



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 17

**Manslaughter or Dangerous Driving
Causing Death**

WORKING PAPER

JUNE 1970

INTRODUCTION

As part of its programme the Law Reform Committee has been asked to examine the law relating to criminal culpability in cases of negligent driving causing death and to consider whether any alteration should be made to the Code.

The Committee having completed its first consideration of the matter now issues this working paper. The paper does not represent the final views of the Committee.

Comments and criticisms are invited. The Committee requests that they be submitted by the 14th July, 1970.

Copies of the paper are being forwarded to -

The Chief Justice and Judges of the Supreme Court

The Judges of the District Court

The Law Society

The Magistrates Association

The Law School

The Crown Law Department

The Commissioner of Police

Other Law Reform Commissions and Committees with which this Committee is in correspondence.

The Committee may add to this list.

The research material on which this paper is based is at the offices of the Committee and may be made available on request.

TERMS OF REFERENCE

1. The Committee has been asked -

“to examine the law relating to the criminal culpability of the person who, by reason of his unreasonable conduct in the driving of a motor vehicle, is responsible for the death of another, and to suggest any changes in that law that may be thought desirable.”

THE LAW IN WESTERN AUSTRALIA

2. Leaving aside killings that amount to wilful murder or murder, a person who unlawfully kills another in the course of driving a vehicle may be convicted of the crime of manslaughter, or of the crime defined in s.291A of the *Criminal Code*.
3. Upon an indictment charging a person with the crime of manslaughter, he may be convicted of a crime under s.291A (Code s.595).
4. The maximum sentence for manslaughter is imprisonment with hard labour for life, whereas the maximum for a crime under s.291A is imprisonment with hard labour for five years.
5. During the debate on the Bill introducing s.291A in 1945, the Minister in charge of the Bill pointed to the reluctance of juries to convict a negligent driver of manslaughter, first "because of the high degree of negligence that has to be proved" and secondly because the maximum punishment for that offence is life imprisonment. He explained that the Government's purpose in introducing s.291A was to create an "intermediate offence... which would involve a lesser degree of proof and a shorter term of imprisonment" (Hansard, 1945, Vol.2; 1707).
6. The attempt to produce an "intermediate offence" was unsuccessful, the High Court holding that the degree of negligence necessary to establish an offence under s.291A is the same as that necessary for manslaughter (*Calloghen v. The Queen* (1952) 87 C.L.R. 115).
7. As a matter of general policy the Crown Prosecutor's office prosecutes for manslaughter and not under s.291A. Mr. Dixon, the Chief Crown Prosecutor, in *R. v Laporte*

(1969 unreported) explained to the Court of Criminal Appeal that as the degree of negligence required to establish guilt of either offence was the same, the Crown left it to the jury to decide, having regard to the seriousness of the offence, under which of these sections they would convict.

8. While judges do not all use the same form of words to explain the law to the jury, in effect they direct that there are degrees of negligence and that for a conviction either of manslaughter or under s.291A the jury must find the accused guilty of criminal or gross negligence, that is, that his negligence must have gone beyond a mere matter of compensation between individuals and shown such a disregard for the life and safety of others that it was deserving of punishment.

The classic statement is that of Lord Hewart C.J. in *R. v Bateman* (1925) 19 Cr. App. R8; [1925] All E.R. 45.

9. The judges then explain that the only difference between the two offences is that a conviction under the one carries a lesser maximum penalty than a conviction under the other and that this is [possibly] "the only case in the law in which the jury is given an express right to indicate by its verdict that the case is not as bad as it might otherwise be and in effect to put a ceiling on the possible penalty." (The portion of the sentence in quotation is taken from a typical direction to a jury).

INCIDENCE OF INDICTMENTS AND CONVICTIONS

10. From records kept in the Supreme Court it appears that from 1945 when s.291A was enacted until the end of 1969, there have been 214 indictments for manslaughter arising out of the use of a motor vehicle. Of these, 118 proceeded to conviction. Only 3 were convictions for manslaughter, the remainder being convictions under the alternative open to the jury, s.291A. A table showing the number charged each year with the verdicts rendered is appended to this paper.

11. In 1970, to the end of May, there have been seven charges of manslaughter, of which one was convicted of manslaughter and five under s.291A. There has also been one

indictment (on committal by the Coroner) under s.291A (*R. v Haseldine*, 1970 unreported):-
the jury disagreed and a new trial was ordered.

LAW IN OTHER JURISDICTIONS

12. The United Kingdom, New Zealand, Queensland and South Australia have specific offences of "dangerous driving causing death". See -

U.K. The *Road Traffic Act 1960*, s.1;

N.Z. The *Transport Act 1962*, s.55;

S.A. The *Criminal Law Consolidation Act Amendment Act 1939*, s.14;

QLD. The *Criminal Code*, s.328A.

13. In New South Wales, if a vehicle is being driven by a drunken person or in a dangerous manner and the death of another is occasioned through impact with the vehicle, the driver is guilty of culpable driving for which the penalty is five years (*Crimes Act 1900*, s.52A).

14. Victoria has an offence of "reckless or negligent driving causing death" (*Crimes Act 1958*, s.318).

15. Tasmania has no express provision relating to causing death by the use of a motor vehicle but, when indicted for manslaughter the accused may be convicted of the lesser offence of "reckless, negligent or dangerous driving" (*Traffic Act 1925*, s.14).

CRITICISMS OF THE PRESENT LAW

16. The dissatisfaction with the present law may be summarised as follows -

- (a) it is understood that some judges feel it is confusing to juries to tell them - as now must be done - that though the elements of the two offences are precisely the same, the maximum penalty for one is significantly more than for the other;

- (b) the policy of the Crown in indicting all alleged offenders for manslaughter has led to judicial suggestions that the Crown may be abdicating its responsibility; that it should be exercising its discretion to differentiate between the worse and the less bad cases and indicting accordingly;
- (c) juries have shown a pronounced reluctance to convict for manslaughter where the unlawful killing is due to the negligent use of a motor vehicle; though an alternative verdict is available, there are some who feel that the mere use of the term "manslaughter" leads juries to acquitting when they might otherwise convict; to quote Lord Goddard, "Juries hate the word 'manslaughter'. They see in front of them fifteen years, or something of that sort. They associate manslaughter with murder trials...". (Hansard H.L. Vol. 191, Col. 86).

17. Moreover the policy of the Crown (see paragraph 16(b) above) has also meant that all indictments must be presented before the Supreme Court, as the District Court jurisdiction is limited to offences for which the maximum term of imprisonment does not exceed 14 years; there is no reason why the Supreme Court should be compelled to deal with all of the cases of death caused by the use of a vehicle.

TENTATIVE VIEWS OF THE COMMITTEE

18. In the Committee's view the introduction of a separate offence of "dangerous driving causing death" as has been done in some of the other jurisdictions may satisfy some of the criticisms of the present law, but this will not serve to clarify the law or the principles involved even if it has been made to work in practice elsewhere.

19. Dangerous driving causing death is **not** a lesser degree of criminally negligent driving causing death. It is different. In *R. v McBride* (1966) 15 C.L.R. 44 at p. 50 Barwick C.J. drew the contrast in the following terms -

"This concept [dangerous driving causing death] is in sharp contrast to the concept of negligence. The concept with which the section deals requires some serious breach of the proper conduct of a vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others. This does not involve a mere breach of

duty however grave, to a particular person, having, significance only if damage is caused thereby. These distinctions make it imperative that the jury be specifically directed as to the criteria to be applied and distinctions to be observed in determining whether any particular speed or manner of driving can have the quality, intrinsic or occasional, of being dangerous to the public within the meaning of the section: and that the particular features of the driving charged as in breach of the section to be isolated for the jury and related to these criteria."

20. The introduction of an offence of dangerous driving causing death could lead to confusion. In practice, in the vast majority of cases, if the facts constitute dangerous driving causing death they would also constitute criminally negligent driving causing death, and the distinction would become one of words rather than substance. The two offences must cover substantially the same ground. But if there are to be separate offences with different penalties, then to determine in any particular case whether the circumstances constitute the one (dangerous driving causing death) or the other (criminally negligent driving causing death and thus manslaughter) would not be easy even for a trained lawyer. If the jury are to be permitted on an indictment for manslaughter to bring in a verdict on the lesser charge, their task in trying to distinguish between the two concepts would be very difficult indeed.

21. It is also not insignificant that in Western Australia (and in Queensland) the criminal negligence provisions are contained in a separate part of the Code and framed to provide a causal nexus between the conduct of the individual and the consequences of such conduct. The introduction of a "dangerous driving causing death" offence may result in some conflict and confusion with these provisions, though it has been held in Queensland that on a charge of dangerous driving causing death (*Criminal Code* (Qld) s.328A) it is not necessary to prove criminal negligence - see *R. v. Wilson* [1965] Q.W.N. 42.

22. It has been suggested that the offence relating to causing death by the use of a motor vehicle should be removed from the Code and placed in another statute, the *Traffic Act*, for example. But in the opinion of the Committee this would not overcome any of the difficulties since the general provisions of the Code apply to all offences (see *Wilson v. Dobra* (1955), 47 W.A.L.R. 95). Moreover, since the purpose of a code is to attempt to include in the one statute all or at least substantially all the law, it would be undesirable to remove from it an indictable

offence of such importance. There are at present a few indictable offences in other statutes (e.g. *Companies Act*, s.375(2)) but these should be regarded as exceptional.

23. The Committee is of opinion that notwithstanding the dissatisfaction that has been expressed in the past (see paragraph 16 above), the principles of the law in this State are now well settled and generally understood and that no drastic change is warranted.

24. There would appear however to be some aspects of the law which **might** be improved by a reformulation of s.291A.

- (a) The offence of causing death by the negligent use of a vehicle could be clearly separated procedurally from manslaughter. If manslaughter arising from the negligent use of a motor vehicle is to be retained as an offence (otherwise than as an alternative verdict to a charge of wilful murder or murder) then the Crown will probably (as it does now), in the vast majority of cases, be forced into prosecuting for manslaughter leaving it to the jury to determine the degree of negligence and appropriate maximum penalty.
- (b) The statutory definition of the offence could be brought more into accord with the practice: the definition should expressly recognise that there are degrees of criminal negligence. It is perhaps not insignificant that in *R. v Haseldine* (see paragraph 11 above) when the accused was indicted under s.291A the jury wanted to know whether they had an alternative lesser verdict open to them.
- (c) The maximum penalties provided for the two degrees of the offence could be brought more into accord with penalties considered appropriate and imposed by the courts. In *R. v Laporte* (see paragraph 7 above) which concerned an appeal against a sentence of four years imprisonment with hard labour for manslaughter, the Court of Criminal Appeal said -

"While it is impossible to standardise sentences for particular offences, and no attempt to do so should be made, nevertheless, for each of the more common offences there is a broad range of penalties within which most sentences will fall, with variations according to the circumstances

and the character and record of the convicted person. We do not recall a sentence of four years imprisonment for a motor vehicle homicide in this State...".

And in *R. v Taylor* (1970 unreported) in imposing a sentence of 18 months on a conviction under s.291A, Burt J. said -

"Attitudes have changed by experience and the judicial attitude with reference to this particular offence has, I believe, hardened as has the social attitude."

(See also [1970] Crim. L.R. 67).

25. The Committee therefore suggests if any change is to be made, that the following section be substituted for s.291A -

When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute manslaughter causes the death by failing to use reasonable care and take reasonable precautions in the use and management of a vehicle he is guilty only of negligent killing by the use of a vehicle and shall not be indicted for manslaughter.

Upon an indictment charging a person with the crime of negligent killing by the use of a vehicle he may be convicted of negligent killing by the use of a vehicle in the first or second degree.

If the negligence of the accused was serious he is guilty of negligent killing by the use of a vehicle in the first degree.

Penalty: 7 years.

If the negligence of the accused was not serious but nevertheless deserving of punishment under the criminal law he is guilty of negligent killing by the use of a vehicle in the second degree.

Penalty: 3 years.

(Note that in style the draft has been based on ss. 281, 270 and 291A). It is assumed that the standard of negligence will still be the same as for manslaughter, i.e., criminal negligence.

26. The following incidental amendments will also be required -

Section 595 should be amended by the omission of the last paragraph.

Section 594 should be amended by the addition of the following proviso -

"On an indictment charging a person with an offence under s. 291A he may not be convicted of manslaughter".

27. It will be noted that no specific change has been suggested in relation to the offences of causing grievous bodily harm or negligently causing bodily harm. The Committee is of opinion that the criticisms do not extend to these offences and that the law as it stands is adequate. The maximum penalty for unlawfully doing grievous bodily harm is 7 years (Code s.297) and of negligently causing bodily harm is 2 years (Code s.306).

28. Copies of the relevant sections of the Code are contained in Appendix B to this paper.

ANNEXURE A

Year	No. Charged Manslaughter	No Charged with s.291A	Guilty of Manslaughter	Guilty of s.291A	Not Guilty
1946	4	-	-	1	3
1947	4	-	-	2	2
1948	2	-	-	1	1
1949	3	-	-	3	-
1950	1	7	-	1	7
1951	7	2	-	3	6
1952	8	-	-	5	3
1953	4	-	-	2	3
1954	4	-	-	1	3
1955	7	-	-	3	4
1956	16	-	-	13	3
1957	6	-	-	-	6
1958	7	-	-	5	2
1959	13	-	-	5	8
1960	15	-	-	6	9
1961	11	-	-	5	6
1962	16	-	-	6	10
1963	11	-	-	7	4
1964	15	-	2	7	6
1965	12	-	-	10	2
1966	14	-	-	10	4
1967	10	-	-	8	2
1968	10	-	-	6	4
1969	14	-	1	5	8
1970	7	1*	1	5	3
	221	10	4	120	109

* Indictment on committal by the Coroner. Jury disagreed and new trial ordered.

ANNEXURE B

THE CRIMINAL CODE OF WESTERN AUSTRALIA

Duty of persons in charge of dangerous things. Code, s.266.	Section 266: It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.
Definition of killing. Code, s.270.	Section 270: Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.
Definition of manslaughter. Code s.280.	Section 280: A person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter.
Punishment of manslaughter. Code s.287.	Section 287: Any person who commits the crime of manslaughter is liable to imprisonment with hard labour for life.
Reckless or dangerous driving. Inserted by No.40 of 1945, s.2.	Section 291A: (1) Any person who has in his charge or under his control any vehicle and fails to use reasonable care and take reasonable precautions in the use and management of such vehicle whereby death is caused to another person is guilty of a crime and liable to imprisonment with hard labour for five years. (2) This section shall not relieve a person of criminal responsibility for the unlawful killing of another person.
Conviction for offence other than that charged. Code, s 594. Repealed and new section inserted by No. 32 of 1918,	Section 594: Except as hereinafter stated, upon an indictment charging a person with an offence he may be convicted of any offence which is established by the evidence, and which is an element or would be involved in the commission of the offence charged in the indictment.

s.18.

Charge of murder or manslaughter. Code. s. 595. Amended by No. 40 of 1945, s.3.

Section 595: Upon an indictment charging a person with the crime of wilful murder, he may be convicted of the crime of murder or of the crime of manslaughter, if either of those crimes is established by the evidence, but not, except as herein expressly provided, of any other offence than that with which he is charged.

Upon an indictment charging a person with the crime of murder, he may be convicted of the crime of manslaughter, if that crime is established by the evidence, but not, except as herein expressly provided, of any other offence than that with which he is charged.

Proviso:
Charge of homicide of child.

Upon an indictment charging a person with the crime of manslaughter he cannot, except as herein expressly provided, be convicted of any other offence. Provided that upon an indictment charging a person with the wilful murder or murder of any person, or with unlawfully killing any person, if upon the evidence it appears that the person alleged to have been killed was a child of which a woman has recently been delivered, the accused person may be convicted of the offence of preventing the child from being born alive by an act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, or of the offence of endeavouring by a secret disposition of the dead body of the child to conceal the birth, if either of those offences is established by the evidence.

Provided also that upon an indictment charging a person with the crime of manslaughter he may be convicted of a crime under section two hundred and ninety-one A hereof, if the crime is established by the evidence.