CITATION: *Sally Nicholas v Ashley Louise Gundersen (2019) NTLC 021*

PARTIES:	Sally NICHOLAS v Ashley Louise GUNDERSEN
TITLE OF COURT:	Local Court
JURISDICTION:	Criminal
FILE NO(s):	21827826
DELIVERED ON:	9 May 2019
DELIVERED AT:	Darwin
HEARING DATE(s):	5 & 6 February 2019
JUDGMENT OF:	Chief Judge Lowndes

CATCHWORDS:

CRIMINAL LAW – ELEMENTS OF OFFENCE UNDER SECTION 174F OF THE CRIMINAL CODE – DRIVING A MOTOR VEHICLE DANGEROUSLY – LACK OF SLEEP – MISTAKE OF FACT – DRIVE WITHOUT DUE CARE

Criminal Code ss 174F(2), 43(AF), 43AN, 174K(3), 174K(4), 43(AF), 43AN and *43AX(1)*
McBride v R (1966) 115 CLR 44 applied
Kroon v R (1966) 115 CLR 44 applied
Jiminez v R (1992) 173 CLR 572 followed
Langan v White [2006] TASSC 83 applied
Mei Ying Su v Australian Fisheries Management Authority (No 2) (2008) 251 ALR 135 applied
Franjic v Visser (1990) 12 MVR 393 followed

REPRESENTATION:

Counsel:

Complainant:	Ms G McMaster
Defendant:	Mr J Adams

Solicitors:

Complainant:	DPP
Defendant:	NTLAC

Judgment category classification:	B
Judgment ID number:	[2019] *NTLC 021*
Number of paragraphs:	179

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No.

BETWEEN:

Sally Nicholas
Complainant

AND:

Ashley Louise Gundersen
Defendant

REASONS FOR JUDGMENT

(Delivered 9 May 2019)

CHIEF JUDGE LOWNDES

THE CHARGES

1. The defendant was charged with two offences.

2. The first charge relates to an offence contrary to s 174 F(2) of the *Criminal Code* (NT). The offence creating provision reads:

> A person is guilty of an offence if:
>
> (a) the person drives a motor vehicle dangerously; and
>
> (b) that conduct causes serious harm to any person.

3. The defendant pleaded not guilty to the charge in relation to s 174F(2) of the Code.

4. The second charge relates to an offence contrary to Regulation 18 of *the Traffic Regulations* – namely driving without due care.[1] The defendant also pleaded not guilty to that charge.

THE ELEMENTS OF THE SECTION 174F OFFENCE AND THE RELEVANT LAW

5. The elements of the offence contrary to s 174F(2) are as set out in the offence creating provision together with the statutory definition contained in s 174F(3) which provides that a person drives a motor vehicle dangerously if the person drives the vehicle:

   (a) while under the influence of alcohol or a drug to such an extent as to be incapable of having proper control of the vehicle; or

   (b) at a speed that is dangerous to another person; or

   (c) in a manner that is dangerous to another person.

6. The offence is an offence of strict liability.[2] Section 43AN of the Code provides that in the case of a strict liability offence there are no fault elements for any of the physical elements of the offence. However, the defence of mistake of fact under s 43AX of the Code is available.

7. Although an offence of strict liability contains no fault element the conduct constituting the physical element of the offence must be voluntary.[3]

8. In relation to s 174F(2) it is incumbent on the prosecution to prove beyond reasonable doubt that the defendant drove a motor vehicle dangerously in one of the

[1] Regulation 18(1) provides:
" A person must not walk, or drive a motor vehicle, on a road or public place without due care or attention or without reasonable consideration for other persons using the road or public place.
[2] Section 174F(4).
[3] Section 43AF.

9. The element of dangerous driving was considered by the High Court *in McBride v The Queen* (1966) 115 CLR 44 at 49-50 per Barwick CJ:

> [it] imports a quality in the speed or manner of driving which either intrinsically in all the circumstances, or because of the particular circumstances surrounding the driving, is in a real sense potentially dangerous to a human being or human beings who as a member or members of the public may be upon or in the vicinity of the roadway on which the driving is taking place…This quality of being dangerous to the public in the speed or manner of driving does not depend upon the resultant damage… A person may drive at a speed or in manner dangerous to the public without causing any actual injury: it is the potentiality in fact of danger to the public in the manner of driving, whether realized by the accused or not, which makes it dangerous to the public…
>
> This concept is in sharp contrast to the concept of negligence. The concept…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.

10. Dangerous driving was subsequently considered and explained in *Kroon v R* (1990) 12 MVR 483 at 484 (SA):

> It is well established that the question whether a vehicle is driven in a manner dangerous to the public…must be answered by reference to an objective standard and irrespective of whether the accused intended to drive dangerously or appreciated that he was doing so: *R v Coventry* (1938) 59 CLR 633 at 637-8, 639; *McBride v R* (1966) 115 CLR 44 at 49-50; *Giorgianni v R* (1985) 2 MVR 97 at 101; *R v Cornish* (1988) 48 SASR 520. The character of the driving is tested not by reference to whether the danger to the public involved in the driving was appreciated by the accused but to whether he ought to have appreciated the danger; or to put it another way, whether a reasonable person in the situation of the accused would have appreciated the danger: *R v Mayne* (1975) 11 SASR 583 at 585….

11. The concept of dangerous driving was elaborated upon by the High Court in *Jiminez v The Queen* (1992) 173 CLR 572 at 579:

> The manner of driving encompasses "all matters connected with the management and control of a car by a driver when it is being driven". For driving to be dangerous…there must be some feature which is identified not as want of care but which subjects the public to some risk over and above that ordinarily associated with the driving of a motor vehicle, including driving by persons who may, on occasions, drive with less than due care and attention. Although a course of conduct is involved it need not take place over a considerable period. Nor need the conduct manifest itself in the physical behavior of the vehicle. If the vehicle is in a condition while driving which makes the mere fact of his driving a real danger to the public, including the occupants of the motor vehicle, then his driving in that condition constitutes driving in a manner dangerous to the public. In the same way driving a motor vehicle in a seriously defective condition may constitute driving in a manner dangerous to the public, even though the defect does not manifest itself until such time as the vehicle is out of control of the driver. But it should be emphasized, and it must always be brought to the attention of the jury, that the condition of the driver must amount to something other than a lack of due care, before it can support a finding of driving in a manner dangerous to the public. Driving in that condition must constitute a real danger to the public.

12. Whether a particular instance of driving is dangerous will depend upon the particular circumstances surrounding the driving and this is especially so in relation to driving in a manner dangerous. There must be some feature of the driving which subjects the public to some risk over and above that ordinarily associated with the driving of a motor vehicle. The test for assessing the dangerousness of a person's driving is and remains an objective one.

13. Dangerous driving may be constituted by a momentary lapse of attention by a driver if it results in potential danger to another person or to other persons.[4]

14. Of particular relevance to the present case, driving whilst tired or in a drowsy

[4] *L v P* (1993) 69 A Crim R 159; *McBride v The Queen* (1966) 115 CLR 44; *Coventry v The Queen* (138) 59 CLR 633; *Jiminez v The Queen* (1996) 173 CLR 572.

condition may constitute dangerous driving:[5]

> For a driver to be guilty of driving in a manner dangerous to the public because of his tired or drowsy condition that condition must be such that, as a matter of objective fact, his driving in that condition is a danger to the public. Various matters will be relevant in reaching such a conclusion. The period of the driving, the lighting conditions (including whether it was night or day) and the heating or ventilation of the vehicle are all relevant considerations. And, of course, it will be necessary to consider how tired the driver was. If there was a warning as to the onset of sleep that may be some evidence of the degree of his tiredness. And the period of driving before the accident and the amount of sleep that he had earlier had will also bear on the degree of his tiredness. But so far as "driving in a manner dangerous " is concerned, the issue is not whether there was or was not a warning of the onset of sleep, but whether the driver was so tired that, in the circumstances, his driving was a danger to the public. The various matters which bear on that question and the way in which they bear on it, should, be carefully drawn to the attention of the jury.

15. In such cases, it is incumbent on the prosecution to prove that the defendant was "affected by tiredness to the extent that, in the circumstances, his driving was objectively dangerous".[6]

16. The defendant can only be found guilty of the offence contrary to s 74F(2) if the prosecution can establish beyond reasonable doubt that the condition of the defendant immediately prior to the accident which resulted in her vehicle colliding with the motor cyclist was such that continuing to drive in that condition constituted an abnormal danger to the public.[7]

17. The final element of the offence created by s 174F(2) of the Code is that the dangerous driving caused serious harm.

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[5] *Jiminez v The Queen* (1992) 173 CLR 572 at 579-580.
[6] *Jiminez v The Queen* (1992) 173 CLR 572 at 583.
[7] *See Rowlson [1996] 67 SASR 96 at 105 per Olsson J.*

THE EVIDENCE

Mr Keane's Evidence

18. Mr Keane gave evidence that on 26 March 2018 he was driving down Finn Road and onto Jenkins Road, going the back way to Palmerston. It was about 5.55am and it was still dark. There were no street lights on that stretch of road. The road was dry and there were no traffic hazards.

19. When he turned into Jenkins Road there were two cars travelling in the opposite direction and a motor bike behind him. The bike's headlight was on.

20. The cars coming towards him had their headlights on and he first noticed them about 200 metres away. Mr Keane said that he was unable to identify the make of those vehicles. He recalled that the second of the two approaching cars had a look as if to overtake the vehicle in front. Mr Keane said that things then happened so quickly and suddenly. All of a sudden the defendant's vehicle was in Mr Keane's lane. Mr Keane said that he swerved left and the mirror of his vehicle touched the mirror of the defendant's vehicle.[8] Mr Keane did not know what had happened to the motor cyclist at this stage. He went back to look for the motor cyclist and located him.

21. Mr Keane sad that he spoke to the defendant who was in a state of shock, hysterical and shaking. He asked her what had happened to which she replied she went to sleep. He said nothing back to her. However, after refreshing his memory (by reference to his statement) he recalled saying to her "I can see why your'e exhausted". He went on to say that she had told him that she had arrived in Darwin late that night and had taken her husband to the airport.

[8] Mr Keane prepared a diagram indicating the movement and position of the vehicles involved in the accident (Exhibit P7).

22. During cross-examination, Mr Keane said that he could not recall the defendant saying that "she must have fallen asleep". However, he said that it was possible they were the words that she used.

The Evidence of Constable Cassar

23. Constable Rachel Cassar gave evidence that she attended the scene of the accident with constable Matthew Woldseth on 26 March 2018.

24. Constable Cassar said that when she arrived at the scene she spoke to an unnamed person who stopped her and said that she may want to speak to the other driver (the defendant). She said that she spoke to the defendant and asked her what had happened. The defendant told her that she was tired and she may have fallen asleep, and that she had only been in Darwin for a short period of time. She also told her that she was just coming back from taking her husband from the airport as he was a FIFO worker.

25. Constable Cassar said that she had taken some notes of that conversation and she had looked at those notes just prior to giving evidence. She had also read her statement.

26. Constable Cassar said that she could not remember any more about the conversation except that the defendant was "very visibly upset" and had a baby who she was trying to settle down.

27. At this stage of the witness's evidence in chief the prosecution made an application pursuant to s 32 of the *Evidence (National Legislation) Act* seeking that the witness be allowed to revive her memory by referring to her statement – in particular paragraph 8.

28. Section 32 (1) of the Act provides that a witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the court gives leave.

29. Subsection (2) provides that without limiting the matters that the court may take into account in deciding whether to give leave, it is to take into account:

> (a) whether or not the witness will be able to recall the fact or opinion adequately without using the document; and
>
> (b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that:
>
> (i) was written or made by the witness when the events recorded in it were fresh in his or her memory; or
>
> (ii) was, at such time, found to be accurate by the witness to be accurate.

30. The matters specified in s 32(2) are not the only matters to be taken into account. Section 192(2) of the Act provides as follows:

> Without limiting the matters that the court may take into account in deciding whether to give the leave, permission of direction, it is to take into account:
>
> (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and
>
> (b) the extent to which to do so would be unfair to a party or to a witness; and
>
> (c) the importance of the evidence in relation to which the leave, permission or direction is sought; and
>
> (d) the nature of the proceeding; and
>
> (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

31. The application pursuant to s 32(1) of the Act was opposed by the defence on the basis that having regard to the matters specified in s 32(2) the witness should not be

granted leave to use her statement to try and revive her memory about the contents of the conversation she had with the defendant at the scene of the accident.

32. Section 32 permits witnesses to "refresh their memories in court by reference to documents that actually revive their memories but also by reading documents made or adopted by them closer to the events in issue (at a time when memory still existed) so long as they are prepared to vouch in court for the accuracy of the memory in that record".[9] The document need not be actually written or signed by the witness as long as its contents have been affirmed by the witness while the events were still fresh in the witness's memory: *R v Singh* (1977) 15 SASR 321. For example leave could be granted to revive memory from a newspaper report or other document prepared by another person or from notes jointly prepared by the witness and another person.[10]

33. In the present case the document in question is the statement made by constable Cassar.

34. Although I am satisfied that constable Cassar was unable to recall the entirety of her conversation with the defendant without using her statement I am not satisfied that when she made her statement the events recorded in it were fresh in her memory.

35. There is no hard and fast rule concerning how soon after the event or events in question the document must have been made or found to have been accurate in order for the document to be regarded as being fresh in the memory.

36. In *R v Beelon* (1972) 6 SASR 534 at 537 it was observed:

[9] See A Ligertwood and G Edmond " Australian Evidence: A Principled Approach to Common Law and Uniform Acts" 6th ed at [7.76]. As noted by the authors, the section speaks of reviving memory rather than "refreshing memory"; however this has been interpreted as embodying the common law notion of "refreshment": Ligertwood and Edmond at [7;76] citing *MGICA (1992) Ltd v Kenny and Good Pty Ltd* (1996) 135 ALR 743 at 745.

[10] N Williams, J Anderson, J MaryChurch and J Roy " Uniform Evidence in Australia " at [33.6].

> [A] …requirement of a document to which a witness is to be allowed to resort is that it must have been made or verified by him while the facts were still fresh in his memory. See, for example, *Phipson on Evidence*, para 1529(2). The suggestion in *Cross on Evidence* (Aust ed) of the requirement of "contemporaneity" seems to me, again, with respect, to be wrong. Certainly if the memorandum were made or verified contemporaneously the facts would be fresh in the mind of the witness, but in my opinion the real test is freshness of memory as a question of fact and not the relationship in time, except that shortness of time makes it easier to accept the witness's assertion that the facts were fresh and length of time more difficult – and a great length of time would undoubtedly lead any court to reject the evidence claiming that the events were fresh in the memory of the witness at the time of making the memorandum…

37. In *Graham v R* (1998) 195 CLR 606 the High Court considered the notion of "fresh in his or her memory" in the context of the "freshness" requirement in s 66 of the Act:

> The word "fresh" in its context in s66 means "recent" or "immediate". It may also carry a connotation that describes the quality of the memory (as being "not deteriorated or changed by the lapse of time") but the core of the meaning intended is to describe the temporal relationship between "the occurrence of the asserted fact" and time of making the representation. Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours and days, not as was the case here, in years.

38. It would seem to follow that courts should not take a rigid approach to "freshness of memory" in the context of s 32 (2)(b)(ii) of the Act.[11] Notwithstanding such a flexible approach, the fact that the statement was made almost three months after the accident raises very real concerns about the "freshness" of the witness's memory at the time the statement was made. Furthermore, the statement was only made at the request of Sergeant Casey; and there is no evidence that between the date of the

[11] Williams, Anderson, MaryChurch and Roy n 10 at [33.5].

accident and the making of the statement that the witness had any occasion to recall the accident or indeed had given it any thought.

39. Of course, the s192(2) matters also need to be taken into account. I have considered the importance of the evidence that is sought to be relied upon, but because I am unable to be satisfied that when the statement was made the events were fresh in the constable's memory it would be unfair to the defendant to give the relevant leave.[12]

40. In my opinion, the leave sought pursuant to s 32(1) should be refused and the defendant should not be permitted to read her statement or relevant parts thereof as part of her evidence.

41. However, in the event that leave should have been granted, then in my opinion the constable's evidence as contained in paragraph 8 of her statement should be found to be so inherently unreliable that it cannot be accepted.[13]

42. During the voir dire, constable Cassar's attention was drawn to paragraph 8 of her statement and she was asked whether she recalled what the defendant had told her about much sleep she had received. Constable Cassar stated: "Couple of hours. Hardly any, couple of hours". However, she agreed that she had not used those words in her statement; but had said "hardly any sleep". Notwithstanding, constable Cassar remembered her saying "only a couple of hours".

43. Constable Cassar said that the totality of the notes that she made in relation to her conversation with the defendant were as recorded at the top of page 98 of her notebook which was attached her statement made on 21 June 2018. The witness said

[12] In my opinion the other matters in s192(2) have little or no bearing on the matter.

[13] Arguably, the unreliability of this evidence could be relied upon as a basis for finding that the events in question were not fresh in the memory of the witness when she made her statement and as a ground for refusing leave under s 32(1).

that when she came to make the statement she still recalled the conversation that she had with the defendant.

44. Under cross examination (as part of the voir dire) constable Cassar gave the following evidence.

45. The witness confirmed that she had written in her statement that the "RAV driver said she may have fallen asleep" (which was recorded in the notes that she took shortly after the accident).

46. Constable Cassar said that she made the statement on 21 June 2018 at the request of Sergeant Casey. She said that she made the statement based on her "own recollection of attending" the accident scene.

47. Although the constable used the words "she had hardly any sleep" in her statement, she agreed that she did not put that in her notes. She also agreed that she had not included in either her notes or statement that the defendant had told her that she had "a couple of hours sleep".

48. When it was suggested to the witness that all the defendant said to her was that she may have fallen asleep, she stated : "I recall her saying something of the cause of she's hardly had any sleep or had a couple of hours sleep". Constable Cassar told the court that she could recall that having been said as a result of "going through the process of today and remembering what had happened". By "going through the process today" she meant reading her notes and her statement. She said she was clear from her notes and statement that the defendant had said that she may have fallen asleep.

49. Constable Cassar said that she was not sure whether the defendant had told her she had hardly any sleep or only had a couple of hours sleep. She added that the latter had only come to her mind today when giving evidence.

50. During re-examination (on the voir dire) Constable Cassar could not explain why the second part of her conversation with the defendant (as recorded in her statement) was not recorded in her notes (which were made about 90 mins after she had spoken to the defendant). Her evidence was:

> I can't tell you why. I just know I took my notes at the time. I drew a picture of what I can recall of the actual accident. I took notes of anybody that I spoke about. The only thing that I can think of is "may have fallen asleep" was the most poignant thing that I could think of that she said to me at that time.

51. It is telling that in the notes constable Cassar made about the accident and the conversation that she had with the defendant no mention was made of the defendant having said that she "had hardly any sleep" or "only had a couple of hours sleep". Those notes were made very soon after the conversation. In accordance with ordinary human experience, the constable's memory of the conversation would have been optimal at that stage: the freshest it could be. Her memory would not have been dulled or faded by the effluxion of time.

52. The constable's explanation for the absence of any reference in her notebook to the further part of the conversation was unconvincing. She said that the defendant's statement that she "may have fallen asleep" was the most poignant thing that she said during the conversation. However, it is difficult to understand why further statements such as "hardly having any sleep" or "only having a couple of hours sleep" would not have stuck in her mind and been recorded in her notebook so soon after the conversation between the constable and the defendant when her memory was at its freshest.

53. It is also telling that the witness did not include in her statement the assertion that the defendant had told her that she "only had a couple of hours sleep". It is clear that this was something that she only thought of while in the witness box.

54. Furthermore, the fact that constable Cassar could not be sure whether the defendant had told her she "had hardly any sleep" or "had only a couple of hours sleep" casts serious doubts on the accuracy and reliability of her evidence.

Senior Constable Woldseth's Evidence

55. Senior Constable Woldseth gave evidence of attending the accident scene on 25 March 2018. He made a statement in relation to the matter which was tendered as Exhibit P6 (including notes made at the scene).

56. The constable said that he had spoken to the defendant at the accident scene. She had told him that had just driven from the airport after dropping her partner off at the airport. When he asked her what happened regarding the accident she said that must have just dozed off and she heard a loud bang "before freaking out about her baby being in the car". The constable also said that she told him "that they had only flown in on the red eye that night and she had only been home a short time before having to drive back to the airport to drop her partner off for work".

57. Under cross –examination, Senior Constable Woldseth said that the defendant was quite upset – "shaken up about the incident"- when he spoke to the defendant.

58. The constable could not recall whether the defendant had said that "she must have fallen asleep" rather than "must have just dozed off". He said:

> To my knowledge, probably if I've written it in the statement as dozed off, that's my interpretation of what she said.

59. In re-examination the constable said that he had recorded in his notes that she had said “must have dozed off”, and it was his usual practice to record conversations in terms of the actual words used.

The Evidence of Constable Scott

60. Constable Amelia Scott gave evidence of attending the scene of the accident on 26 March 2018.

61. Constable Scott said that she drove the defendant back home after the accident. She had a conversation with the defendant which related to how she was feeling and what had happened. The constable recalled the defendant telling her about her flight back to Darwin. They discussed being tired as a result of catching late flights. She said that the defendant mentioned being tired or fatigued, having returned from Brisbane and then driving back to Berry Springs and then doing a return trip to the airport. However, she did not recall the specific words used by the defendant, and was unsure if she was offering an explanation for the accident. Constable Scott said that to the best of her recollection the defendant did not appear emotional.

62. The witness could not recall whether she spoke to the defendant about sleeping. The prosecution made an application under s 32 of the Act seeking leave for the witness to refer to her statement. That application was originally opposed by the defence but subsequently withdrawn.

63. After refreshing her memory from paragraph 4 her statement, constable Scott said that the defendant had told her that she had not been sleeping well due to the birth of her new child.

64. Under cross examination the constable said that when the defendant told her she was tired she was not sure whether she was referring to her condition at the time she was being conveyed home or at an earlier time.

Sergeant Casey's Evidence

65. Sergeant Casey, who was part of the Major Crash Investigation Unit, gave evidence of attending the accident scene and being involved in the investigation of the accident. [14]

The Defendant's Evidence

66. The defendant gave evidence that at the time of the accident she was on maternity leave and was a "stay at home mum".

67. Prior to the accident – about 24 hours earlier - she had been in Queensland on the Gold Coast near Warwick, attending a family wedding. At that time she was with her partner, Ian and her new born child.

68. The defendant said that the she left the wedding reception about 8.30pm about 24 hours prior to the accident and her best recollection was that she went to sleep between 9.30pm and 10.30pm at the premises attached to the reception venue. Her partner who was still at the reception did not return to the accommodation until the next morning.

69. The defendant said that she slept with her baby that night and got up the next morning about 8.00am. She could not recall waking up during the night.

70. The defendant gave evidence that at 8.00pm on the day before the accident she caught a return flight to the Northern Territory with her partner and her child. The flight was about 4 hours. She said that during the flight she slept and looked after

[14] See pp 77 – 86 of the transcript of proceedings on 5 February 2019.

her child. She thought that she got about 3 hours sleep during the flight. The flight landed in Darwin just after midnight.

71. After disembarking she caught a taxi with her partner and child to a friend's place near the airport to pick up their car. She then drove back to their residence at Berry Springs.

72. The defendant was unable to recall what time they arrived home; but she said that they went back to bed because they knew that they had to get early that morning. She had no idea as to how long she slept. However, she had to get up at 4.00am because her partner was flying out at 6.00am that morning. The defendant went on to say that she was up by 3.30am and ready to go. She said that she probably got a couple of hours sleep: "two and a half, maybe".

73. The defendant gave evidence that she drove her partner to the airport. Her child was a passenger. She then dropped her partner off, and then proceeded to drive back home.

74. She told the court that on the return trip she thought she was fine: "like I felt fine. But I had the baby in the car".

75. The defendant said that she listens to audio books when she drives constantly. This occasion was no exception and she was listening to an audio book just before the accident. She was pretty sure that she was listening to "Outlander".

76. As to how she felt just prior to the accident, the defendant said:

> As far as I can remember I felt okay. Like, I didn't feel different. Like, I thought I was fine to drive, so I'm not really sure how to describe how I felt.

77. The only thing she recalled about the accident was hearing a "loud bang". It was then that she pulled over to the side of the road. She said that her vehicle was obviously damaged.

78. The defendant said that after the accident she initially spoke to a police officer who she was unable to identify. She could not really recall what she told the police officer. However, she talked about having returned to Darwin and dropping her partner off at the airport, and not knowing what had happened concerning the cause of the accident.

79. The defendant gave evidence that she had subsequently thought about the cause of the accident. She reached the following conclusion about the cause of the accident:

> …after listening to the police officers and listening to everything and talking to – about what happened, I come to the conclusion that I must have fallen asleep. But, I didn't know if that's what had happened while I was there or – I just - I didn't know what had happened. I had no memory of the impact or anything. I didn't know what happened.

80. The defendant said that she could not recall anything unusual happening before the accident.

81. The defendant gave the following evidence during cross-examination.

82. She did not recall telling Constable Scott that she had not been sleeping well due to the recent birth of her son. She said: "I honestly don't remember what I said to her… I don't remember". The defendant added that she had been sleeping well. She further said that "we'd had a lot on the last couple of weeks" and did not recall telling the constable that she had not been sleeping well.

83. The defendant went on to give this evidence:

> If I said that I'd probably say that I said it in a different way and it wasn't related back to the baby. I feel like I might have said stuff about being tired and that she put it down to the baby because he was there.

84. As to why she may have told the police officer she was tired, the defendant said:

> I had been standing at a car accident that I was involved in for about 1.5 to two hours. I was freaking out about the fact that I didn't know how to get home and that I didn't have anyone in town and had driven to the airport twice and had a relatively long weekend.

85. The defendant said that all those things made her feel tired at that point. She added:

> ….I'd been crying as well as so I wasn't just – because I was standing on the side of the road. I'd been crying and I was really obviously upset that everything had happened.

86. The defendant said that since the birth of her child she got "a good six or seven hours sleep each night", though the sleep was broken.

87. The defendant gave evidence that her broken sleep did not necessarily affect her and make her tired:

> …at times I'd still get five hours before I'd get woken up and then – or like, then every three hours and then I'd get woken up. Like, I was going to bed pretty early and sleeping when I could.

88. The defendant said that she usually sleeps on flights. She said that although she could not remember the flight from Queensland to Darwin, she slept on that flight. She said that she was holding her son the whole time and he fell asleep on her. She then went to sleep with him in his little baby carrier on her. That's what happened on most previous flights. The defendant repeated her evidence in chief that she got at least three hours sleep during the return flight from Brisbane to Darwin. She was pretty sure she was asleep during the flight. However, the defendant conceded that it was possible that she was awake for a couple of hours and that she did not remember that. Although she recalled waking when it was announced that the flight was descending she did not know when she fell asleep during the flight. The defendant said that her child slept during the flight though she fed him when the flight

commenced and during descent. She could not recall whether her child drank anything during the flight.

89. The defendant said that when she got off the plane she was “fresh, ready to drive”.

90. The defendant said that when she arrived home from the airport at about 1.30am she was “not really tired”; though she went to asleep about 2.00am so as ensure that she got some sleep before driving back to the airport - waking up about 3.30am in preparation for taking her partner to the airport.

91. The defendant said that she could not remember feeling sleepy when she drove her partner to the airport. She said: ‘…I wouldn’t have driven in the car with the baby if I thought I wasn’t right to drive. Like I thought I was fine to get Ian to the airport”. The defendant thought about whether she was too tired to drive that morning. She repeated that she would not have driven with her baby in the car if she did not think it was safe for her to drive.

92. The defendant gave evidence that her partner could have caught a taxi to the airport, though she felt obligated to drive him because she was his wife.

93. The defendant said that her partner called her at about 5.30am when she got to Palmerston while she was driving. She said that she missed the first call; but answered the second call while driving, using the “hands free” in her car. She could not recall her whereabouts at the time she took the call. She thought it was when she was driving past McDonalds. He told her he had checked in and everything was fine. The defendant thought that the call was “pretty brief

94. The defendant gave evidence that she was aware that drivers falling asleep at the wheel was an issue in Queensland and the Northern Territory. She was also aware of signs posted along the roadway warning of driving whilst tired. The defendant

agreed that driving whilst tired would slow down one's reflexes and could lead to inattention whilst driving.

95. The defendant told the court that she was not affected by any medical conditions that affected her driving at the time.

96. The defendant said that on the return trip from the airport she was travelling along Jenkins Road which has no street lights. She was listening to "Outlander". However, she could not recall what part of the story she was listening to at that time. She said that she was not listening to the audio book to keep her awake. She said that she listens to audio books whenever she is driving.

97. The defendant said that when she turned on to Jenkins Road she remembered seeing a vehicle in front of her. She could not recall when she first saw the vehicle but she remembered switching off the high beam on her vehicle. She could not recall whether she switched her high beam off because of the car in front or oncoming traffic. The defendant could not recall overtaking any other vehicles on Jenkins Road.

98. The defendant said that she was sitting behind another vehicle for a period of time before the accident and before she heard "the bang". She could not recall how close she was to that vehicle when she heard the bang. The defendant gave evidence that between 3 to 5 seconds before the accident the distance between the car in front of her and her vehicle was about 2 to 3 car lengths. She could not remember seeing the lights of the oncoming vehicle. The defendant said that she had no idea that there was a motor bike behind Mr Keane's vehicle.

99. The defendant could not recall how fast she was travelling before the accident. However, she agreed with the police officer's estimate of 100 kph. She could not

recall whether she had cruise control on at the time. The defendant was not aware of taking her foot off the accelerator pedal before she heard the bang.

100. The defendant could not remember checking on her son (who was in rear of her vehicle) between Channel Point Road and the accident. She said that it was possible that she turned around to check on him – including just before the accident.

101. The defendant told the court that when she heard the bang she broke and pulled over. She did not what she had hit.

102. At that point the defendant was aware that another vehicle was involved, but did not know what happened to the other person. She recalled hearing Mr Keane's voice. He said that a person down the road had told him to make sure that she did not go anywhere. The defendant did not know that a motor cyclist had been involved in the collision until Mr Keane informed her of that.

103. The defendant said that she was in shock and did not know what was going on. She said she was crying incessantly. The defendant said that when the police arrived at the scene they spoke to her. She vaguely recalled talking to police officers.

104. The defendant did not recall saying to Constable Cassar (a female police officer) that she was tired. She only remembered speaking to a male office. She had no recollection of speaking to the female police officer.

105. Her memory of her conversation with the male officer was piecemeal. She only recalled saying repeatedly that she did not know what had happened. She said that she did not recall anything other than the bang.

106. The defendant said that she thought that in the past she may have had the experience of going from one point to another and not been entirely sure of how she got from "A to B"; though she was unable to think of a specific instance. She described the

sensation as being like “time all blends into one”. However, she said that did not happened the morning of the accident: she did not know what happened.

107. The defendant said that she had told Mr Keane that she went to sleep because she had been talking with the officer and she was going over everything in her mind. She concluded that she must have fallen asleep because she did not know what had happened and that was the only thing that made sense. When she told Mr Keane that she must have gone to sleep he replied “you’re joking”. First she said “no” and then she said “I don’t know”. She then kept saying that she did not know what had happened.

108. The defendant went on to say that she had concluded that she had fallen asleep “after trying to wrap [her] head around everything, while being hysterical and crying”. The defendant agreed that she had told Amelia Scott that she was tired – but that was in the context of being tired at the point of her conversation with her. The defendant said that she had been crying for a long time and was worried about what had occurred. She said that she was hysterical because she had been involved in an accident and did not know what had happened.

109. The defendant said that she did not know whether in fact she had gone to sleep prior to the accident.

110. The defendant told the court that she was not tired before the accident: she thought she was “in the right frame of mind to drive”. Later she said that she thought she was right to drive: she did not think she was unfit to drive. She said that she did not know that she was tired when she got into her vehicle.

111. She did not know how she came to be on the incorrect side of the road just prior to the collision.

112. During re-examination the defendant gave the following evidence.

113. The defendant said that when she woke up to take her partner to the airport she felt tired, but after she had woken up she thought she was fit to drive him to the airport.

114. On the return trip from the airport at about Jenkins Road the defendant felt fine. She stated that she was not nodding off, not swerving out of her lane, not speeding but driving normally. She said that if she had felt tired and unable to drive she would have pulled over. The defendant had no fear that she may have been too tired to drive at that stage. She did not feel exhausted just prior to the accident. There was no prior indication that she should not be driving.

DID THE DEFENDANT DROVE A MOTOR VEHICLE DANGEROUSLY WITHIN THE MEANING OF SECTION 174(2) OF THE CRIMINAL CODE

Facts Not in Dispute

115. Certain facts are not in dispute. Those facts are as stated in the Agreed Facts *Pursuant to Section 191 of the Evidence (National Uniform Legislation) Act* (NT).[15]

Consideration of the Evidence and Findings of Fact

116. As it is the prosecution case that the defendant was so tired that it was objectively dangerous for her to drive motor vehicle on the occasion of the accident it is necessary to make findings of fact as to whether she was tired and if so as to the extent of that tiredness.

117. As noted earlier, Constable Cassar's testimony that the defendant had told her that she had "hardly any sleep" was ruled to be inadmissible and not received as part of

[15] See Exhibit P10.

her oral evidence.[16] In any event – even if the evidence were admissible – it would have to be found to be unreliable.[17]

118. As also noted earlier, the constable's evidence that the defendant had told her that she was tired and "she only had a couple of hour's sleep" due to having just returned to Darwin, lack of sleep because of her baby and the need to get up early to take her husband to the airport is inherently unreliable.[18] That part of the conversation was not recorded in the constable's notes nor in her statement. Furthermore, the constable could not recall whether the defendant had mentioned having hardly any sleep" or having "only a couple of hours sleep". Significantly, constable Cassar only recalled the defendant mentioning "a couple of hours sleep" when she was in the witness box – almost 12 months after the accident.

119. Furthermore, the defendant's evidence differed to that given by Constable Cassar. As noted earlier, the defendant said that after the accident she spoke to a police officer who she was unable to identify. However, she was unable to recall what she had told the police officer, except for some conversation concerning her recent return to Darwin and dropping her husband off at the airport, and not knowing what had happened in relation to the accident. The defendant did not recall telling constable Cassar that she was tired.

120. That leaves constable Cassar's evidence that the defendant had told her that she must have fallen asleep. In my opinion, there is a sound basis for accepting this part of constable Cassar's evidence. First, this part of the conversation was recorded in the constable's notes made soon after the accident - and when her recollection of the conversation she had with the defendant would have been "fresh in her memory".

[16] See pp 7-8 above.
[17] See pp 8-9 above.
[18] See pp 8 -9 above.

Secondly, although the defendant does not recall telling constable Cassar that she may have fallen asleep, the defendant's evidence was that she had told Mr Keane that she had gone to sleep. Thirdly, during the course of her evidence, the defendant said that she had concluded that she must have fallen asleep, which lends further weight to constable Cassar's account of her conversation with the defendant.

121. As noted earlier, Senior Constable Woldseth gave evidence that the defendant had told him that she must have "just dozed off". Although the defendant had no recollection of that part of her conversation with the police officer, I think there is a sound basis for accepting that part of the constable's evidence. That part of the conversation was recorded in his notes attached to Exhibit p6. Furthermore, the conversation that is said to have taken place is consistent with constable Cassar's recall of her conversation with the defendant and the defendant's own conclusion as to how the accident occurred. In my opinion, little (if anything) turns upon the semantics – namely the difference between "dozing off" and "falling asleep".

122. That then leaves the evidence of constable Scott, the third prosecution witness who gave evidence concerning the tiredness or otherwise of the defendant.

123. As noted earlier, although constable Scott could not recall the specific words used by the defendant during their conversation on the way back to the defendant's home in Berry Springs the conversation related to how the defendant was feeling and what had happened. The constable recalled the defendant saying that she was tired or fatigued, after returning from Brisbane and travelling to and from Darwin airport. The constable also said that the defendant had told her that she had not been sleeping well due to the birth of her son.

124. The defendant's evidence differed from the evidence of constable Scott in that she could not remember telling the constable that she had not been sleeping well as a

result of the birth of her baby. However, as noted earlier, the defendant proffered an explanation as to why she may have told the police officer why she was tired. The explanation had nothing to do with her baby, but related to her feeling tired at the time of the conversation due to being upset about the accident and remaining at the accident scene for 1.5 to 2 hours.

125. In my opinion, constable Scott's evidence about the defendant telling her she was tired is unreliable because the constable was not sure whether the defendant's statement about being tired was referable to her condition at the time she was being conveyed home or to her condition at an earlier time – for example prior to and at the time of the accident.

126. However, it is important not to overlook the evidence of the defendant as the prosecution rely upon her evidence as circumstantial evidence that she was so tired that it was objectively dangerous for her to be driving at the time of the accident. The prosecution rely heavily upon the defendant's apparent lack of sleep and tiring activities during the pre-accident period.

127. The prosecution seeks to rely upon a number of circumstances – along with the defendant's statement that she must have fallen asleep - which the prosecution says collectively establish that the defendant's level of tiredness was such that it was an objective fact dangerous for her to drive in that condition:

- the lack or insufficient sleep that she had been having since the birth of her son;
- the fact that she had recently travelled to Brisbane for a family wedding and had arrived back in Darwin about midnight prior to the accident;
- the fact that she had driven her husband and her son from the airport back to their home at Berry Springs after landing in Darwin; and

- the fact that within a short after returning home she then drove her husband to the airport, after having very little sleep, followed by the return trip from the airport to home during which the accident occurred.
- the defendant drove her husband to the airport out of economic necessity and/or a moral obligation despite her unfitness to drive.

128. As regards lack of or insufficient sleep on account of the birth of her child, the defendant stated that since the birth of her son she had been sleeping six or seven hours a night; and although the sleep was broken she was not affected to the extent of being tired. The defendant said that she had been sleeping well, especially over the last couple of weeks. As also noted earlier, the night before she left Brisbane to return to Darwin she slept from somewhere between 9.30pm and 10.pm until the next morning at 8.30am.

129. With respect to the return flight from Brisbane to Darwin, as previously noted, the defendant said that she got some sleep on the flight. She said that she was "fresh" when she got off the plane. When she got home she was "not really tired".

130. In relation to the amount of sleep she received between arriving home and then getting up to take her husband to the airport, she said that she would probably had two and half hours sleep. Although she felt tired when she first woke up, the defendant said that she was fine after she had fully woken up.

131. As regards the early morning trip to the airport the defendant said that she was not feeling sleepy.

132. Although the defendant said that they could not afford a taxi and she felt obligated to drive her husband to the airport she said that her husband could have caught a taxi. She added that had she felt too tired to drive her husband "would have caught a

cab", and she would not have driven with her baby in the car if she did not feel it was safe to drive.

133. With respect to the return trip from airport she said that she felt fine and was not listening to an audio book to keep her awake.

134. Relevantly, there is no evidence of any indicia of tiredness such as a warning as to the onset of sleep that may have provided some evidence of the defendant's degree of tiredness.

135. It is significant that none of the police witnesses at the scene of the accident gave evidence that the defendant appeared to be tired or was displaying the symptoms of tiredness. Although Mr Keane recalled saying to the defendant "I can see why you are exhausted" this does not appear to have been an observation as to either the appearance or condition of the defendant at the scene of the accident; but rather a response to her statement that she went to sleep.[19]

136. There is insufficient evidence to establish that the defendant fell asleep at the wheel just prior to the accident. Her evidence was that she did not know whether she had fallen asleep – which is consistent with her evidence that she did not know how the accident occurred. This is not a case where it is open to the court to infer that the defendant was affected by tiredness to the extent that it was objectively dangerous for her drive from the fact that she went to sleep at the wheel.

137. The defendant's statement that she must have fallen asleep adds very little to the strength of the case against her. It is important to put the defendant's statement in proper perspective. Proper regard needs to be paid to the defendant's "professed lack of recollection of critical events".[20] She did not know how the accident occurred, and

[19] See above at p 4.
[20] See *Waldie v Cook* (1988) No 319 of 1988 per Martin J at [29].

her statement was no more than an attempt to reconstruct how the accident came about. In my opinion, her statement does not rise beyond mere speculation or conjecture. As observed by Palmer, "speculation and conjecture run beyond the point where the evidence can take us".[21]

138. Finally, but not least, the expert evidence concerning the occurrence of the accident does not assist in explaining how the defendant's vehicle came to be on the incorrect side of the road just prior to the accident and the condition of the defendant at that time.

139. In my opinion, the state of the evidence (including the circumstantial evidence and the defendant's own evidence) does not enable the court to determine the degree (if any) to which the defendant was tired at the material time.

140. Turning to other matters that are the relevant to the question of whether the defendant was driving in a manner dangerously, there was evidence as to the period of driving and the lighting conditions.

141. Prior to the accident the defendant had driven from Berry Springs to the airport and then on the return trip drove from the airport to the point where the accident occurred. The distance from Berry Springs to the airport was estimated to be over 50 kilometres – making the return trip over 100 kilometres. The return trip was not so long as to necessarily induce tiredness.

142. The accident occurred pre-dawn on the morning of 26 March 2018. There was no street lighting, with vehicles having to rely on their headlights to illuminate the roadway.

[21] *A Palmer "Proof: How to Analyse Evidence in Preparation for Trial" second ed at [7.290].*

143. There was no evidence as to the heating or ventilation of the defendant's motor vehicle; nor any evidence of any other matter that might bear upon the question of whether the defendant was driving dangerously.

Application of the Law to the Facts

144. It is well established law that In cases where the driver of a motor vehicle has fallen asleep just prior to an accident criminal liability for dangerous driving depends upon proof that prior to falling asleep it was unsafe for the driver to drive or continue to drive due to his or her degree of tiredness: *Jiminez v The Queen* (1992) 173 CLR 572.

145. Although the present case differs from the facts in Jimenez in that there is insufficient evidence that the defendant fell asleep immediately prior to the accident or at any other time the law remains the same: the prosecution bears the burden of proving that it was unsafe for the defendant to drive or to continue to drive in her tired condition. The prosecution case rests on the proposition that tiredness – without actually falling sleep – can cause impaired cognitive performance leading to a diminution in the ability of a person to properly and safely drive a vehicle. In other words, tiredness can slow reaction time, increased variation in lane position whilst driving, lapses in attention or impaired judgment and visual function. The prosecution also relies upon the proposition that a momentary lapse of attention caused by tiredness can constitute dangerous driving within the meaning of s 174F(2) of the Code.[22]

146. In my opinion, the prosecution has failed to prove beyond reasonable doubt that the defendant was so tired that she was driving dangerously prior to and at the time of the accident.

[22] See p 3 above.

147. The proof of the defendant's degree of tiredness is critical to the prosecution case. As noted earlier the state of the evidence does not enable the court to determine to the extent (if any) to which the defendant was tired. Whilst the circumstantial evidence points to the defendant being tired, that evidence needs to be considered along with the defendant's evidence which denies that she was tired.

148. The second deficiency in the prosecution case is that the relationship between driver tiredness and motor vehicle accidents (including driving behavior) is, in my opinion, a matter for expert evidence. That is borne out by the extensive research and literature on the subject. In the present case the prosecution did not adduce any opinion evidence based on specialized knowledge relating to that matter pursuant to s 79 of the *Evidence (National Legislation) Act*. In the absence of such expert evidence the court can only speculate as to the effect of tiredness on driver behaviour based on individual experience – which falls short of the kind of evidence that is required in cases such as the present.

149. Therefore, the problem with the prosecution case is two-fold. The first is that the court cannot be satisfied as to the extent (if any) of the defendant's tiredness at the material time. The second is that the court does not have the benefit of expert evidence as to the effect of tiredness on the ability of a driver to properly and safely drive a motor vehicle. As a result of those deficiencies the prosecution has failed to establish that the defendant was so tired that she was suffering from impaired cognitive performance that made it unsafe for her to be driving at the material time.

150. The present case highlights the difficulty of proving criminal liability for unexplained accidents and the evidential difficulties in securing convictions for offences for dangerous driving causing death or serious harm. It also highlights the difficulties in securing convictions in cases based on circumstantial evidence.

151. In the present case the prosecution cannot rely upon the civil maxim "res ipso loquitor" – the "event speaks for itself"- to prove that the defendant was driving dangerously.[23] In order to prove the offence as charged the prosecution must prove that the defendant was driving in a manner dangerous to the public – which in this case is said to be constituted by driving or continuing to drive in a condition that constituted a real danger to the public. As the present case is largely a circumstantial evidence case the prosecution must prove beyond reasonable doubt that the only rational inference is that the defendant was so tired that it was, as an objective fact, dangerous for her to drive or to continue to drive in that condition. The prosecution must negative beyond reasonable doubt any hypothesis consistent with innocence – namely that she was driving in a safe manner.

152. In this case the defendant's answer to the charge laid by the prosecution is that she does not know how the accident happened. The court must therefore consider all reasonable possibilities as to how the accident happened.[24]

153. In my opinion, the prosecution has failed to prove that the only rational inference that can be drawn from the evidence is that the defendant drove whilst tired to the extent that it was unsafe for her to drive in that condition and the accident was caused by a lapse of attention or impaired judgment due to her condition.

154. There is a competing reasonable inference or hypothesis which cannot be excluded beyond reasonable doubt. That inference is that the defendant's vehicle travelled on to the incorrect side of the road and collided with the motor cyclist due to her driving without due care or attention constituted by a momentary lapse of attention or error of judgment – being in no way related to the defendant driving whilst tired.

[23] The doctrine does not even apply to criminal prosecutions for negligent driving.
[24] See *Langan v White* [2006] TASSC 83, 3.

155. I have considered whether, on the evidence, the defendant could be found to have been driving dangerously in a manner other than driving whilst tired.

156. As noted earlier, there was evidence that the defendant had a telephone conversation with her husband while she was driving. Although using a mobile phone whilst driving could amount to driving in a manner dangerous, whether or not the driving is dangerous depends on the circumstances. In the present case, the evidence is not sufficient to establish that the defendant answered the call on her mobile at the time of, or just prior to, the accident. In any event, the evidence is that she took the call, using the "hands free" facility in her vehicle. On the evidence, I am unable be satisfied that the defendant was driving in a manner dangerous through her use of her mobile phone whilst driving.

157. It was suggested to the defendant during cross –examination that just prior to the accident she may have turned around to check on her son who was in the rear of the vehicle she was driving – the inference being that she was distracted and as a result of that distraction she crossed the centre of the roadway and collided with the oncoming motor cyclist. She said that was a possibility. In my opinion, the state of the evidence is insufficient to prove beyond reasonable doubt that the defendant was driving dangerously by reason of turning around and taking her attention off the road.

158. In the final analysis, I am unable to be satisfied beyond reasonable doubt that on 26 March 2018 defendant drove dangerously causing serious harm.

THE DEFENCE OF MISTAKE OF FACT

159. Having found the defendant not guilty of the offence contrary to s 174F(2) of the Code, it is strictly not necessary to consider the defence of mistake of fact, which is

available in relation to offences of strict liability such as driving dangerously causing serious harm.[25]

160. However, I consider it appropriate to consider the application of the defence to the present offence in the event that I have erred, for whatever reason,[26] in finding that the elements of the charge as laid were not proved beyond reasonable doubt and should have found that on the whole of the evidence the defendant was so tired that it was dangerous/ unsafe for her to drive in that condition. Furthermore, the defence of mistake of fact was so comprehensively dealt with in the submissions of the prosecution and defence that it is worthy of attention.

161. The defence of mistake of fact is to be found in s43AX(1) of the Code which provides:

> (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:
>
> (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed and was under a mistaken but reasonable belief about those facts; and
>
> (b) had those facts existed, the conduct would not have constituted the offence.

162. There is an evidential burden on the defendant to raise the defence. This means that the defendant must either adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist.[27] As further pointed out by Odgers, this means that the defendant must adduce or point to evidence that suggests a reasonable possibility that the following elements of the defence exist:[28]

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[25] See ss 174F(4) and 43AX of the Code.
[26] For example, evidence ruled inadmissible was in fact admissible, or the evidence was in fact sufficient (by way of inference) to establish that the defendant fell asleep immediately prior to the accident.
[27] See s 43BT of the Code.
[28] S Odgers *Principles of Federal Criminal Law* 3rd ed at [9.2.330).

1. the defendant considered, at or before the time of the conduct constituting the physical element of the offence for which there is no fault element, whether or not the facts existed.
2. the defendant was under a mistaken belief about those facts at the time of the conduct constituting the physical element of the offence.
3. it was reasonable for the defendant to have the mistaken belief about those facts at the time of the conduct constituting the physical element of the offence.
4. had those facts existed, the conduct would not have constituted an/the offence.

163. In relation to the first element, "if a person has a belief about facts, he or she has invariably considered, to some extent, whether or not the facts exist".[29] The consideration that is required to be given by the first element of the defence "may have been minimal, but it seems there must have been some to form the belief that the facts exist".[30]

164. With respect to the third element of the offence the mistaken belief must be a reasonable belief. The requisite belief has generally been interpreted to mean a belief that is based on reasonable grounds, rather than a belief that the hypothetical ordinary or reasonable person would have formed.[31]

165. Once the evidential burden has been discharged by the defendant, it is then incumbent on the prosecution to disprove the mistake of fact defence beyond reasonable doubt.[32] According to Odgers, this requires the prosecution to prove beyond reasonable doubt at least one of the following propositions:[33]

1. the defendant did not consider, at or before the time of the conduct constituting the physical element of the offence for which there is no fault element, whether or not certain facts existed;

2. the defendant was not under a mistaken belief about those facts at the time of the conduct constituting the physical element of the offence;

[29] Odgers n 28 at [9.2.160].
[30] Odgers n 28 at [9.2.160].
[31] Odgers n 28 at [9.2.210] citing *Sweet v Parsley* [1970] AC 132 at 165 per Lord Diplock; *He Kaw Teh* (1985) 157 CLR 523 at 558-9 per Wilson and Dawson JJ; *R v Mrzljak* [2005] 1 QD R 308; *GJ Coles & Co Ltd v Goldsworthy* [1985] WAR 183; *Aubertin v Western Australia* (2006) 167 A Crim R 1; *Mei Ying Su v Australian Fisheries Management Authority (No 2)* (2008) 251 ALR 135.
[32] Odgers n 28 at [9.2.330].
[33] Odgers n 258 at [9.2.330].

3. it was not reasonable for the defendant to have that mistaken belief about those facts at the time of the conduct constituting the physical element of the offence;

4. had those facts existed, the conduct would have constituted an/the offence.

166. In my opinion, in the present case, the evidential burden was discharged by the defendant adducing evidence suggesting a reasonable possibility as to the existence of the elements of the defence of mistake of fact.

167. As noted earlier, the defendant gave the following evidence:

1. when she got off the plane from Brisbane she was "fresh, ready to drive";
2. when she arrived home from the airport after returning from Brisbane she went to bed because she knew that she had to get up early to take her husband back to the airport;
3. the defendant thought about whether she was too tired to drive her husband to the airport. She could not remember feeling sleepy when she drove her husband to the airport. She said that she "wouldn't have driven the car with the baby if [she] thought [she] wasn't right to drive". She added that she would not have driven with the baby on board if she did not think it was safe for her to drive. She felt fine to get her husband to the airport;
4. after dropping her husband off at the airport, she thought that she was "fine" on the return trip from airport. She said "I felt fine. But I had the baby in the car";
5. just prior to the accident she thought she was "fine to drive" – though she did add that she was not really sure how to describe how she felt.

168. In my opinion, the evidence given by the defendant raised as a real possibility that she had considered at the material time her fitness to drive a motor vehicle – that is to say whether it was safe for her to drive in her condition. Her evidence also raised as a real possibility that she was under the belief (albeit mistaken) that she was not affected by tiredness to the extent that it was dangerous for her to be driving. The fact that the defendant had such a belief is, as noted earlier, further evidence that she had given consideration as to her fitness to drive.

169. Furthermore, her evidence raised as a real possibility that it was reasonable for her to have that belief. That her belief was objectively reasonable – in the sense of being

"rational, based on reason or capable of sustaining belief"[34] – is supported by the following:

1. the defendant had her baby in the car at the time and she said that she would not have driven unless she thought it was safe to do so;

2. there was no evidence from any source (including the defendant) suggesting that during the course of driving the defendant experienced or was aware of premonitory or precursory symptoms of tiredness such as yawning, drowsiness or napping that would tend to undermine the objective reasonableness of her belief that it was safe to drive; and

3. except for the rather cryptic evidence of Mr Keane there was no evidence from any witness at the scene of the accident (in particular the police witnesses) that the defendant appeared tired or was displaying the symptoms of tiredness.

170. The defendant having discharged the evidential burden, the prosecution then bears the burden of disproving the defence of mistake of fact beyond reasonable doubt.

171. In my opinion, the prosecution has failed to discharge that burden. It has failed to prove beyond reasonable doubt that:

1. the defendant did not consider whether it was safe for her drive in all the circumstances (that is, whether or not she was affected by tiredness such as to render it dangerous to drive in that condition); or

2. the defendant was not under a mistaken belief as to her fitness to drive; or

3. it was not reasonable for the defendant to have that mistaken belief.

172. There is a reasonable possibility that the defendant is telling the truth and that she had a mistaken belief that it was safe to drive in all the circumstances - a belief that was based on reasonable grounds.

[34] See *Mei Ying Su v Australian Fisheries Management Authority (No 2)* 2008) 251 ALR 135.

173. Therefore, even if the elements of the offence had been established, the defendant would have had a defence of mistake of fact and on that basis would have been found not guilty.

THE ELEMENTS OF THE OFFENCE OF DRIVE WITHOUT DUE CARE

174. The essence of the offence of drive without due care is a failure on the part of a driver to give proper care and attention to the activity of driving a motor vehicle.[35]

175. The standard of driving to determine whether a person has driven without due care is objective.[36] The standard of care is that "which an ordinary prudent person would deem necessary in the circumstances presented to him or her, in order to avoid injuring or causing damage to the person or property of others while using the road".[37]

176. In accordance with the observations in *Franjic v Visser* (1990) 12 MVR 393 at 396, in order for a person to be found guilty of drive without due care, it must be established beyond reasonable doubt that the defendant "failed to exercise due care and attention when driving, by way of objective judgment based on all the circumstances established by the evidence".[38]

177. Although it is not possible to determine how the defendant's motor vehicle came to be on the incorrect side of the road (resulting in a collision with the motor cyclist), I am satisfied beyond reasonable doubt that at the time of the accident the defendant was driving without due care, and failed to meet the standard of care which an ordinary prudent driver would deem necessary in order to avoid injuring or causing damage to the person or property of others while using the road.

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[35] D Brown "Traffic Offences and Accidents" 4th edition at [6.2] (iii).
[36] Brown n 35 at [6.2] (v).
[37] Brown n 35 at [6.2](iv)) citing *Wintulich v Lenthall* [1932] SASR 60; *Black v Goldman* [1919] VLR 689.
[38] Brown n 35 at [6.2] (v).

DECISION

178. I find the defendant not guilty of the offence contrary to s 174F(2) of the Code and the charge is dismissed.

179. However, I find the defendant guilty of the offence contrary to Regulation 18 (1) of the *Traffic Act Regulations*.

Dated 9 May 2018

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Dr John Lowndes
Chief Judge of the Local Court of the Northern Territory