

Locally we have also been fortunate to have had local print coverage with articles about Indigenous road safety. Specifically we have had the Motlop cousins covered in a *NT News* story when they took time out from their football commitments to attend a road safety session at a local high school with a number of Indigenous boarders.

Project evaluation

At this stage a project evaluation has not been completed, as it is simply too early to do so. Additionally this is just one educational project that complements and works alongside others being conducted by NT Road Safety and other service providers targeting Indigenous road users. We are also mindful that the statistics in the Northern Territory, whilst very high per 100,000 population compared to other jurisdictions, are small in number and one crash with multiple deaths can significantly alter the ratio.

On a positive note and at the risk of ruining a good run, at the time of preparing this, the crash killing the two Indigenous boys is the last recorded fatal crash in the Northern Territory. The Northern Territory experienced their first fatality-free January in 2011. This is the first time since data were first collected in 1981 where the NT has not experienced a fatal crash during the month of January. In 2009 February was a fatality-free month, and an exceptional year where only 31 fatalities were recorded as opposed to the average 51.4. Here's hoping this year we will experience a lower level again.

Criminal liability of drivers who fall asleep causing motor vehicle crashes: TLRI report

by R Bradfield, Senior researcher, Tasmania Law Reform Institute, and E Newitt, Executive officer, Tasmania Law Reform Institute

Introduction

In October 2010 the Tasmania Law Reform Institute (TLRI) released its Final Report on drivers who fall asleep at the wheel and cause motor vehicle crashes. The Report looked at the criminal liability of drivers who fall asleep causing motor vehicle crashes that result in death or serious injury. It considered the current laws in Tasmania that relate to these types of crashes and reforms that have been introduced in other jurisdictions. It also considered police practices and procedures, in particular the collection of evidence and the interviewing of drivers and witnesses, in suspected fall-asleep driving cases in Tasmania. The TLRI made a total of 10 recommendations in its Report, of which at least one has been expressly adopted to date.

Background and current law

Courts in Australia have had cause to consider the criminal responsibility of drivers who fall asleep and cause motor vehicle crashes resulting in death or other serious injury on a number of occasions. Most notably, the High Court considered the issue in *Jiminez v The Queen* ((1992) 173 CLR 572). This case is the leading authority in Australia. In *Jiminez*, the court found that for a person to be found guilty of causing death or injury by driving, it is necessary for the prosecution to establish that the accused's act of driving was voluntary.

The court also found that in fall-asleep cases, the period of driving while asleep does not constitute that voluntary act. This means that the focus of the prosecution case must be on the driving that

immediately precedes the driver falling asleep. It is for this prior period of driving that the prosecution must establish criminal fault. A finding that the driver fell asleep may allow the inference of criminal fault to be drawn. That is, if the court finds that the driver fell asleep at the wheel of their motor vehicle, the court may infer that the driver would have known that they were affected by tiredness to the extent that in the circumstances their driving was objectively dangerous and therefore, by continuing to drive, they were criminally at fault.

However, the High Court also found that the liability in such cases is strict rather than absolute, meaning that the accused may rely on the defence of honest and reasonable mistake. This means that the accused can argue that they honestly and reasonably, but mistakenly, believed that it was safe for them to drive.

Between 2001 and June 2010 there were 14 cases in Tasmania where a driver was charged with dangerous driving causing death. The topic for the TLRI's project was suggested by the Attorney-General of Tasmania in 2003 following considerable public comment about two fatal motor vehicle crashes where the drivers had fallen asleep.

An Issues Paper, which considered the application of the principles articulated in *Jiminez* and proposed possible reform options, was released in 2007. The TLRI received 13 responses to this paper. Some responses were from government departments, including the Department of Police and Emergency Management, the Department of Infrastructure, Energy and Resources and the Office of Director of Public Prosecutions, while others were from scientific bodies and agencies associated with sleep research and

transport safety. The TLRI also received a number of submissions from individuals who had been directly affected by fatal motor vehicle crashes caused by a driver who had fallen asleep.

In preparing the Final Report and developing its recommendations, the TLRI gave detailed consideration to all responses received on this matter. The TLRI also attempted to reconcile two competing views about the liability of drivers who fall asleep. On the one hand, there is a reluctance to apportion criminal liability, or blame, to acts over which a person has no conscious control. It would be contrary to a recognised rule of law for an accused to be held liable for an act, such as driving while asleep, which was unconscious and therefore involuntary.

On the other hand, the community is becoming increasingly aware of the dangers posed by drivers affected by tiredness or some other medical condition that may result in diminution of concentration or a loss of consciousness. The community has an interest in seeing that drivers are deterred from driving in circumstances where they pose a danger to themselves and other road users. Some of the submissions received by the TLRI demonstrated or acknowledged the general community's difficulty in understanding and accepting the High Court's finding in *Jiminez* and the principles of voluntary and intentional actions.

Sleepiness/drowsiness and driving

The Report examined research that looked at the cause of sleepiness/drowsiness, the impact of sleepiness/drowsiness on driving, and a driver's awareness of their level of sleepiness/drowsiness. It cited a number of clinical trials and studies¹ that examined awareness of sleepiness and individuals' capacities to predict their driving ability after extended periods of wakefulness.

The Report noted that a driver's awareness of their level of drowsiness is relevant both to the question of the dangerousness/negligence of the driving and also to the defence of honest and reasonable mistake in fall-asleep crash cases. This is because a driver who recognised their level of drowsiness before a crash would be less able to argue that they honestly and reasonably believed that it was safe for them to continue to drive.

The Report did find, however, that the limitations of these studies and the application of their findings to criminal trials ought to be recognised. One limitation identified is whether the results obtained in laboratory-based simulators can be extended to real driving experiences. In particular, most studies involve single periods of sleep deprivation and not an accumulation of insufficient sleep periods or opportunities as usually happens in real-life situations.

Another potential limitation is that the subjects of these trials may have been more aware of their drowsiness because they were being questioned about it. As the submission from the Australian Sleep Association (ASA) highlighted, individuals not in test conditions become less able to judge their performance when sleepy and therefore may not recognise that their driving ability or competence is likely to be impaired. The ASA's submission also

noted that with some medical disorders, such as narcolepsy, falling asleep is not necessarily preceded by a period of drowsiness. The ASA wrote that they did not agree at present that a person who falls asleep can be presumed to have prior awareness that they were at risk of this occurring.

An important distinction that became apparent during the consultation period from a number of the submissions in response to the Issues Paper was that between sleepiness/drowsiness and fatigue. As one respondent noted, fatigue (a subjective state of weariness, often with muscle aches or discomfort, emotional irritability and a disinclination to continue activities) is relieved by rest, whereas drowsiness (the intermediate state between alert wakefulness and sleep and often resulting in 'microsleeps') is relieved by sleep.

The TLRI recommended that greater community education programs and material be developed to inform the public about the risks of driving while drowsy and that the only effective remedy for drowsiness is sleep. This educational material should also address the typical misconceptions drivers have that winding down the window, turning on the radio or turning off the heater will help them be more alert.

Reform options and recommendations

Although the TLRI considered various legislative reform options, including introducing a rebuttable presumption that a driver who fell asleep at the wheel did in fact have prior awareness that they were at risk of falling asleep and amending the current legislation to exclude falling asleep at the wheel as a defence to dangerous or negligent driving charges, it was ultimately decided that no changes ought to be made to the substantive law.

The first reform option explored by the Report was to introduce a provision that specifies that if there is an appreciable risk of falling asleep, driving when sleepy may constitute negligence or dangerousness. A similar provision has been introduced in Victoria into the Crimes Act 1958 (Vic). As noted in the Report, introducing this kind of provision may help to clarify what must be proved to establish negligence and/or dangerousness, and it would provide a framework for prosecuting authorities to properly particularise any charges laid. This option, however, was not supported by most respondents as it was seen to add an extra level of complexity to the current legislation.

The TLRI also received little support for the second reform option to introduce deeming provisions to establish a rebuttable presumption that a person who fell asleep at the wheel did in fact have prior awareness that they were at risk of falling asleep. This presumption would result in a reversal of onus of proof and would require an accused to prove that, despite falling asleep at the wheel, they had no prior indication or awareness that this would occur.

Normally the prosecution is required to prove the elements of an offence and rebut any defences. That is, if the defence of honest and reasonable mistake is raised by the accused, the prosecution must prove beyond reasonable doubt that the defendant did not have an honest and reasonable belief that it was safe to drive

because they were aware of their level of sleepiness/drowsiness.

This option was rejected by respondents on two grounds. Firstly, it was seen to encroach on the fundamental legal presumption of innocence and principle that the prosecution must prove the defendant's guilt. The Australian Lawyers Alliance wrote that requiring a person to prove that they had no warning that they were falling asleep would be unfair and unjust and should not be implemented.

It was also rejected on scientific grounds. As mentioned above, the ASA pointed out in its submission that a person cannot be presumed to have prior awareness that they were at risk of falling asleep based on their feelings of sleepiness. Several other submissions from both the medical and legal communities also noted the limitation of research in this area.

The TLRI received no support for the reform option of amending the current legislation to exclude falling asleep at the wheel being relied upon as a defence. This approach was seen as extreme and would result in falling asleep at the wheel being treated differently from any other form of driver behaviour. For example, driving in excess of the speed limit or after drinking or taking drugs does not automatically result in a finding of negligence or dangerousness.

This reform option does not take account of circumstances where a person may have no warning that they were going to fall asleep, such as an undiagnosed sleep disorder. It also offends against the fundamental principles of criminal responsibility that an accused's conduct must be voluntary and intentional. It would also create an undesirable situation where a judge would have to direct a jury to pretend that the defendant was awake at the time of the crash, even though the jury may have irrefutable evidence that the defendant was in fact asleep. Ultimately it was decided that this reform option would be unnecessary, radical and irrational.

The final option, and the one recommended by the TLRI, was for no changes to be made to the substantive law. That is, the current law as set out in *Jiminez* should continue to apply. This means that prosecution are required to prove that the accused's act of driving that caused death or serious injury was voluntary and intentional. In fall-asleep cases, the prosecution need to ensure it shifts the focus of the legal inquiry from the time the driver fell asleep to the immediately preceding time when the person was awake.

The TLRI also gave consideration to procedural matters in relation to the prosecution of cases involving motor vehicle crashes. All serious and fatal motor vehicle crashes are investigated by the Accident Investigation Squad. The police in these squads have specific skills and training in accident investigation. Where an investigating officer believes that a crime or a summary offence has been committed, he or she prepares a file that is forwarded to the Director of Public Prosecutions, or Deputy Director, who review the file and recommend what charges ought to be laid. Officers in the prosecution section then draft and file a complaint in the Magistrates Court. This complaint contains the particulars of the charge.

After considering the submissions received, and reviewing a number of Tasmanian cases from the last 10 years, the TLRI

formed the view that the current procedure appears to be working sufficiently in relation to the formation of the charge. However, the TLRI found that there appears to be some continued problems in relation to the drafting of the particulars of negligence in fall-asleep cases. In a number of cases, several of the particulars (that is, the details of the crash relevant to the charge) referred to the period of driving after the accused had fallen asleep (and so could not be considered criminally responsible). These particulars did not comply with the requirements of *Jiminez*.

In order to avoid these situations in the future, the TLRI recommended that police prosecutors, with guidance from the Office of the Director of Public Prosecutions, prepare a precedent for the particularisation of negligence where it is alleged that the driver has fallen asleep. In December 2010, the TLRI received a letter from the Director of Public Prosecutions stating that he had drafted some particulars in accordance with this recommendation for the Prosecution Service to use.

During the consultations and research conducted by the TLRI, it became evident that the initial investigation of crashes by police, including the interviewing of both the driver and other witnesses, is vital to the success or otherwise of a case. Fall-asleep driving cases have been successfully prosecuted in Tasmania where the crash was investigated by a member of the Accident Investigation Services and the interview conducted by a police officer with experience in driving cases and an understanding of the issues surrounding *Jiminez*.

For these reasons, the TLRI recommended that police policy and procedures reflect the need for all crashes to be investigated by police officers with training in the legal principles set out in *Jiminez* and all interviews in suspected fall-asleep cases be conducted by police with similar training and understanding. To date the TLRI has not received any indication from the Department of Police and Emergency Management (Tasmania) to indicate if these recommendations have been adopted.

Both the Issues Paper and Final Report are available from the TLRI's website: www.law.utas.edu.au/reform

Notes

¹These included the following: Reyner L, Horne J. Falling asleep whilst driving; Are drivers aware of prior sleepiness? *International Journal of Legal Medicine* 1998; 111(3): 120-123; Crummy F et al. Prevalence of sleepiness in surviving drivers of motor vehicle collisions. *Internal Medicine Journal* 2008; 38(10): 769-775; Lisper H et al. Relation between time of falling asleep behind the wheel on a closed track and changes in subsidiary reaction time during prolonged driving on a motorway. *Ergonomics* 1986; 29(3): 445-453; Horne J, Baulk S. Awareness of sleepiness when driving. *Psychophysiology* 2004; 41(1): 161-165; Atzram M et al. Can sleep attacks occur without feeling sleepy? *Sleep* 2001; 24: 428; Jones C et al. Self-awareness of impairment and the decision to drive after an extended period of wakefulness. *Chronobiology International* 2006; 23(6): 1253-1263.