Motor manslaughter and the gross negligence question

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A precedent regarding the concept of "gross negligence" may have serious consequences for drivers distracted from the task at hand.

By Jason Harkess

A driver's duty of care on the road is an important one. Fundamentally, it requires the driver to concentrate so as to adequately control the vehicle and adhere to the road rules. By observing this duty, the careful driver minimises the inherent danger that the vehicle poses to its passengers, pedestrians and other road users.

But occasionally a driver will lose concentration and lapse into careless or negligent driving. Failing to give way or simply not seeing others on the road are common mistakes made by road users every day.[1] These mistakes are sometimes caused by drivers being distracted by things completely irrelevant to the driving task at hand. Modern day culture and technology have presented drivers with many potential distractions. For example:

- changing radio stations or CDs;
- lighting cigarettes while driving;
- consuming food and beverages;
- checking hair or make-up in rear-vision mirror; or
- using a mobile phone.

Drivers who indulge in such activities probably do so without a second's thought that their duty of care on the road may be being compromised. That is because they have done so before and experienced no detrimental effect of significance to their driving. Either consciously or subconsciously, they have determined the risk of harmful consequence to be minimal.

However, divided attention can lead to an accident and perhaps the serious injury or death of another person. The question of culpability then arises under criminal law.

R v Ciach

In the late morning of Sunday, 30 December 2001, Silvia Ciach, a 22-year-old dentist, was driving her Holden Barina along Portarlington Road towards Geelong. The road was a divided highway with two marked lanes for traffic travelling in her direction and there was also a lane to the left for use by cyclists. Anthony Marsh, a 36-year-old mechanical engineer from Geelong, was riding his bicycle in that lane on the return leg of a training ride. The weather was fine and the road was dry.

As she held the steering wheel with one hand, Ms Ciach held her mobile phone in the other. She had just finished entering a text message into the phone while stationary at an intersection and was now preparing to send it to the intended recipient. As she continued driving, the act of preparing to transmit the text message distracted her, resulting in the car veering left and Ms Ciach having to correct her course three times. Eventually she swerved into the bicycle lane and there the left-hand front corner of the car collided with the rear of Mr Marsh's bicycle. The car's speed at the moment of impact was about 70 to 80 kilometres per hour. The impact threw Mr Marsh against the windscreen and roof of the car, into the air and ultimately onto the side of the road. He died almost instantly on impact.

Ms Ciach was charged with one count of culpable driving causing death by gross negligence, an offence under s318(2)(b) of the *Crimes Act* 1958. Her trial commenced in the County Court in November last year.

It was a novel case because s318(2)(b) had never been tested in relation to a road death arising out of a driver using a mobile phone. However, despite the lack of precedent supporting the prosecution, shortly into the trial Ms Ciach chose to plead guilty. She was convicted and sentenced to two years imprisonment, wholly suspended for three years.

The precedent value of *R v Ciach*

Ms Ciach's conviction might be viewed as a warning to others who choose to be distracted by using their mobile phone while driving. As the sentencing judge noted, "the offence of culpable driving causing death will almost always require a sentence of imprisonment".[3] This will frequently be the case even with first offenders of good character,[4] into which class Ms Ciach clearly fell. In this respect, Ms Ciach was lucky with her sentence. One reason given by the judge for not imposing an immediate custodial sentence was that "the seriousness of this specific risk and its potentially fatal consequences

had not previously been highlighted before a court".[5] Therefore, it might be expected that drivers convicted in the future, involving similar circumstances, will be dealt with more severely.

Significantly though, Ms Ciach's decision to plead guilty was "not due to [her] lawyers' urgings".[6]

Statutory context of s318(2)(b)

Section 318(1) of the *Crimes Act* states that a person is guilty of the offence "who by the culpable driving of a motor vehicle causes the death of another person". By sub-s2(b), the definition of "culpable driving" includes a person who drives "negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case". Those who drive recklessly, or under the influence of alcohol or drugs[7] are also captured by the offence. In practice, however, these latter types of offenders are invariably charged under the sub-s2(b) "gross negligence" provision.[8]

When s318 was originally enacted,[9] the prescribed maximum penalty was seven years imprisonment. Over a relatively short period in the 1990s, Parliament increased the penalty a number of times. Today the maximum is now 20 years imprisonment.[10] Manslaughter carries the same maximum penalty.[11]

As a consequence, the Court of Appeal has in recent years come to recognise that culpable driving causing death by gross negligence is a species of involuntary manslaughter and that both crimes bear exactly the same criminal element of negligence.[12]

The Court has colloquially dubbed the offence "motor manslaughter".[13] While there is no sentencing tariff,[14] the principle of general deterrence has weighed heavily in the Court of Appeal endorsing prison sentences of several years for the grossly negligent first-time offender of good character.[15]

Section 318(2)(b) is therefore to be regarded as the most serious in a range of road traffic laws in Victoria designed to deter and punish conduct symptomatic of driver carelessness. Perhaps most significantly, the negligent driver who kills is potentially subject to the same penalty that may be imposed on drunken, drugged or reckless drivers.

Here lies the question of whether a s318(2)(b) charge was the most appropriate, in terms of moral culpability, for Ciach's mobile phone-induced carelessness. She could have been prosecuted for other less serious offences.

At the lowest end of the culpability spectrum, using a handheld mobile phone while driving is a strict liability regulatory infringement under the *Road Safety (Road Rules) Regulations* 1999,[1][6] which attracts a small fine.

Under s65 of the *Road Safety Act* 1986, she could also have been charged with driving "carelessly" and incurred a fine of up to $1200.[1][7] Alternatively, under s64, those who drive "at a speed or in a manner which is dangerous to the public" may suffer a maximum fine of $24,000, two years imprisonment, and cancellation and disqualification from holding a licence for at least six months.

As with s318(2)(b), the careless and dangerous driving provisions in the *Road Safety Act* impute statutory duties of care on drivers, breaches of which will attract criminal liability. Both tests are objective. The s65 careless driver is one who fails to exercise the "degree of care and attention that a reasonable and prudent driver would exercise in the circumstances".[1][8] The s64 dangerous driver adds further to the breach by creating a danger real or potential to the public.[1][9] All matters connected with the management and control of the vehicle are taken into account, and even casual behaviour and momentary lapses of attention will fall within the scope of the offences.[2][0]

What distinguishes s318(2)(b) from these lesser offences is twofold. First, under s318(2)(b) the driver must have caused the death of another. Second, the degree of negligence involved must have been gross.[2][1]

What is "gross" negligence?

It has been said that the issue of gross negligence is "supremely a jury question".[2][2] In Victoria, common law manslaughter by gross negligence has been defined for juries quite specifically since the early 1970s:[2][3]

"It is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of

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

Historically, the same comprehensive definition has not been provided to juries in s318(2)(b) trials. Since *R v Horvath*,[2][4] trial judges were obliged to confine themselves "to the very terms of the relevant legislation ... [because] to do more than emphasise that the departure from the stated standard of care must be gross is only likely to obscure the nature of the task before the jury". A year after *Horvath* was decided, a different Court of Appeal Bench suggested that juries could be told that "gross" means "glaring", "flagrant" and "monstrous".[2][5]

However, this approach was rejected three years later in *R v Stephenson*[2][6] where the Court stated that "gross" in the context of negligence had a natural and well-understood meaning and, in the context of s318(2)(b), conveyed the sense of a "high and reprehensible degree of negligence". In keeping with *Horvath*, it was held that the words contained in the legislation needed no further explanation.

The rule in *Horvath* prevailed.[2][7] Consequently, juries had largely been left to contemplate the meaning of "gross" among themselves in the jury room.

Courts in other jurisdictions have long been circumspect about the concept of gross negligence and its lack of intelligibility in the absence of precise explanation.[2][8] But it is only recently that the Victorian Court of Appeal has reviewed *Horvath* with a view to change.

In *R v De'Zilwa*,[2][9] the Court accepted that in cases of s318(2)(b) juries would frequently ask what the word "gross" meant. Resiling from the rule that "gross" be left unexplained, the Court stated that "the time has come for juries to be given more assistance as to their task in cases of this kind".[3][0] A new standard direction was now to be applied by judges in future trials, which reflected almost verbatim the standard manslaughter trial direction:[3][1]

"[W]here in future a person is charged with culpable driving under s318(2)(b), the judge should direct the jury that the jury are required to find that the driving of the accused involved such a great falling short of the standard of care which a reasonable person would have exercised in the circumstances, and which involved such a high risk that death or serious injury would follow, that the driving causing death merited criminal punishment".

After more than 30 years, the meaning of “gross negligence” in culpable driving cases was raised from definitional obscurity. Grossly negligent driving was now to be explained to juries as involving “such a great falling short of the standard” and “such a high risk that death or serious injury would follow”.

It might be argued that these words import the same objective element of “dangerousness” requisite in the dangerous driving offence under s64 of the *Road Safety Act*, although under s318(2)(b) being a danger far greater in scale.

Whatever the case may be, the new *De’Zilwa* direction clearly calls for an objective assessment of the driver’s conduct which will leave jurors little room to have recourse to their subjective feelings.

Sending a text message – a case of gross negligence?

Ms Ciach’s legal advisers would have been aware of the new rule set by *De’Zilwa*. Comfort may have been felt in knowing that semantic gymnastics over the meaning of “gross” was unlikely to play a part in the jury’s deliberations.

There were relatively straightforward questions for the jury to consider. Did Ms Ciach’s sending of the text message really involve such a great falling short of the standard? Did it really create such a high risk that death or serious injury would follow? How often does this type of driver conduct go on, but without such serious consequences as those experienced by Ms Ciach?

The difficulty with Ms Ciach’s situation was that sending a text message while driving is a deliberate act which diverts the driver’s sight and concentration away from the road. Further, before colliding with Mr Marsh’s bicycle she had been observed veering left and then resuming her course three times. As the sentencing judge remarked, “those movements ought to have alerted you to the fact that you were losing significant control over the steering or concentration on the whereabouts of your car”.

That type of driving behaviour may have been regarded by the jury as being highly dangerous and a departure from the reasonable standard of care sufficient to constitute gross negligence.

Nevertheless, Ms Ciach could have gambled on the jury's appreciation of the prevalence of mobile phone technology and the ease with which driver's may use it, despite the regulatory prohibition on handheld phone use.

Further, a comparison could have been made with drivers who use a mobile phone in a fixed cradle, which is not prohibited by the regulations, even though the pressing of buttons such as to send a text message would seem to be at least equally distracting.[3][2]

The analogy could have been extended to include driver distractions caused by attending to the car stereo, lighting a cigarette, consuming fast food or checking one's hair in the visor mirror. And so the common experiences of the 12 men and women selected to try the case may have availed Ms Ciach of reasonable doubt as to whether this was indeed an instance of gross negligence.

Conclusion

A typical offender of culpable driving causing death might be described as one "who takes his car on to the road when he is incapable of controlling it properly by reason of alcohol, or who drives at an obviously homicidal speed, or whose vehicle is not equipped with proper brakes, or who cuts a blind corner, or who in some other way demonstrates a total disregard for other people who are unfortunate enough to be on the same road at the same time".[3][3] A case under s318(2)(b) based simply on a driver's inattention and failing to keep a proper lookout is not typical in this regard and may be too weak to justify a conviction.[3][4]

Ms Ciach's plea of guilty did not permit these legal issues to be properly explored in relation to using a mobile phone to send a text message. Her case has therefore set a factual precedent which has the potential to expand the boundaries of motor manslaughter to capture conduct that is arguably characterised as commonplace driver inattention.

For some, this may be regarded as leading to applications of s318(2)(b) resulting in a punishment disproportionate to the moral culpability of the accused. On the other hand, Ms Ciach's case may be seen as justifiably raising the standard of care to be expected of drivers in prevailing times.

As the sentencing judge observed, the case serves as a stark warning to all that the risk of serious consequences arising from the use of a mobile phone when driving is very real.

"[W]ith the extent of use of mobile phones generally, more public attention should be drawn to this risk, as well as to the myriad of distractions to which drivers are now susceptible with the ever increasing technological and entertainment options in vehicles."[3][5]

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[1] VicRoads suggests that hundreds of thousands of crashes may be caused by driver mistakes of this sort every year: "Road to Solo Driving", chapter 1, forms and handbooks,http://www.vicroads.vic.gov.au.

[2] Unreported, County Court, Melbourne, 10 November 2003, Judge Cohen.

[3] Note 2 above, at para 12.

[4] Note 2 above, at para 12. Her Honour was probably relying on the line of Court of Appeal authority in support of this sentencing practice: *R v Cody* (1997) 25 MVR 325; *R v Gattas* [1998] 2 VR 420; *R v True* (1999) 29 MVR 151; *R v O'Connor* [1999] VSCA 55; *R v McGrath* [1999] VSCA 197; *R v Yalim* [2000] VSCA 64; *R v Sherpa* (2001) 34 MVR 345; *R v Scott* [2003] VSCA 55.

[5] Note 2 above, at para 18.

[6] Note 2 above, at para 11.

[7] Sub-sections 2(a), 2(c) and 2(d).

[8] See, for example, the cases listed in note 4 above and, more recently, *DPP v Caldarera* [2003] VSCA 140 and *DPP v Di Nunzio* [2004] VSCA 78 which illustrate how an offender's consumption of alcohol or drugs will often form part of the Crown's case of gross negligence.

[9] *Crimes (Driving Offences) Act* 1967.

[10] *Sentencing Act* 1991 (increased to 10 years); *Crimes (Culpable Driving) Act* 1992 (increased to 15 years); *Sentencing and Other Acts (Amendment) Act* 1997 (increased to 20 years).

[11] *Crimes Act* 1958, s5

[12] *R v Shields* [1981] VR 717; *R v Franks* [1999] 1 VR 518; *R v Wright* [1999] 3 VR 355; *R v Taylor* (1999) 30 MVR 88; *R v Guariglia* (2001) 33 MVR 543; *R v Sherpa* note 4 above; *DPP v Solomon* (2002) 36 MVR 425; *R v Tran* [2002] 4 VR 457; *DPP v Wareham* (2002) 36 MVR 566; *R v De'Zilwa* [2002] 5 VR 408; *Scott*,note 4 above; *R v Heron* [2003] VSCA 76; *R v Withers* [2003] VSCA 176.

[13] *Scott*, note 4 above, at para 17 (per Winneke P).

[14] See *Cody*, *Gattas*, *True* and *McGrath*, note 4 above.

[15] See the decisions in note 4 above and more recently *Withers*, note 12 above. In *DPP v Whittaker*[2002] VSCA 162, Winneke P at para 22 noted that "a sentence of four years imprisonment for a culpable driving offence based on gross negligence and without aggravating features is within the range available to a sentencing judge".

[16] Schedule 4.

[17] Subsequent offenders face a maximum penalty of $2500.

[18] *Simpson v Peat* [1952] 2 QB 24 at 27; *Crispin v Rhodes* (1986) 40 SASR 202.

[19] *R v Coventry* (1938) 59 CLR 633; *R v McBride* [1966] ALR 753; *Wynwood v Williams* (2000) 30 MVR 476.

[20] *Coventry*, note 19 above, at 638-639.

[21] The same element of "gross negligence" is required to be proven in cases of serious injury, for which a driver would be prosecuted under s24 of the *Crimes Act* (negligently causing serious injury).

[22] *R v Adomako* [1995] 1 AC 171 at 187; *R v Osip* [2000] 2 VR 595 at para 36.

[23] *Nydam v R* [1977] VR 430, at 445.

[24] [1972] VR 533, at 539.

[25] *R v Lucas* [1973] VR 693.

[26] [1976] VR 377.

[27] *R v Taafe* [1998] VSCA 4; *R v Franks* note 12 above; *R v Wright* note 12 above; *R v Frazer* (2001) 34 MVR 315.

[28] See, for example, *Cashill v Wright* 6 E and B 891 (1856) and *O'Grady v Sparling* [1960] SCR 804.

[29] Note 12 above.

[30] *De'Zilwa*, note 12 above, at para 44.

[31] *De'Zilwa*, note 12 above, at para 46.

[32] This analogy was considered by the sentencing judge in *R v Ciach* note 2 above, at para 8.

[33] *England v R* (1991) 14 MVR 187, at 191 per Cox J (a case of dangerous driving causing death under the equivalent South Australian provisions).

[34] *De'Zilwa*, note 12 above (see the comments of Ormiston JA, at para 8).

[35] Note 2 above, at para 8.