

COMMENTS ON PASSING SENTENCE

WEBSTER C

The defendant has been found guilty of causing the death of another person by negligent driving in breach of section 32(2A) of the *Traffic Act 1925*.

The maximum penalty for a breach of section 32(2A) of the *Traffic Act 1925* is one year imprisonment.

In summary, the evidence established that on Sunday 24 March 2013 the defendant was travelling south on the Midland Highway just south of the property known as "Tedworth" when the defendant's vehicle, for no apparent reason, was driven from the single south bound lane into the eastern most of two north bound lanes. The defendant's vehicle continued in the eastern most north bound lane around a sweeping bend until it collided head-on with a vehicle driven by Ms Pearn, which was being driven north in the eastern most north bound lane by Ms Pearn. As a result of the collision Ms Pearn died.

The defendant travelled for approximately 30 seconds after first veering onto the incorrect side of the road or a distance of approximately 700 metres until the collision.

It was an agreed fact that Mr Ellis, the defendant, did not have alcohol or drugs in his system at the moment of collision.

The precise reason as to why the defendant drove into the north bound lane, and continued in that lane for a considerable distance until the point of impact with Ms Pearn's vehicle, was most likely the result of the defendant's inadvertence and lack of attention to driving combined with confusion as to the direction of travel of the lane in which he was travelling. In any event, it does not appear to have been a deliberate act, such as overtaking a vehicle on double white lines, which caused the fatal collision.

The Court has read the victim's impact statement dated 12 December 2014, prepared by Mr and Mrs Pearn and tendered on their behalf, and gives it full weight. The Court expresses its sympathy to the family of Ms Pearn. It is accepted that the deceased's family will suffer severe and ongoing trauma. The family would be an unusual family to forgive the defendant and it would be unusual if they did not want and expect retribution. I sympathise with the family of the deceased but the duty of the court is to sentence in accordance with several principles. No sentence will ever return the life that has been taken.

Mildren, J of the Northern Territory Supreme Court said in the case of *R v Shaue*, April 2006:

"Of course, it is true that a human life has been lost and this and the tragic consequences thereof to the deceased family cannot be overlooked. But no sentence from me would bring the deceased back to life and no sentence could ever be said to be the measure of a person's life. To ask a question, which is sometimes asked, "is that sentence all a person's life is worth?" is to ask the wrong question. Sentencing always includes an element of retribution for hurt to others, but that is not the prime purpose of the criminal law. The prime purpose of the criminal law is to protect the community."

There are few decisions of the Supreme Court of Tasmania directly relating to the charge of causing death by negligent driving indicating the approach that this Court should take to such charges or the appropriate penalty. In the recent decision of *Charnlock v Tasmania Police* (2013) TASSC 64 Justice Pearce considered an appeal regarding the severity of sentence that was imposed for a conviction for a charge of causing death by negligent driving.

At paragraph 52 he stated:

“I have been referred to no other sentences previously imposed in this State for the offences for which the applicant was sentenced. That is most likely because such sentences are imposed by Magistrates and details of are not readily available. I was referred to no appeals that suggest a sentencing range or standard. From my experience of sentencing in the Magistrates Court the offence of causing death by negligent driving commonly attracts sentences of imprisonment which are wholly suspended.”

(This is my own experience with such charges, though the suspension of the sentence is not inevitable if the circumstances of the offence are at the more serious end of the scale or the defendant has been a bad record).

His Honour then warned of the dangers of slavishly following statistical data and warns that such data cannot displace the Court’s own evaluation of the gravity of the offence before it in light of all the known facts and circumstances.

Guidance is provided by other decisions of the Supreme Court of Tasmania when dealing with a charge of death by dangerous driving or motor manslaughter. These charges are of course more serious charges than the charge of causing death by negligent driving.

The Supreme Court has made it clear in these cases that youth and/or good character of an offender must usually be regarded as subordinate to the demand for a sentence that may deter other drivers from irresponsible conduct.

In considering an appropriate penalty I adopt the approach of Wright, J (*R v Downie* [1989] TAS R 167) and Underwood, J (*Director of Public Prosecutions v Timothy William Watson* [2004] TASSC 54) that it is the seriousness of the criminal conduct rather than the category of crime for which the offender has been convicted which is of paramount importance. That conduct giving rise to liability from prosecution and conviction for a particular crime may vary greatly in its seriousness if proper account is given to all the circumstances. This means that all cases of death by negligent driving should be treated according to the individual facts and the degree of negligence in each case when deciding penalty, rather than treating all cases the same because the end result (death) was the same in each case.

I am also conscious of the fact that death from negligent driving is widely recognised by the community as a serious matter and as Blow, J said in the matter of *Shipton* (where he was dealing with a more serious charge): “Courts are expected to impose penalties that will substantially deter the offender and others who might be minded to act like him or her”.

In the present case, the defendant’s negligence was significant; however, it was not at the higher end of the scale of seriousness for offences of causing death by negligent driving.

The defendant was not driving with alcohol or illicit drugs in his system. He was not speeding or deliberately undertaking a dangerous manoeuvre such as overtaking on double white lines.

On my finding he was not driving whilst tired, or not in a fit condition to do so. There was no reason for him not to be on the road at that time.

On the other hand his inadvertence and lack of attention to his driving and his position on the road was not mere moments but prolonged. He drove for a relatively long time and distance whilst on wrong side of the road.

The defendant is not entitled to any discount on his sentence for an early plea of guilty. Of course he does not suffer any additional punishment because he has defended the charges against him.

The defendant holds high public office. He is the Director of Public Prosecutions. He would not hold this office if he was not considered to be of the highest character and a person of good standing in the community. I have no doubt that in addition to the reference that he has provided from Mr Damien J Bugg, AM, QC, he could produce further innumerable references as to his good character and standing from a wide range of persons in the Tasmanian community.

The defendant has a good driving record.

In addition to other matters, I take into account the defendant's serious medical condition arising from the accident; both the extensive treatment he has already received and the ongoing effects on him.

I also take into account the effect of the defendant's injuries upon his future employment and the fact that this accident resulted in a premature suspension of his employment and that there is a real risk that the defendant will lose his present employment and be unable to work as a barrister.

I take into account the defendant's contribution to public service and the legal profession and accept the comments made by Mr Stevens.

Finally, I take into account that the defendant's position in the criminal justice system which would, no doubt, place him in great jeopardy if he were actually imprisoned.

I have considered the matters under s9 of the *Sentencing Act 1997* as to whether or not a conviction should be recorded and have concluded that a conviction should be recorded.

I have concluded that a term of imprisonment is appropriate; however, that term of imprisonment should be wholly suspended.

A conviction is recorded. The defendant is disqualified from holding a driver's licence for two years. He is sentenced to four months imprisonment which will be wholly suspended for two years on condition that he is of good behaviour and commits no imprisonable offence. He is ordered to pay court costs and victim of crime levy.