness. Do you know Martin Grannas? Have you met him? No?---Ah no.

Who will give evidence saying that he saw the collision and that just prior to it that the cyclists were taking up the left hand lane?---Ah well not me.

All right?---Not Foxy. Taking up the whole lane? No.

All right?---But I like - but I can't recall for who's behind me.<sup>51</sup>

100 Mr Lynch was re-examined on the issue raised in cross examination as to whether he was riding left or right of the left fog line shortly before the collision. He was adamant he would have been riding on the left of the fog line. He said this:

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<sup>48</sup> T52  
<sup>49</sup> T62  
<sup>50</sup> T62-63  
<sup>51</sup> T66

What is your memory as to where you were?---It isn't my memory for it - we're talking over a big, over beyond, and then just looking at the photo there, was a little bit of a tight passage, I'd say that the possibility that my eye would be aimed to be on the left the whole time and especially I know if we're side-by-side, I would have been on the left of it. I would - it's very rare if I went over.<sup>52</sup>

101 Martin Grannas was the next witness called. It is important to first refer to Mr Grannas's general observations and movement of his vehicle on Black Forrest Drive before coming to his precise evidence as to positioning of the cyclists on the roadway. As I say, acceptance of Mr Grannas's evidence is critical to the prosecution case.

102 He gave evidence that he was travelling towards Gisborne along Black Forrest Drive having entered via a left turn from McBean Avenue, near the United Service Station. He was driving, a 2010 model Subaru Forrester,<sup>53</sup> and he was accompanied by his partner Ms Barnes who was seated in the front passenger seat.<sup>54</sup> Mr Grannas gave evidence that he saw the collision occur between the accused's vehicle and the cyclists a short time after he had overtaken the group of three cyclists utilising the right hand south bound lane, and just after he moved his vehicle back into the left hand lane.

103 Mr Grannas gave evidence he first noticed the three cyclist after he had travelled 300 to 500 metres along Black Forrest Drive from McBean Avenue.<sup>55</sup> He said when he first saw the cyclists they were 300 to 500 metres in front of him.<sup>56</sup> When he first saw the cyclists he said all he could see was that there

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52 T68  
53 T86  
54 T71-72  
55 T72  
56 T73



was a group of cyclists. When he first saw the cyclists he was travelling in the left hand lane. He could not recall seeing any other cars.<sup>57</sup>

- 104 After Mr Grannas saw the cyclists he changed into the right hand lane after first indicating. He did so to avoid being in the same lane as the cyclists.<sup>58</sup> At that point he noticed another car, a white car, travelling in the same direction in the left hand lane. It was about 100 to 150 metres behind his car. He gave this evidence:

Now at the time, you've now told His Honour about you moving to the right-hand lane. Can you now take it step by step and tell the court as to your movement and the cyclists' movements as you travel further south?---I changed into the right-hand lane, I was catching up to the cyclists. I then had a chance to have a look at how many of them there were, their position on the road and my curiosity was to whether I knew them.<sup>59</sup>

- 105 He said after seeing the cyclists he moved to the right hand lane to pass them. This he said occurred two to three hundred metres before the road bends to the left. He added he could have been "further back than that" meaning further back from the bend.

In relation to when you move to the right, how far were you away from that bend when you moved to the right?---Still - perhaps two/three hundred metres, I can't remember exactly where I was.

Okay?---How far from the bend.

Hopefully that may assist, if this doesn't assist?---May I - I think I was even further back than that, because when I first saw them, I was changing lanes and when I was in the right-hand lane, I hadn't even passed the crest yet.<sup>60</sup>

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<sup>57</sup> T73  
<sup>58</sup> T73  
<sup>59</sup> T73  
<sup>60</sup> T75

106 As photographs 2 and 3 show, the bend to the left commences approximately 300 metres north of the estimated point of impact. There is no evidence as to the speed of the group of three cyclists at any point. The evidence suggests that in the lead up to the collision they were pedalling up an incline. Given Mr Grannas was travelling at 90 kph, his evidence as to when and where he pulled to the right hand lane to overtake the cyclists cannot be correct. His evidence that the collision between the accused vehicle and the cyclists occurred 100 to 150 metres behind his vehicle, in my opinion means he must have been well past the left hand bend when he actually pulled out and past the cyclists.

107 An aerial photograph depicting Black Forrest drive was tendered in evidence as Exhibit C.<sup>61</sup> Mr Grannas marked that exhibit with the number "1" indicating the position he was in Black Forrest Drive when he first saw the cyclists.<sup>62</sup> He marked with the number "2" where the cyclists were when he first saw them.<sup>63</sup> He marked with the number "3" the point on Black Forrest Drive where he moved his vehicle into the right hand lane.<sup>64</sup> I do not accept this as being reliable evidence. I accept that Mr Grannas was doing his best to be accurate more than three years later. But given the position where the collision occurred (approximately 250 to 300 metres past the left hand bend), his evidence in this regard cannot be accurate. His evidence also conflicts with the evidence of his passenger Ms Barnes.

108 Mr Grannas was then asked about a crest in the road which he marked with the number "4". He gave this evidence in what I think is an important passage of evidence:

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61 T85  
62 T75  
63 T76  
64 T76

You referred to a left-hand bend, if I'm using that word, curve, left-hand bend in Black Forest Road?---I did.

How did you describe it? You described it better?---I can't remember what my wording was at the time.

HIS HONOUR: I think you said that you'd come up a crest and then beyond that there's a bend?---A gradual, yeah, very shallow bend. Yes.

MR DEVLIN: A gradual bend or a subtle bend?---Yes.

All right. Now can you mark where the crest is that you have referred to in your evidence?---The number 4 or what would you like me to use? Number 4?---I've chosen to put it there near that rather dark patch on the image.

Near the other - right. You then - I withdraw that. When you go around the gradual bend where are the cyclists?---I think they would have been coincident with the bend.<sup>65</sup>

109 The effect of this evidence is that Mr Grannas passed the cyclists on the bend captured in photographs 2 and 3 which we know from the evidence of Howie is located between 300 and 250 metres before, and to the north of, the collision point. He said at that point the white car was still about 100 to 150 metres behind him. He said his speed was approximately 90kph and the white car did not appear to change speed.<sup>66</sup> Again, I find this evidence as to where Mr Grannas passed the cyclists to be most unlikely. I do not accept it to be accurate, and I do not rely on it. Given the point of collision is 300 to 250 metres south of the bend I think it more likely that Mr Grannas passed the cyclists at a point south of the bend and just before the point of impact between the cyclists and the accused vehicle. I do accept that Mr Grannas was driving at a speed of approximately 90kph.

110 Mr Grannas was asked about his observations of the cyclists made as he passed them. Dealing with the rider we now know to have been Mr Lynch, he said he was riding 60 to 70 centimetres from the white lane on the edge of the road.<sup>67</sup> He said the cyclist we now know to have been Mr Fox, was one metre

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<sup>65</sup> T77

<sup>66</sup> T77

<sup>67</sup> T78

to the right of Mr Lynch.<sup>68</sup> He gave this evidence:

HIS HONOUR: Well, I just want to make sure I understand this. Are you saying that the front left driver - rider was 60 to 70 metres west - - -

MR DEVLIN: Centimetres.

HIS HONOUR: - - - centimetres west of the white line on the left?---  
Yes, I am, Your Honour.

MR DEVLIN: All right. And the rider to that rider's right was a metre from the first rider?---The first-mentioned rider. Yes.

So am I correct - and you tell me if I'm wrong, does that mean they're 1.6 metres from the white hand line - - -?---If you're looking at the head - - - the left - - -?--- - - - but his hand will be another 20 centimetres beyond that so nearly 2 metres from the edge.

All right. And Rider 3?---Was behind the first two, difficult to judge how close he was but within 2 metres.<sup>69</sup>

- 111 He said the rider, whom we now know to have been Mr Nguyen, was 2 to 3 metres behind the others and closer to the left than the eastern front cyclist Mr Lynch.<sup>70</sup> He added this evidence:

In relation to the riders, was there anything that you noted or that drew your attention to the riders apart from seeing the riders themselves?---  
What drew my attention to them was how far they were into the lane - ah how much of the lane they were occupying.<sup>71</sup>

- 112 In cross examination he agreed that on his account there were three cyclists that were "in effect taking up the left hand lane."<sup>72</sup> It can be immediately seen that this evidence differs markedly from that given by the two cyclists themselves.

- 113 Mr Grannas said he moved back into the left hand lane perhaps 100 metres after passing the cyclists. He said he saw the white car in his rear vision mirror. He saw the white Commodore collide with the cyclists.<sup>73</sup> He then

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68 T78-79  
69 T79  
70 T79-80  
71 T80  
72 T98  
73 T82

stopped, did a U-turn, and went back to assist at the scene.<sup>74</sup>

- 114 The prosecution case was effectively put to Mr Grannas with the final question in chief:

I think this is my last question sir. In relation to the gradual bend, when you're at that gradual left-hand bend, I think you've told His Honour you could see the riders? ---I could.

From that point, the gradual left-hand bend, was there any obstacles or any item that could interfere - that did interfere - with your observation of the road?---No.<sup>75</sup>

- 115 In cross examination Mr Grannas agreed that having lived in the area for some time he knows Black Forrest Drive well. He said he had literally been along the road thousands of times. He agreed that along the left hand side there is shadowing from the trees. He agreed that the section of road is popular with cyclists. He agreed that he was thus attuned to look out for cyclists along that section of roadway. He is a cyclist that had used that section of roadway many times before.<sup>76</sup>

- 116 Ms Shann pressed Mr Grannas as to his memory of events more than three years ago. He agreed that some aspects of his evidence may be inaccurate.<sup>77</sup>

- 117 Mr Grannas marked Exhibit C with the number "5" as the point where the accused car was on Black Forrest Drive when he first saw it. The number is located on the exhibit towards the top, a short distance south-east of the service station and east of the intersection with McBean Avenue. He agreed that in putting numbers on Exhibit C they were his "best guesses".

Now in terms of these marks on the map that we've each asked you to

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<sup>74</sup> T83  
<sup>75</sup> T83-4  
<sup>76</sup> T84-85  
<sup>77</sup> T89

do, they fall within that category, don't they, of a best guess?---Yes.  
And there may be errors within those best guesses?---Yes, that's correct.<sup>78</sup>

118 Mr Grannas agreed that after turning into Black Forrest Drive from McBean Avenue he accelerated his Subaru Forrester up to 90K/PH. He agreed he was concentrating on his driving whilst glancing to the side, and into his rear vision mirror, to make other observations but his primary concentration was on the road ahead.<sup>79</sup>

119 Mr Grannas was pressed on when he first saw the white commodore and when he first saw the cyclists. At pre-trial he agreed he was in error when he said he first saw the white Commodore when he was still in McBean Avenue. Yet he again repeated that same error here. On any view of the evidence he cannot have seen the white Commodore when he was in McBean Avenue. At the end of the day as I understood Mr Grannas to concede that he first saw the white Commodore when he was travelling along Black Forrest Drive and when he looked in his rear vision mirror. He was asked this by Ms Shann, and clarified by questions from me:

And you conceded that you thought that you might have just filled in a gap?---Yes, I conceded and I agreed with you that I should withdraw that part of the evidence.

And the evidence you've given today is, 'I don't know when I first saw that car', is that right?---No, I remember seeing that car when I was on McBean Avenue heading - when I saw the cyclists and I checked the rear view mirror, that was when I can firmly say that I saw the white commodore car.

When you were on McBean Avenue?---Yes, when I was on McBean Avenue.

You saw the cyclists when you were on McBean Avenue?---I did. Sorry. Black Forest Drive. I've made a mistake. I meant to Black Forest. When I was on Black Forest Drive, I first saw the cyclists and when checking my mirror, that's when I saw the white commodore.

HIS HONOUR: Can I just - when you first saw the commodore, - - -?---

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<sup>78</sup> T91

<sup>79</sup> T86-87

Yes, Your Honour. ---was it in front of you or behind you?---It as behind me.

And where was it?---It was on Black Forest Drive heading south like - like I was.<sup>80</sup>

120 The witness agreed that he was doing the best that he can to give honest answers to questions asked of him, and he agreed there may be some inaccuracies in his evidence, especially after three and a half years.<sup>81</sup> I formed the opinion that much of the evidence from Mr Grannas was an inaccurate reconstruction.

121 Mr Grannas was challenged on his evidence that after seeing the cyclists he moved to the right hand lane to pass them 200 to 300 metres before the left hand bend. He had marked this as position number "3" on Exhibit C. He agreed his marking on Exhibit C were "best guesses".<sup>82</sup>

122 Mr Grannas was cross examined about what he had told police in a written statement made on the 12<sup>th</sup> June 2017, the day of the collision. He agreed that in that statement he told police 'I saw a group of cyclists from several hundred metres away as they were approaching the gentle rise in the road on a straight part of the road'.<sup>83</sup> He was taken to photograph 3. He agreed it shows a gentle rise in the road on a straight part of the road, but was adamant that is not the part of the road he was referring to in his statement.<sup>84</sup>

123 Ms Shann informed Mr Grannas of the evidence anticipated would be called from Ms Barnes. In her statement she had said 'There is a slight left hand bend in the road and as we came around, I saw three cyclists in the left hand lane up ahead of us. They were on a straight part of the road at that point.

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<sup>80</sup> T87-88  
<sup>81</sup> T89  
<sup>82</sup> T91  
<sup>83</sup> T94  
<sup>84</sup> T95

'Martin moved into the right hand lane to pass the cyclists safely". Mr Grannas confronted with that evidence said that it did not shake his confidence in his recollection of events whatsoever.<sup>85</sup>

124 With the greatest of respect to Mr Grannas, I found his explanation of the obvious differences in his evidence from that of Ms Barnes somewhat bizarre. He said this:

Now, we'll have to ask her of course but - about all of that but does learning that that's her description, does that shake your confidence at all - - -?---No, it doesn't. about where these events occurred?---None whatsoever because I don't mean to be disrespectful but her descriptions of left and right aren't always accurate. She may say turn left and she's pointing in her right direction. So her description of the left hand bend wouldn't - she would be referring to the right hand bend here.

Well, we'll ask her about that?---Please do so.<sup>86</sup> (my underlining)

125 Mr Grannas said that he passed the cyclists at about position "4" on Exhibit C. It could have been later. He was travelling at 90 K/PH and to the best of his perception the white car was travelling at about the same speed. After he passed the cyclists he travelled 100 to 150 metres before the collision occurred.<sup>87</sup>

126 Ms Andrea Barnes gave evidence she was a front seat passenger in a vehicle being driven by Mr Grannas at the relevant time in question. She said at some point whilst travelling along Black Forrest Drive she saw three cyclists about two or three hundred metres maybe ahead. She said she was very familiar with the road and she could not remember how far from McBean Avenue she was when she first saw the cyclists.<sup>88</sup>

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85 T97

86 T97-98

87 T98

88 T107



- 127 Ms Barnes was clear in her evidence that she first saw the cyclists after the left hand bend. She gave this evidence by reference to a description of the roadway:

Generally, could you describe to His Honour, the direction or shape of the road. How does it go?---Um - - -

From McBean south?---Okay. Um, you go past a service station, it curves around to the right a bit, straight for a while and then it curves back round to the left, and it straightens out. It was on that section, I believe the road that I saw the cyclists.

Sorry which section, as best you can?---Um, the road goes around a bit slightly to the left and then it straightens out. It was on the straight section.

When you saw the cyclists, were they close to you, far away from you or when was the first time you noted - how far were they ahead of you?---Approximately 200 metres.<sup>89</sup>

You've given evidence that you saw the cyclists for the first time about 200 metres behind them?---Yes.

And that Mr Grannas then moved in to the right-hand lane, passed them, and moved back into the left-hand lane? ---Yes.

You had, so from when they went behind you, but you had continuous vision of them, from when you first saw them, Mr Grannas moving into the right hand lane to when you passed them, is that right?---Um, yes, I didn't see them again once we were in front of them, until I looked in the side mirror.<sup>90</sup>

- 128 Ms Barnes described the position of the cyclists on the roadway in a very similar way to the cyclists themselves. She said this:

In relation to the cyclist, and I'll take them - I'll take the first two, the front cyclists?---M'hmm.

What position on the road were they in comparison with the right-hand - I'll call it the fog line on the left-hand side of the road?---Um, the white cyclist was probably, um, a metre and a half out from the line and the blue cyclist was, um, yeah, riding next to him, but I can't recall how far from that line.

And what about the cyclist on the back?

Where - what position on the road in comparison with the white line was he?

---Um, he - I recall he was riding quite close to the - the fog line.

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<sup>89</sup> T107

<sup>90</sup> T114 xxn

What do you mean by quite close?---Oh, um, maybe half a metre.<sup>91</sup>

129 Ms Barnes said that Mr Grannas overtook the three cyclists and when he did so she observed the rear rider to be about three metres behind the other two riders. After the passing was complete Mr Grannas moved back into the left lane and she continued to see the three cyclists in the side mirror with the white Commodore coming up behind them. She had not noticed the white car before then. She did not see the collision.<sup>92</sup> She said after the passing was complete and she looked back to see the cyclists and the car they were about 100 to 200 metres behind.<sup>93</sup>

130 In cross examination Ms Barnes agreed photographs 3 to 8 depict the stretch of road she had given evidence about. She agreed there was a shadowing effect from the trees on the left across the roadway.

So firstly, you can see the trees lining that eastern side of the road?---  
Yes.

That's depicted in Photos 3 to 8, that's the period of road, or the stretch of road that you were travelling on when you observed the cyclists?---  
Um, yes.

And you agree that the - on a sunny day, that - the sun coming through those trees create that shadowing effect on the road?---Yes.

Now, you're very familiar with that shadowing effect, is that right?---  
Yes.

It's not a surprise to you driving on that road, to see that light and shade as you're driving?---No.

Or the sun coming through the windscreen and then leaving and then coming through the windscreen again, that's familiar to you?---Yes.

You've experienced that many times along that road?---Yes.

Similarly, it's very common in your experience and again, just taking June 2017 as the marker, to see cyclists along that stretch of road?---  
Yes.

You're alert to look out for cyclists?---Yes.<sup>94</sup>

131 Ms Barnes agreed that with shadowing on the road it is difficult to discern

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91 T109

92 T110

93 T119

94 T113-114

black clothing. That is why she and Mr Grannas referred to such clothing as "safety black".<sup>95</sup>

132 On the question of the approximate position of the cyclists on the roadway I accept the evidence of the cyclists themselves. Mr Lynch said he was riding along to the left of the white fog line with Mr Fox adjacent to his right. Mr Nguyen was following both of them possibly two to three metres behind. I do not accept the evidence of Mr Grannas that Mr Lynch was riding 60 to 70 centimetres right of the left fog line, and that Mr Fox was riding some two metres right of the left fog line. I do not accept that the cyclists were taking up most of the left hand lane when Mr Grannas passed them. Not only is that evidence at odds with the evidence of the two cyclists themselves but it also differs with the evidence of Ms Barnes as to her observations of the position of the riders on the roadway. Her evidence more closely resembles that given by the cyclists, which I accept.

133 On the question of where Mr Grannas passed the cyclists, I accept and act upon the evidence of Ms Barnes. I find that the vehicle being driven by Mr Grannas, after moving into the right hand lane, overtook the cyclists at a point a short distance north of the estimated point of impact between the accused vehicle and the cyclists.

134 Having travelled along the section of roadway whilst on the view, I do not accept Mr Grannas's evidence that he had these cyclists under observation for several hundred metres before, and after, the bend. Once the cyclists had rounded the left hand bend, they had to ride 250 to 300 metres to the approximate point of impact. Once they had rounded the bend the cyclists would have been out of view to any driver travelling south in the left hand lane

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<sup>95</sup> T115

until that driver also rounded the left hand bend.

135 As the drive throughs recorded by Detective Senior Constable Howie,<sup>96</sup> and the videos of the drive throughs conducted on the view,<sup>97</sup> both clearly show, a driver cannot see ahead around the bend until the vehicle has passed through the apex of the bend and straightened up.

136 The cyclists were riding along at a speed very much slower than 90kph and they could only have covered a short distance in the few seconds these cyclists could have been under Mr Grannas's observation. Mr Grannas's evidence differs markedly from the evidence of Ms Barnes. She first saw the cyclists after the left hand bend. They were then about 200 metres ahead. She was clear Mr Grannas pulled into the right hand lane after the left hand bend and then passed the cyclists. Mr Grannas may have had a brief glimpse of the cyclists before they went around the left hand bend, but I think his best observations of them were most likely after he himself had rounded the bend. I find he pulled into the right hand lane to pass the three cyclists after the left hand bend, and not before it. I do not accept the three cyclists were taking up most of the left hand lane. I find they were on the left hand side of the left hand lane making it more difficult for a driver to see them than if they were taking up most of the left hand lane. This is consistent with the opinion evidence later given by Dr Hardiman as to the first point of impact disclosed by scuff marks on the roadway depicted in photo 10 by yellow markings. I shall return to this aspect of Dr Hardiman's evidence later.

137 In making my findings in relation to the evidence of Mr Grannas, I stress I think he was an honest but mistaken witness. Some of his evidence was confusing, and he somewhat begrudgingly made concessions, even when it

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<sup>96</sup> Exhibit F  
<sup>97</sup> Exhibit C

was obvious that he should. He tried to make a case that I should prefer his evidence, rather than the evidence of Ms Barnes. He implied by his evidence that she does not know left from right. I found this extraordinary. His evidence that suggested Ms Barnes was really referring to the right hand bend in the road<sup>98</sup> was mischievous, the only relevant right hand bend being back towards the service station several hundred metres north of the collision scene. Ms Barnes impressed me as a witness. She gave her evidence in a very straight forward manner. By contrast Mr Grannas was at pains to always impress that he was right. At times he seemed to be trying too hard to have me accept his evidence. He did concede when pressed that some of his evidence was guesses. In evidence he conceded that immediately after the collision he called the accused an idiot.<sup>99</sup> I must not act on guesses in making my findings. This is a criminal trial. As I said earlier, I regard much of Mr Grannas's evidence as an inaccurate reconstruction.

138 My rejection of the evidence given by Mr Grannas as to where he moved to the right hand lane, and passed the cyclists, is an important factor in deciding this difficult case. I accept the evidence of Ms Barnes, that Mr Grannas pulled into the right hand lane, and passed the cyclists, at a point south of the left hand bend. I also accept that when the collision occurred with the accused vehicle, Mr Grannas and Ms Barnes were 100 to 150 metres further down the road, albeit travelling at 90kph. Having made those two findings on the evidence, a better picture emerges from the evidence, of what was on the roadway that may have prevented the accused from seeing the cyclists until the very last second before impact. This evidence raises the question of whether the presence of Mr Grannas's vehicle on the roadway in the left hand lane after the left hand bend, and then the movement of it into the right hand

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<sup>98</sup> T97-98

<sup>99</sup> T111

lane, prevented the accused from seeing the cyclists? If so, does the evidence led by the prosecution negate this scenario beyond reasonable doubt? The issue here is, has the prosecution produced evidence which enables me to dismiss the presence of Mr Grannas's vehicle on the roadway in front of the accused vehicle in the left hand lane, in combination with shadowing and the cyclists wearing dark clothing as a reasonable possibilities as to why the accused did not see the cyclists on the roadway?

139 I keep in mind the undisputed evidence from the informant, Detective Sergeant Amos who is attached to the Major Collision Investigation Unit of the Victoria Police. He was asked about the time it would take a vehicle to travel the distance of 250 metres leading up to the collision as depicted in photo 3. He said a car travelling at 70kph would take 12 to 13 seconds to travel the distance.<sup>100</sup> He said a car travelling at the speed calculated by Dr Hardiman of 84kph would take 10.71 seconds to travel the same distance.<sup>101</sup> A car travelling at 90kph would take 10 seconds to travel the distance of 250 metres.<sup>102</sup> It follows from this evidence that a car travelling half the distance of 125 metres at 90kph would take five seconds.

140 The prosecution relies upon the evidence of Det Sgt Amos. The prosecution case against the accused, at its' highest, boils down to an allegation that the accused, having rounded the left hand bend at 90kph, would have had an uninterrupted view of the cyclists in the left hand lane for 250 metres, and for 10 seconds of driving time. It argues that had the accused been paying proper attention to the manner he was driving his vehicle he had ample time to see the cyclists and take evasive action to avoid them. Such argument ignores the possibility that at some point between the left hand bend and the

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<sup>100</sup> T218  
<sup>101</sup> T220  
<sup>102</sup> T220

point of collision with the cyclists, Mr Grannas's car itself may have interrupted the accused view of the cyclists on the roadway because Mr Grannas's car moved from the left hand lane into the right hand lane to overtake the cyclists, and thus may have entered the space between the accused car and the cyclists impeding the accused view of them.

#### Did the Bicycles Have Lights Displayed

- 141 Mr Fox gave evidence that he would have turned his lights on as part of his preparations before setting off on his ride. He said he had a flashing white light on the front of the bike and a red light on the back.<sup>103</sup> When pressed in cross examination as to whether he had an actual memory of having turned the lights on, as opposed to remembering from practice, Mr Fox said he would be very surprised had he not turned his lights on but he had no actual memory of having done so.<sup>104</sup> The light in question is depicted in photo 42. But there is no certainty that Mr Fox turned his light on. There is no evidence as to what setting it was likely on.
- 142 Mr Lynch gave similar evidence. He said his rear red light would have been pulsing.<sup>105</sup> It is common ground that Mr Lynch was riding the black "Specialized" bike. It is an agreed fact that police officer Oakley observed a flashing red light on the bicycle with the black frame after the collision.<sup>106</sup> This is consistent with the photos 36 to 39 of the black Specialised bike being ridden by Mr Lynch. The photos clearly show the red light fitted to his bike.
- 143 Mr Grannas gave evidence that he remembers seeing a red light on one of the bikes.<sup>107</sup> Ms Barnes did not observe any lights.<sup>108</sup> If one or other of the

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<sup>103</sup> T25-26  
<sup>104</sup> T43  
<sup>105</sup> T49  
<sup>106</sup> Exhibit J [24]  
<sup>107</sup> T80

VCC:

bikes had lights operating, it did not come to her attention.

144 Ms De Lacy gave evidence of her observations of seeing group of cyclists on Black Forest Drive on 12 June 2017 at approximately 10.36 am. Her evidence was only relied upon by the prosecution for the purpose of demonstrating that the visibility conditions were such that she could identify a group of cyclists with flashing red lights on from a distance of approximately 500 metres.<sup>109</sup> I found this evidence unhelpful. There is no evidence that enables me to find beyond reasonable doubt that the group of cyclists observed by Ms De Lacy, whilst she was driving south along Black Forrest Drive, is the same group involved in the collision the subject of these charges. I therefore ignore that evidence.

145 In his Record of Interview the accused told police that he did not see any flashing lights.<sup>110</sup>

146 There is no evidence led as to whether the bike being ridden by Mr Nguyen was either fitted with a rear light, or had a rear light flashing immediately before the collision. Photographs 31 to 35 depict the Avanti bike being ridden at the time by Mr Nguyen. They do not appear to show a rear light affixed to the bike.

147 Much was made of the issue concerning whether the riders had lights on their respective bikes at trial. Both Mr Fox and Mr Lynch were impressive witnesses in this trial. They did not exaggerate or overstate their evidence in any way. They both made appropriate concessions at times.

148 Ms Shann in submissions was critical of the investigation on this issue. There was no definite evidence about what time the riders set off on their ride. A

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108 T116  
109 T200  
110 Q & A 335

VCC:



Strava recording device apparently fitted to Mr Lynch like a watch recorded information about the ride including its' length or duration.<sup>111</sup> Yet, that device was not secured or produced in evidence, nor was any evidence from it. There was no evidence produced that would have given the time of sunrise on the day of the collision. There was no attempt by the prosecution to call any evidence of even the average speed of the cyclists.

149 In my judgement, this collision between the accused car and the cyclists happened in a matter of a few seconds. I very much doubt that even if each of the cyclists had a rear light operating that it would have made the presence of the cyclists on the roadway much more obvious to the accused, whom I find possibly had a view of the cyclists open to him for a matter of only a second or two at most. I note Ms Barnes did not see any light operating and she had an uninterrupted view of each cyclist.

150 I find that Mr Lynch's bike had a rear red pulsating light operating at the time of the collision. I cannot find beyond reasonable doubt that Mr Fox's bike had a rear red light operating. There is no certain evidence that it was definitely turned on. I find beyond reasonable doubt that the bike being ridden by Mr Nguyen did not have a rear red light operating.

151 Further, Mr Nguyen was riding behind Mr Fox and Mr Lynch. He was a short distance out from the left hand side of the left lane. The presence of Mr Nguyen's bike on the roadway quite possibly, or may have, blocked any vision the accused may possibly have had from behind of any light displayed by Mr Lynch's bike.

152 The question of whether or not the cyclists had front and/or rear lights operating was an obvious line of inquiry for investigators. It is not a topic that was sufficiently probed by investigators immediately, or soon after, the

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<sup>111</sup> T63

collision. That was the time to secure definite evidence had it existed.

#### Colour of the Lycra Clothing being worn by the Cyclists

153 Mr Fox initially gave evidence of wearing a bright lycra top with lots of colours.<sup>112</sup> However, when cross examined on this topic he was not as certain as to the colours he was wearing. He agreed it was possible the top was not actually multi coloured.<sup>113</sup> He also agreed that it's possible he was wearing a top that is black but has white stripes like a skeleton. He was uncertain if the white stripes were across the back of the top.<sup>114</sup>

154 Mr Lynch gave evidence that his cycling top was blue and white. He said the blue part was a darker blue.<sup>115</sup>

155 Mr Grannas gave evidence that two of the riders were wearing dark colouring, and the front rider's top had grey and black patterning.<sup>116</sup> He agreed in cross examination that in conversation with Ms Barnes they had both referred to the colour of the clothing being worn by the cyclists, somewhat sarcastically, as being safety black.<sup>117</sup> In re-examination, he agreed that the dark colouring being worn by the cyclists did not stop him from seeing the group of cyclists on the roadway.<sup>118</sup>

156 Ms Barnes gave a somewhat more descriptive evidence as to what the cyclists were wearing. She said the first rider, whom we now know to have been Mr Nguyen, was wearing dark clothing top and bottom.<sup>119</sup> She agreed she had referred to this in her police statement as "safety black", meaning to

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112 T26-27  
113 T36-37  
114 T37  
115 T57  
116 T78  
117 T102  
118 T104  
119 T108

describe it as unsafe clothing.<sup>120</sup> Ms Barnes said Mr Fox, the one on the right-hand side of the two was wearing a light, a white-coloured top.<sup>121</sup> She said it was white with some patterning on the front.<sup>122</sup> As to Lynch she gave evidence that the front left hand cyclist was wearing a blue top.<sup>123</sup> In cross examination she agreed it could have been a darker colour towards being navy blue.<sup>124</sup>

157 Mr Stibbard attended the scene of the collision after he heard the collision from his property adjacent in Black Forrest Drive the entrance of which is depicted in photo 6. He agreed that in his police statement he said 'I did take note that all three of the bike riders were wearing Lycra or similar professional type rider apparel, however, the apparel worn by all riders was a dark colour. I was not aware of fluorescent or similar safety gear.'<sup>125</sup>

158 The evidence of the colour of the lycra clothing being worn by the cyclists varies a little. The strong evidence is that both Mr Lynch and Mr Nguyen were wearing dark coloured clothing. Mr Fox was wearing dark shorts but there is unresolved controversy about what colour top he was wearing. I find that from the accused viewpoint the three cyclists were wearing dark clothing. Mr Grannas and Ms Barnes were not prevented in seeing the presence of the cyclists on the roadway because of the dark colour of their clothing. However, I am not prepared to find that the accused would have had the same view as he approached the group of cyclists. In my judgement the cyclists could only have been within his vision for a second or two at most. The accused was in a different car and always in the left lane up to and including the collision

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<sup>120</sup> T115  
<sup>121</sup> T109  
<sup>122</sup> T116 xxn  
<sup>123</sup> T109  
<sup>124</sup> T116  
<sup>125</sup> T139 xxn

point. Mr Grannas and Ms Barnes, having moved into the right hand lane to pass the cyclists, at least had the advantage of viewing the cyclists for a short time from a different angle. The accused was never in the right hand lane. There was no evidence called as to whether the field of vision for a driver of a 2010 Subaru Outback (Mr Grannas) differs from the field of vision of the accused whilst driving a 2001 Commodore.

159 This issue of the colour of the lycra being worn by the cyclists is another aspect of this investigation that leaves a gap that could so easily have been filled. Mr Fox said he still has his top yet it was never produced. Given the importance which this issue seemed to have taken in the trial, I am somewhat surprised that the police, or prosecutors, did not take steps to have the clothing, or what remains of it, produced as evidence.

#### Shadowing on the Roadway

160 As I have already said, the evidence in photos 2 to 9 shows shadowing on the roadway when those photographs were taken.<sup>126</sup> There is no evidence as to what time of the day these photographs were taken. Exhibit 1, which was introduced into evidence by the accused, is a photo of the accident scene that was taken after the collision but at least when ambulances were still in attendance. It seems to be the best evidence of shadowing interspersed with areas of sunlight on the left hand side of Black Forrest Drive soon after the collision.

161 It is an agreed fact that Senior Constable Oakley arrived at the scene of the collision at 11.00AM. He observed at the time that the south bound lanes of

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<sup>126</sup> Exhibit A

Black Forrest Drive were shaded by the roadside trees on that side whilst the northbound lanes were in sunshine.<sup>127</sup>

162 Mr Stibbard gave evidence of his observation at the time of the collision or just immediately after the collision, of the presence of "dappled light" which he said did not affect his observations of the roadway.<sup>128</sup> I note that Mr Stibbard drove to the scene of the collision in his Nissan four wheel drive vehicle seen stationary in the photograph Exhibit 1.

163 Mr Grannas,<sup>129</sup> and Ms Barnes,<sup>130</sup> each acknowledged the presence of shadowing on the roadway in the left hand lane. They both said the presence of shadowing did not affect their observations of the three cyclists on the roadway whom they both somewhat sarcastically described as wearing "safety black". By that expression they meant dark coloured clothing worn by cyclists is unsafe because it makes it harder for drivers to see the cyclists. That is opinion evidence that I accept. It is based on common sense.

164 The accused raised the issue of shadowing in answers given in his recorded interview without specific reference to shadowing. At answer 192 he said:

'And I just remember, yeah, I was looking at the road in front of me. I just didn't notice any cyclists in front of me, like, I don't know whether or not - I don't know whether it was in fact that I'm coming from a bit of a hill. It might have been below the horizon so to speak. Or whether it was the backdrop of the eucalyptus trees, that I didn't notice any cyclist'.

165 At answer 312 he added:

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<sup>127</sup> Exhibit J [24g]  
<sup>128</sup> T132  
<sup>129</sup> T85; T104  
<sup>130</sup> T113; T119

'And I just remember, yeah, I was looking at the road in front of me. I just didn't notice any cyclist in front of me, like, I don't know whether or not - I don't know whether it was in fact that I'm coming from a bit of a hill. It might have been below the horizon so to speak. Or whether it was the backdrop of the eucalyptus trees, that I didn't notice any cyclist'

166 The accused was not adamant or blaming of the shadowing for the fact he did not see the cyclists. He does not know why he did not see them. But he does raise the issue as a possible explanation for his failure to see the cyclists on the roadway.

167 Again, the issue here is, has the prosecution produced evidence which enables me to dismiss the presence of the shadowing, in combination with light filtered through the trees on the left of the road, and the dark clothing being worn by the riders as a reasonable possibility as to why the accused did not see the cyclists on the roadway until they were right in front of him?

168 In my opinion the evidence led by the prosecution does not enable me to dismiss these possibilities as to why the accused did not see the cyclists on the roadway beyond reasonable doubt. The shadowing and sunlight that can be seen in Exhibit 1 may have affected the accused's view as he travelled along Black Forrest Drive in the left hand lane.

#### Speed of the Accused Vehicle

169 Mr Grannas gave evidence that at the relevant time he was driving at a speed of 90kph and the accused car was travelling at about the same speed.<sup>131</sup> I accept that evidence.

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<sup>131</sup> T98

- 170 Dr Hardiman calculated the speed of the accused's vehicle at impact at 84kph.<sup>132</sup> Dr Hardiman, the expert reconstructionist, was not advised about key aspects of the scene which had been altered before she prepared her report. These related to movement of the bikes from the roadway and she was given incorrect information as to where the riders came to rest after impact. She was left to do the best she could with a scene which she said 'Didn't make sense' to her.<sup>133</sup> She was not assisted by the fact there were no skid marks left on the roadway by the accused car that could be used as a starting point for her calculations. This was because the accused car was fitted with power brakes that prevent the wheels locking and skidding.
- 171 In his record of interview the accused said he was driving at 70kph.
- 172 Dr Hardiman did her best to assist the court with her opinion as to the speed of the accused car at or immediately before impact. I do not accept her evidence of the accused vehicle travelling at 84kph. I think the best evidence is that of Mr Grannas and Ms Barnes which has the accused an even distance of 100 to 150 metres behind their car travelling at about the same speed of 90kph.

### Collision Reconstruction

- 173 The prosecution called Dr Hardiman who's expertise as an accident reconstructionist was not challenged.<sup>134</sup> Dr Hardiman attended the collision scene at about 1.40pm.<sup>135</sup> She said her primary role was to examine the physical evidence at the collision scene and give an opinion about the speed of the vehicles involved. She would also give an opinion about what may

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<sup>132</sup> T175  
<sup>133</sup> T186  
<sup>134</sup> T145  
<sup>135</sup> T149

have happened with any of the vehicles involved before impact.<sup>136</sup> She produced Exhibit "D" a scale plan prepared based on information recorded by a Trimble device. Unlike in other similar cases, that plan was not in dispute or controversy in this case.<sup>137</sup> She also produced a two dimensional Reigel plan as Exhibit E. It too was not controversial.

174 Dr Hardiman identified two scuff marks found on the roadway as shown in photo 10 which she said in her opinion showed the area of impact between the vehicle and the cyclists. The two yellow marks on the roadway represented the "zero point", and all of the other photos were referenced from that point on the roadway.<sup>138</sup>

175 Dr Hardiman referred to photos 15 and 16 and she pointed out damage to the front of the vehicle which she took into account. She said this:

Um the vehicle had extensive damage to the front um so the - ah there was ah two dints on the ah bonnet, ah the windscreen was shattered and caved in at the top. The ah roof line where it joins the windscreen had been pushed ah down um and ah towards the front of the vehicle, ah there was two - so not towards the front, on the front, on the front bumper cover were two ah scuff marks, black scuff marks, and there was also a - um what appeared to be a green coloured scuff mark along the front passenger fender.<sup>139</sup>

176 Dr Hardiman observed dark scuff marks on the roof of the accused's car and she also observed the various bikes as they then lay at the collision scene. Referring to photo 11 of Mr Lynch's bike and the fact it had little or no damage

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<sup>136</sup> T146  
<sup>137</sup> T148  
<sup>138</sup> T152  
<sup>139</sup> T156



to it, she formed the opinion the position of Mr Lynch's bike at point of collision was to the left of the other two riders, being Mr Fox and Mr Nguyen.<sup>140</sup> That evidence is consistent with the evidence of Mr Lynch and Mr Fox.

177 Referring to photo 31 which depicts Mr Nguyen's Avanti bike, Dr Hardiman observed the rear damage to the bike which she said was consistent with a direct impact from the bumper of the accused vehicle.<sup>141</sup> She said this bike had to be further onto the road<sup>142</sup> than Mr Lynch's bike which, in her opinion, was side swiped. She said Mr Nguyen's bike had direct impact with the accused vehicle.<sup>143</sup>

178 Referring to photo 30 of Mr Fox's bike, Dr Hardiman said she had been told this bike had been moved.<sup>144</sup> She said the rear damage to this bike was consistent with it having come into direct contact with the accused's car. She said at the time of the collision, Mr Fox's bike was to the right of Mr Lynch's bike. It was the bike closest to the centre of the accused's car. Mr Nguyen's bike (the Avanti) was between the bike of Mr Lynch and Mr Fox.<sup>145</sup>

179 Having identified the scuff marks shown in photo 10 as the point of impact Dr Hardiman said she was unable to determine which of the three bikes was struck first. She said the scuff marks were left by one or other of Mr Nguyen's bike, or Mr Fox's bike, they being the two bikes with rear damage.<sup>146</sup>

180 Dr Hardiman confirmed there was no physical evidence left on the road by the accused vehicle as to when the brakes were first applied.<sup>147</sup>

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<sup>140</sup> T162  
<sup>141</sup> T162  
<sup>142</sup> T164  
<sup>143</sup> T163  
<sup>144</sup> T164  
<sup>145</sup> T165-166  
<sup>146</sup> T172-3  
<sup>147</sup> T173

181 As to the speed of the accused vehicle, Dr Hardiman said that based on the damage to it and based on her experience, she thought the speed of the vehicle at impact "was within the realms of 80 to 100 just as an idea."<sup>148</sup> She then gave evidence of a more specific calculation of 84kph. She said this:

HIS HONOUR: Sorry, what two numbers?---The - so the - the throw distance of the cyclists and the distance from the area of impact to the rear of the whole commodore are both recorded at 43.1. So they're ah approximately the same distance. So using that throw distance from um the cyclist, I used the Intech formula and calculated that the approximate speed of the vehicle ah at impact with that cyclist was 84 kilometres per hour.<sup>149</sup>

182 In cross examination from Mr Shann, I understood Dr Hardiman to agree there could be an allowance or variation made in her calculations as to the speed of the accused vehicle at impact which she agreed would have been not less than 78 kph and not more than 89kph. She was referred to the evidence from Mr Grannas of having observed the accused vehicle to be travelling at about the same speed of his vehicle of 90kph. She agreed that speed would be consistent with her scientific findings.<sup>150</sup>

183 In cross examination, Dr Hardiman gave evidence on the topic of driver perception reaction time which involves four things. Detection, Identification, Decision and Response. She disagreed with an opinion expressed in a publication by Olsen & Farber expressed as 'Response times for drivers under normal states of alertness should be taken to be not less than 1.5 seconds'? Dr Hardiman said that is what the research showed at the time of

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148 T174  
149 T175  
150 T188 & 189

publication.<sup>151</sup>

- 184 Dr Hardiman expressed the opinion that it is possible for someone to react to a situation in less than 1.5 seconds. She was asked why she did not agree with Olsen & Farber's theory. She said this:

MS SHANN: Why not?---Because people can perceive and respond under 1.5. I can't say what someone's perception response was, but it is possible. It all - it all depends on the circumstances and the - the variables that we're talking about are - are so wide and varied, but it is absolutely possible for someone to perceive and respond under 1.5 seconds. It - it doesn't mean we expect everyone to do it and that you're doing something wrong if you don't, but it is possible for someone to perceive and react under 1.5 seconds.<sup>152</sup>

- 185 When pressed by Ms Shann, Dr Hardiman conceded that perception reaction time can be a number of seconds for a normal alert driver.<sup>153</sup>

- 186 As I indicated earlier in this judgement, the expert opinion evidence of Dr Hardiman was not of great assistance in deciding this case. There is no dispute that the accused car struck either Mr Nguyen and/or Mr Fox on their respective bikes at or near the identified area of impact before stopping his vehicle about 43 metres further to the south. The best evidence is that just prior to impact the accused was travelling at about 90kph. There is no dispute the three cyclists were in the left hand lane and the best evidence is that Mr Nguyen was likely struck first followed by Mr Fox.

- 187 Dr Hardiman's evidence relating to perception reaction time of a normal alert

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151 T190  
152 T190  
153 T192 xxn

driver having perceived and identified a risk is such a driver would take a second or two to react. I accept that evidence.

### The Investigation

188 Detective Sergeant Amos from the Major Collision Investigation Unit is the informant in this case and he gave evidence. He has 17 years of experience in this unit of Victoria Police, and has attended more than 200 serious collisions.<sup>154</sup>

189 He arrived at the collision scene at 12.45pm.<sup>155</sup> He produced as Exhibit H, Howie's description of the 43 photographs.<sup>156</sup>

190 Sgt Amos agreed in cross examination that the accused had effectively been taken into police custody around 11am. The accused was breadth tested at the collision scene. Later at hospital a blood sample was taken. Both tests produced a negative result. Sgt Amos agreed he had been told by Mr Grannas, and Ms Barnes, that in their opinion the accused was in shock at the collision scene. The accused was not checked by a doctor prior to being interviewed at around 5.00pm.<sup>157</sup>

191 Sgt Amos agreed that the car being driven by the accused in fact belonged to the accused's father.<sup>158</sup>

192 The accused was interviewed by Detective Sgt Amos and Senior Constable Carlton at the Kyneton police station on the day of the collision. The interview commenced at 4:55 PM and it was video recorded. The DVD recording of the interview was tendered in evidence as Exhibit G. I was also provided with a

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154 T209  
155 T209  
156 T215  
157 T222 to 223  
158 T225

transcript of the recording as an aide memoir. I remind myself that it is the DVD, and what is seen and heard on it, that constitutes the evidence. The DVD was played in open court and I have had the advantage of watching it on two further occasions in my chambers.

193 What comes across is that the accused man answered all questions asked of him, and he seemed to be genuinely trying to assist the police with their enquiries. The evidence shows the accused is a young man of very good character with no prior convictions. Not even a traffic infringement. There is no reason why I should not accept what he told police as being other than truthful.

194 Questions and answers 55 to 57 the accused said he did not see the cyclists after coming around the left hand bend:

“I turned right onto Black Forest Drive. I went around that bend and then after I'd cleared the bend I - after a very short while, I glanced at my dash clock and when I looked up there were two cyclists. Well, actually I just saw one but – I saw one cyclist almost directly in front of me in the middle-of-the-road. This was on the left-hand, in the left – most lane of Black Forest Drive heading towards the city, and I didn't have time to react. I hit the – now I know I hit two cyclists and I broke immediately. I screamed in the car and after a couple of seconds of shock I – I got my phone from the cradle which is mounted on the dashboard of the car, because I knew I needed to call 000 immediately.

56. I wrenched the phone off the dash in sort of a panic, in frenzy, and I'm sitting in the car and then the other cyclist came up to the car and looked in the car at me and I got out of the car, and there were two people who had stopped by this stage on the opposite side of the road

and they were coming towards me. One of them – there was a woman who said to me you know, called me an idiot and said “How could how could you not have seen them”

57. And I just said – I just said, “I just came around the bend and I didn’t notice the cyclists.” It’s at this point one of them – I think either the person she was with in the car or another person who had stopped said, “Call triple zero,” so at that point I had the phone in my hand and I called triple zero”

195 The accused answer to question 55 formed the subject of a notice filed by the Prosecution pursuant to s.19(1) of the *Jury Directions Act 2015* for leave to rely on that answer as evidence of incriminating conduct. The sentence “I saw one cyclist almost directly in front of me in the middle-of-the-road” was sought to be relied upon by the Prosecution as a post offence lie told by the accused man. The foreshadowed application took that sentence from what the accused man said entirely out of context. A moments reflection on everything the accused said in answer 55 shows that the foreshadowed application under s.19(1) to be self-evidently misconceived. It is regrettable that the application for leave was filed. To the prosecutor’s credit, when asked he did not proceed with the application for leave.<sup>159</sup>

196 The accused was asked a lot of questions about his movements and what he had been doing the night before the collision. He gave full details to the police. The police did not verify what the accused had told them by further investigation, presumably on the basis that they accepted what he had said without question.

197 At questions 168 to 171 the accused was asked about what he did after

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<sup>159</sup> T246

entering Black Forest Drive from the petrol station and about other traffic. This is what he said:

“169 and then I checked again and then turned right onto Black Forest Drive and stayed in the left-hand most side.

170 Ok. Any other cars? Do you remember any other traffic or there wasn't much traffic?

No, there really wasn't that much traffic.

171 OK

In fact I vaguely – I don't remember there being any other cars on the road, except of course the one that pulled up after the accident but –“

198 At questions and answers 188 to 196 the following is recorded:

188. Now you say you were about 200 or 300 m from a bend.

Yeah, you turn right out of the petrol – sort of out of the – you turn right onto Black Forest Drive having gone in the petrol station.

189 Yeah

Then you sort of drive a little bit and then there's a bend in the road, not a sharp one but a sort of gradual bend.

190 Mm'hm.

I just remember turning around that road. I was focusing on the road directly in front of me 'cause you can't see past the bend that well.

191 Yeah

I was focusing on the road directly in front of me and then when I cleared the bend I drove for a little bit longer, once again fixated on the road – looking at the road in front of me, and I had – it's sort of like a straight – after that bend it's quite straight – –

192 Yeah

And I just remember – yeah, I was looking at the road in front of me and I just didn't notice any cyclist in front of me. Like, I don't know whether or not – I don't know whether it was the fact that I'm coming from a bit of a hill and they might've been below the horizon of the road, so to speak, or whether it was the backdrop of the eucalyptus trees but I didn't – I didn't notice any cyclist.

193 Yep

And then almost immediately after that I remember glancing just that the dash to look at the time for, you know – for me it seems like a moment.

194 Mm.

And then, yeah, I look up and then the collision happened.

199 The accused was asked about the position of his car on the roadway and the position of the cyclist on the road. He said he had a vague memory of being closer to the dividing line between the two inbound lanes to Melbourne. He said he was closer to the right-hand side of the left-hand lane and the cyclist that he hit came into contact directly above the passenger side of the car.<sup>160</sup>

200 At answer 212 the accused said:

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<sup>160</sup> Exhibit G, Q & A 206-208



“Because I didn’t – I honestly didn’t notice them until just before and by that stage I hadn’t – I didn’t have time to make a note of where they were. I was sort of like – I look up and then immediate impact.”

201 As to his speed the accused said “I don’t think I was doing any more than about 70. I remember coming around the bend at a relatively – not a slow speed but, like, well below the limit and I remember – I vaguely recall – I didn’t accelerate afterwards. I mustn’t have been doing any more than about – I think I was doing between like 60 and 70.”<sup>161</sup>

202 At question 243 the accused was asked to give some indication of time and distance from the left-hand bend. He gave this answer:

“time would have been not more than, like, a few seconds, I would think. I just remember coming around the bend and then, like, focusing on the road as I came around the bend, and then when I cleared the bend I remember focusing on the road for, like a little bit longer and then I glanced down at my dash to look at the time and then back up within a moment and then, yeah, just – the rider was just there. I don’t know – I don’t know how long after I stopped between the collision and when I stopped but breaking distance, I dunno”

203 At this and answers 273 to 276 the interviewers again asked the accused about what happened. These are the questions and answers:

273 You said you were focused on the road. Can you describe to me what you mean by that sort of –

So when you – in black Forest Drive when you go around that bend you can’t see anything around the corner – –

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<sup>161</sup> Exhibit G, Q & A 217-218

274 Yeah

-- so I was basically concentrating on the road immediately in front of the car, sort of may be about, I dunno, like 20 m in front of the car. I was just sort of looking at the road to make sure I was following it.

275 Mm'hm. That's whilst you're—

Whilst I'm going around the bend and then I maintain that concentration a little bit after that

276 Mm'hm

And that's when I glanced at the - that's when I looked at the clock on the dash

204 At question 327 the interviewers effectively put the prosecution case to the accused. They asked him to explain how in 250 m he had not seen three cyclists. He said "I honestly can't explain that. I came around the bend – I'm focusing on the road in front of me for a couple of seconds – I didn't see any cyclists on that road – I don't know why I didn't see them." The accused said he did not see any lights. He was effectively asked whether he saw the car driven by Mr Grannas. He said he did not, and he was the only car in the left-hand lane travelling towards Melbourne.<sup>162</sup>

205 Having watched and listened to the accused in the recorded interview I formed the opinion he was being truthful when interviewed. He was in error in some respects but in my judgement those errors do not point to him not telling the truth as he recalled it. Those errors included the speed that he was travelling at prior to the collision, and the presence on the roadway of the

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<sup>162</sup> Exhibit G, Q & A 346 -350

vehicle being driven by Mr Grannas. Indeed they were errors made by him against his interests. In assessing the evidence of the accused record of interview I allow for the fact he was being interviewed about six hours after the collision and at the end of what must have been a stressing day for him. He had been told of the critical nature of the serious injuries suffered by Mr Nguyen. That alone must have been stressful for the accused when having to account for his movements and observations made by him that might be measured by seconds.

206 In the record of interview the accused made clear that he was keeping a close look out ahead, he was paying attention to his driving and yet he did not see the cyclists. He made a concession which he must have appreciated he did not have to make, and that was almost immediately before impact he had glanced across at his dashboard clock. That concession of itself is not evidence of the accused having driven in a dangerous manner. Just as glancing at the speedometer or fuel gauge also cannot be evidence of driving in a dangerous manner. Drivers of motor vehicles glance at instruments fitted in motor vehicles as a matter of routine.

207 I accept the accused gave a truthful account of himself in his recorded interview. I accept he did not see the cyclists until immediately before impact for reasons which he cannot explain. That is not to suggest that the onus of proof should be on the accused in the situation in which he found himself. The accused never bears the onus of proof in a case like this.

208 The question therefore becomes whether there are possibilities, or explanations, raised by the evidence which might, either alone, or in combination explain why the accused did not see the cyclists on the roadway and take immediate steps to avoid colliding with them.

VCC:

209 If there are such possibilities, or explanations, raised by the evidence which might explain why the accused, who was keeping a proper lookout and watching the road, did not see the cyclists then, unless the prosecution by evidence can show those possibilities or explanations to be unreasonable in the circumstances, the accused should be acquitted of the charges.

210 Here, the prosecution case can be summarised in short compass. It submits the evidence shows that after rounding the left hand bend the accused had 250 metres to travel to the area of impact at 90kph. He had 10 seconds to observe the cyclists, and the fact he did not shows he was inattentive to his driving. It further submits the fact Mr Grannas and Ms Barnes observed the cyclists and passed them is evidence the accused was inattentive to the manner he was driving his vehicle. There is no direct evidence of the accused having driven in a dangerous manner. The prosecution case is circumstantial. It relies upon me drawing an inference that no other explanation for the accused having struck the cyclists is reasonably possible, other than he must have been driving in a dangerous manner.

211 The defence submits the prosecution has not proved either charge beyond reasonable doubt. The defence submits there is other evidence which shows a number of possible reasons why the accused may not have seen the cyclists until it was too late. If that is so, the accused cannot be convicted of having driven in a dangerous manner.

212 The defence points to a number of possibilities.

213 Firstly, there is the fact the three cyclists were riding in the left hand side of the left hand lane. Assuming Mr Nguyen was riding behind Mr Lynch and Mr Fox, at best the accused might have had two, not three cyclists visible to him.

VCC:

- 214 Secondly, the cyclists were wearing dark clothing, and riding in the shaded part of the roadway interspersed with dappled sunlight, and against a backdrop of reasonably thick eucalyptus trees. The defence relies upon the photograph of shadowing and sunlight at the scene when the ambulances were still present, Exhibit 2. The defence argues, the dark clothing worn by the cyclists in combination with the shadowing, provided no contrast to assist a driver approaching from the position of the accused in identifying the cyclists ahead on the roadway.
- 215 Thirdly, any light on Mr Lynch's bike would not have been visible to the accused, his view of it being blocked by the position of Mr Nguyen.
- 216 Fourthly, from the left hand bend for the 250 metres before the impact zone the road rises. Shortly before the area of impact, and to the north of it there is a crest or rise in the road. It can be clearly seen in photo 22 looking back from the area of impact in a northerly direction and just beyond the 90kph sign. The converse view can be seen in photos 3-5. That crest, or rise, in the road could possibly have prevented the accused momentarily from seeing beyond it. The fact Mr Grannas was able to see the cyclists notwithstanding the presence of the crest does not answer why the accused did not. Mr Grannas was in a completely different make and model of car to that being driven by the accused. Mr Grannas also changed lanes to the right hand lane. The accused did not.
- 217 Fifthly, on any view of the evidence, until Mr Grannas passed the cyclists he was in the left hand lane. That meant until his car moved into the right hand lane it was between the accused car and the cyclists. Up until that point, the accused would have been most unlikely to be able to see the cyclists. As I have earlier explained, I find Mr Grannas did not move into the right hand lane

to pass the cyclist until after the left hand bend. That being so, there is the very distinct possibility that the accused's view of the cyclists was blocked by the very presence, and/or movement on the roadway, of Mr Grannas's car. I appreciate that when interviewed the accused said there were no other cars on the road that he could then recall. In that he was clearly mistaken. Mr Grannas's car was 100 to 150 metres in front of him. The fact the accused has said there were no other cars on the road is not an admission by him that he was driving in a manner dangerous. It is a fact he did not recall when asked.

218 I accept the defence submissions. In my judgement the evidence led by the prosecution does not dismiss any of the above factors contributing to the accused not seeing the cyclists on the roadway even though he was watching the road. Those factors, either alone, or in combination, cause me to have reasonable doubts about the accused guilt on each charge. I cannot draw the inference that the prosecution case relies upon for a conviction.

219 It follows that the prosecution has not proved the second element of each charge beyond reasonable doubt. I am not satisfied beyond reasonable doubt that at the time of the collision the accused was driving in a dangerous manner. Both charges must be dismissed.

220 After closely examining all the evidence, I have come to the strong opinion that the circumstances that led to the collision between the vehicle being driven by the accused, and the cyclists, resulting in Mr Nguyen and Mr Fox being seriously injured, amounted to a most unfortunate accident for which the accused cannot be held criminally responsible.