SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wilson* [2008] QCA 349
PARTIES:	**R** **v** **WILSON, Andrew Henry** (appellant)
FILE NO/S:	CA No 302 of 2007 CA No 136 of 2008 DC No 430 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	5 November 2008
DELIVERED AT:	Brisbane
HEARING DATES:	28 May 2008; 18 August 2008
JUDGES:	McMurdo P, Fraser JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction allowed** **2. Verdict of guilty set aside** **3. A re-trial is ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – appellant pleaded not guilty to dangerous operation of a motor vehicle causing death and grievous bodily harm – judge expressed his intention not to direct the jury that fault was an element of the offence – counsel for prosecution and defence agreed with that course – whether fault is an element of the offence of dangerous operation of a motor vehicle – whether the judge misdirected the jury as to the elements of the offence CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – WHERE GROUNDS FOR INTERFERENCE WITH VERDICT – PARTICULAR CASES – WHERE APPEAL ALLOWED – judge directed

jury on the defence of honest and reasonable mistake of fact – relevant mistaken belief was appellant's belief that there were no vehicles on the opposite side of the road and so it was safe to overtake – judge directed jury that to convict they had to be satisfied beyond reasonable doubt that a theoretical ordinary, reasonable person in the appellant's position would, could or should not have made that mistake – whether the appropriate question for the jury was whether the appellant's honest belief was based on reasonable grounds – whether the judge misdirected the jury on the defence of honest and reasonable mistake of fact – whether, despite the misdirection, no miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – appellant sentenced to four years imprisonment with parole eligibility after 18 months and was disqualified from holding a driver's licence for four years – appellant showed remorse for injury to at least one victim – offence involved serious error of judgment over a short period of time – appellant had concerning traffic history but had no criminal convictions and suffered serious injuries in the accident – consideration of comparable cases

Criminal Code 1899 (Qld), s 24, s 271, s 328A, s 668E(1A)

CTM v The Queen (2008) 247 ALR 1; [2008] HCA 25, cited
Jiminez v The Queen (1992) 173 CLR 572; [1992] HCA 14, applied
R v Gosney [1971] 2 QB 674, cited
R v Gruenert; *ex parte A-G (Qld)* [2005] QCA 154, cited
R v Hart [2008] QCA 199, cited
R v Hinz [1972] Qd R 272, cited
R v Julian (1998) 100 A Crim R 430, considered
R v Manners; ex parte A-G (Qld) (2002) 132 A Crim R 363; [2002] QCA 301, cited
R v Mrzljak [2005] 1 Qd R 308; [2004] QCA 420, considered
R v Newman [1997] QCA 143, cited
R v Plath [2003] QCA 567, cited
R v Price (2005) 43 MVR 573; [2005] QCA 52,cited
R v Warner [1980] Qd R 207,cited
R v Webb [1986] 2 Qd R 446, doubted
Smith v R [1976] WAR 97, cited
Thomas v The King (1937) 59 CLR 279; [1937] HCA 83, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: A W Collins for the appellant
M J Copley for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

McMURDO P:

[1] Andrew Henry Wilson was found guilty on 18 October 2007 after a four day trial of dangerous operation of a motor vehicle causing death and grievous bodily harm on Sunday 28 August 2004. He was sentenced to four years imprisonment with parole eligibility after 18 months and was disqualified from holding a driver's licence for four years. On 18 August 2008 he was granted an extension of time to appeal against his conviction limited to the following grounds. The first was that the learned primary judge erred in directing the jury on s 24 *Criminal Code* 1899. The second was that the judge failed to direct the jury as to the fault element of the offence of dangerous operation of a motor vehicle. He has also applied for leave to appeal against his sentence, contending that it was manifestly excessive in that the judge gave insufficient weight to the serious nature of the injuries that he suffered as a result of his commission of the offence.

The evidence at trial

[2] The prosecution case was as follows. Mr Wilson drove his Harley Davidson motorcycle on the wrong side of the Pacific Highway south of Cardwell in North Queensland by overtaking a Pulsar sedan when it was unsafe to do so because a motorcyclist, John Charles Wood, was travelling in the opposite direction. The dangerous operation of his motorcycle was his manner of overtaking the Pulsar up to the moment of colliding with Mr Wood's motorcycle. As a result, he caused the death of Mr Wood, and grievous bodily harm to Mr Wilson's pillion passenger and then girlfriend, Tamara Renee Neilsen. Mr Wilson also suffered grave injuries in the accident. He was one of about 120 motorcyclists travelling in convoy as part of a fundraising ride from Cairns to Forrest Beach, east of Ingham. The accident occurred about 5 pm just south of the Sunday Creek Bridge. Another participant in the motorcycle ride, Ms Penelope Anne Vickers, described the day of and up until the accident as "[a]bsolutely beautiful. A perfect day for riding".

[3] Mr Daniel John Parry, the driver of the Pulsar; his passenger, Ms Charmaine Karen Paul; and Mr Heath Kimberley Drendel, a motorcyclist immediately following Mr Wilson in the southbound lane, each saw Mr Wood's motorcycle approaching Mr Wilson's motorcycle in the northbound lane prior to the collision. Mr Wilson's motorcycle had its headlight illuminated but Mr Wood's motorcycle headlight was not illuminated. Mr Parry thought that Mr Wilson was overtaking at a speed of between 130 to 150 kms per hour. He said that after Mr Wilson had overtaken him, Mr Wilson remained on the wrong side of the road as Mr Wood's motorcycle travelled closer to Mr Wilson's motorcycle. The motorcycles collided even though there was sufficient room for Mr Wilson's motorcycle to return safely onto the correct side of the road in front of Mr Parry's Pulsar.

[4] Mr Drendel estimated Mr Wilson's speed at between 120 and 130 kms per hour. The accident occurred in the afternoon when there were shadows on the road. He thought Mr Wilson and Mr Wood did not see each other in time to avoid the collision. The incident happened so quickly that Mr Drendel was unable to avoid

colliding with one of the motorcycles: he was unsure whether it was Mr Wilson's or Mr Wood's; he came off his motorcycle over the handlebars.

[5] At the time of the accident, Mr Rodney John Hawten was also following Mr Wilson behind two other motorcyclists, Mr James Davie and Ms Vickers. He saw the accident as "two eruptions of smoke" about 150 metres in front of him. He described the accident scene to police as "a long straight section of road, with the road surface in excellent condition and there was no apparent oncoming traffic".

[6] Photographs tendered of the accident scene confirmed that the road was long, straight and in sound condition with apparently good visibility both ways.

[7] Mr Wilson gave evidence that he was travelling south behind the Pulsar for some time. Upon reaching a straight stretch of highway he looked ahead to see if it was clear to overtake the Pulsar. He could not see any traffic coming in the opposite direction and commenced his overtaking manoeuvre. He was travelling at about 110 kms per hour. The indicators on his motorcycle had been removed and he used hand signals to indicate the lane change. He crossed the centre line and was travelling about a half a metre from it on the wrong side of the road as he accelerated past the Pulsar. The Pulsar crossed the centre line and came very close to touching his left boot. For that reason, Mr Wilson moved further to his right, very close to the centre of the northbound lane. He checked his rear vision mirror to make sure he was not cutting off another vehicle from behind. When he looked forwards he was staring directly at Mr Wood's motorcycle coming straight towards him and had no time to take evasive action. He said "I did not even have time to think. It was right there." In cross-examination he agreed that it was "a perfect day for riding".

The judge's omission to direct the jury that fault was an element of an offence against s 328A *Criminal Code*

[8] Before Mr Wilson was asked whether he intended to give or call evidence, the judge, in the absence of the jury, told trial counsel that he considered that the prosecutor had wrongly stated in opening his case that the prosecution had to prove fault as an element of the offence of dangerous operation of a motor vehicle under s 328A *Criminal Code*. The judge considered that the prosecutor's statement was inconsistent with the High Court's decision in *Jiminez v The Queen*.[1] Neither counsel sought to dissuade his Honour from that view. In the summing-up, the judge did not direct the jury that fault was an element of the offence. After the jury retired to consider its verdict, neither counsel applied for a redirection on this aspect of the summing-up. His Honour independently raised the matter again and gave detailed reasons for not directing the jury that fault was an element of the offence, emphasising that he had instead directed them on mistake of fact under s 24 *Criminal Code*. Both counsel agreed with his Honour's approach and did not seek any redirection.

[9] Mr A W Collins, who appeared on behalf of Mr Wilson in this appeal but was not counsel at trial, now contends that the judge was wrong in not directing the jury that fault was an element of the charge as well as directing the jury as to mistake of fact under s 24.

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1 (1992) 173 CLR 572; [1992] HCA 14.

[10] Trial judges in Queensland have for many years directed juries in trials for offences against s 328A *Criminal Code* that fault is an element of that offence. By way of example, in the 1986 decision of *R v Webb*,[2] the Queensland Court of Criminal Appeal stated that there were two steps involved in determining whether a driver should be convicted of dangerous driving. The first was that the driving must be considered objectively to have been dangerous. The second was that there must have been some fault on the part of the driver which caused that danger to the public.[3] The Court cited as authority for the proposition that fault was an element of the offence the cases of *R v Gosney*,[4] *R v Warner*,[5] *R v Hinz*,[6] and *Smith v R.*[7]

[11] The terms of s 328A have changed since *Webb*. It now relevantly provides:

> "A person who operates … a vehicle dangerously in any place commits a misdemeanour."

These changes have no relevance for the purpose of this discussion.

[12] *Jiminez* was decided about six years after *Webb*. It concerned an offence of culpable driving under s 52A *Crimes Act* 1900 (NSW). That provision is not in identical terms to s 328A but, again, for present purposes nothing turns on these distinctions. Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ rejected the approach taken by the English Court of Appeal in *Gosney*[8] (upon which *Webb* relied) that fault on the part of the driver was an element of the offence of driving in a dangerous manner. Their Honours noted that a jury considering such an offence should always be told that the driving must amount to more than a lack of due care; it must be a real danger to the public.[9] Their Honours added:

> "To our eyes what the appellant was attempting to do in *Gosney* was to establish an honest and reasonable mistake, a defence which, in this country, makes it unnecessary to introduce fault as an element of that offence. Driving in a manner dangerous to the public is at once both the offence and, if it is relevant, the fault, but it will be a defence to establish an honest and reasonable mistake as to facts which if true would exculpate the driver. Perhaps the most obvious example is where a driver is unaware of the defective condition of his vehicle and believes it upon reasonable grounds to be in good working order. And the same issue is raised when, in a case like the present where the dangerous manner of the driving is said to consist in the likelihood of going to sleep, a driver claims that he had no warning of the onset of sleep.
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> It follows from what has been said above that it was necessary for the prosecution in the present case to establish that the applicant was affected by tiredness to an extent that, in the circumstances, his driving was objectively dangerous. It was open to the jury to draw an inference to that effect from the finding that the applicant went to

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2 [1986] 2 Qd R 446.
3 [1986] 2 Qd R 446 at 448.
4 [1971] 2 QB 674.
5 [1980] Qd R 207.
6 [1972] Qd R 272.
7 [1976] WAR 97.
8 [1971] 2 QB 674.
9 (1992) 173 CLR 572; [1992] HCA 14 at 579.

> sleep at the wheel. It was, however, also open to the jury to find that the applicant honestly and reasonably believed that, in all the circumstances, it was safe to drive."[10]

[13] Although *Jiminez* concerned the common law defence of mistake of fact, s 24 *Criminal Code* is considered to accurately reflect the common law: *Thomas v The King*,[11] recently affirmed in *CTM v The Queen*.[12] In so far as *Jiminez* and *Webb* may be inconsistent, this Court is plainly bound by the High Court's decision in *Jiminez*.

[14] Mr Collins submitted that the more recent 2003 decision of this Court in *R v Plath*[13] was inconsistent with *Jiminez*. I do not accept that submission. *Plath* is authority for nothing more than that, in the circumstances pertaining there, s 24 had no application. It did not purport to decide that s 24 had no application to offences against s 328A generally or that fault was an element of the offence of dangerous driving.

[15] It follows from *Jiminez* that in a trial for an offence against s 328A the jury need not be told that fault is an element of the charge. That is not to say that in establishing the offence any consideration of the offender's mental state must necessarily be disregarded. Section 24 and other provisions of ch 5 *Criminal Code* like s 23, s 25 and s 31 are sometimes raised in such cases. Whether such provisions are raised will always depend on the relevant evidence at trial. Section 24 was raised in this case and his Honour directed on it. His Honour was right in not directing the jury that fault was an element of the offence of dangerous operation of a motor vehicle under s 328A *Criminal Code*. This ground of appeal fails.

The directions on s 24 *Criminal Code*

[16] Section 24(1) *Criminal Code* relevantly provides:

> "**24 Mistake of fact**
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> (1) A person who does … an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act … to any greater extent than if the real state of things had been such as the person believed to exist".

[17] The judge gave the following directions on s 24 *Criminal Code*:[14]

> "Members of the jury, our law provides that a person cannot be found guilty of an offence if the actions which constitute the offence were done because he made an honest and reasonable mistake. What Mr Wilson has essentially told you, members of the jury, is that when he pulled out to pass to overtake the Nissan Pulsar he believed that the road ahead was clear in the northbound lane, that there was nothing within any sort of proximity which would pose any danger. You might take the view that he was wrong, because you might take the view that it's obvious that Mr Wood's motorcycle was within very

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10 (1992) 173 CLR 572; [1992] HCA 14 at 583.
11 (1937) 59 CLR 279; [1937] HCA 83 at 305 – 306.
12 (2008) 236 CLR 440; [2008] HCA 25 at 445 [3].
13 [2003] QCA 567, referring to Williams JA's brief observations at [7].
14 Record Book, vol 1, pp 222 – 226.

close proximity and because of that close proximity that constituted a danger. So under those circumstances, Mr Wilson made a mistake. However, to excuse a person from criminal responsibility for dangerous operation of a vehicle, the mistake must be both honest and reasonable.

You might have little difficulty coming to the conclusion that Mr Wilson's mistake was honest. There is no suggestion that he wanted to commit suicide or kill or injure anyone particularly, including Ms Neilsen. So you might have no difficulty coming to the conclusion that his mistake was honest.

The real question you have to consider, members of the jury, then is was it reasonable? He doesn't have to prove it's reasonable. In order to reject the defence of honest and reasonable mistake, you have to be satisfied beyond reasonable doubt that his mistake was not reasonable. And whether his mistake was reasonable, once again, is to be determined by the objective standard of ordinary, reasonable people. An ordinary, reasonable person in the position that Mr Wilson was in. In order to reject the mistake of defence you must be satisfied beyond reasonable doubt that an ordinary, reasonable person would not have made that mistake.

Once again, you look at the whole of the circumstances. It was a long, straight stretch of road ahead of Mr Wilson. If there was nothing coming then it wouldn't have been particularly dangerous to pass. So you picture yourselves the theoretical, ordinary, reasonable person pulling up to overtake at whatever speed you think he did and consider whether an ordinary, reasonable person could have made that mistake. It really comes down to this, members of the jury, would an ordinary, reasonable person, keeping a reasonably good lookout, that you would expect an ordinary, reasonable person to do when starting to overtake a vehicle in front at that speed, would such an ordinary, reasonable person have looked closely and carefully enough to observe Mr Wood's oncoming motorcycle.

So, members of the jury, you consider that in the whole of the circumstances. You may take into account of course that Mr Parry observed the motorcycle - Mr Wood's motorcycle from some considerable distance away; Ms Paul who was in the Nissan also observed the motorcycle coming from - obviously not as far away as Mr Parry did, but saw it coming. Bear in mind of course they would have been a little in front of Mr Wilson when he commenced his overtaking manoeuvre. You also have the evidence of Mr Drendel who was behind Mr Wilson. He observed the oncoming motorcycle. Now, the fact that they saw the motorcycle at various times - at different times - is not definitive of the issue, but it is evidence which gives you, or may give you, a clue as to the ability that an ordinary, reasonable motorist, pulling out to pass would have had, had that ordinary, reasonable person taken reasonable care to ascertain the presence or otherwise of oncoming vehicles.

> You have Mr Wilson's evidence that the Pulsar moved over to the right and even came across the centreline to some degree. It's a matter for you whether you believe him or not. Both Ms Paul and Mr Parry rejected such a proposition. It's for you to decide who or what you believe.
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> However, if the Nissan Pulsar did pull over to the right a bit then it would not be unreasonable for Mr Wilson to be at least distracted by that to momentarily glance at it before moving over himself, and he also told you that he looked in the rear-view mirror and saw a bike behind him. So you take that into account as well.
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> On the other hand, you can take into account that those two instances were a small part of the total movement between when he started to overtake and when the collision occurred. So it's a matter for you, you assess it.
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> Are you satisfied beyond reasonable doubt that any reasonable person in Mr Wilson's position would have or should have observed the oncoming motorcycle and thereby gave off the overtaking manoeuvre and simply remained there?
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> Once again, it's a matter for you, members of the jury. You call on your own objective experience and your own vast collective experience of driving on roads, being overtaken and overtaking yourselves. What do you expect of the ordinary reasonable person, or what would you expect of the ordinary reasonable person in that particular situation in which Mr Wilson was?
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> So if you are satisfied beyond reasonable doubt that his mistake was not reasonable, then you go on to consider other matters. If you are not satisfied beyond reasonable doubt that his mistake was unreasonable, you return a verdict of not guilty and you don't need to consider the further aspects."[15]

[18] Neither the prosecutor nor defence counsel applied for any redirection on this aspect of the summing-up.

[19] Mr Collins now submits that the primary judge erred in directing the jury to consider mistake of fact by reference to whether the jury were satisfied that any reasonable person in Mr Wilson's position would or should have observed Mr Wood's oncoming motorcycle. Mr M J Copley, who appears for the respondent in this appeal, with his customary balance, concedes that the judge's directions were wrong: the correct question was whether the prosecution proved beyond reasonable doubt that there were no reasonable grounds for Mr Wilson's honest but mistaken belief that it was safe to overtake the Pulsar.

[20] Mr Copley's concession is rightly made for the following reasons. It is clear from its terms that s 24 requires a consideration of whether there were reasonable grounds

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15 Errors as in the original transcript.

for the accused person's belief as to a state of things, not, in the primary judge's words, whether a theoretical, ordinary, reasonable person would or should have made the mistake. The belief must be both subjectively honest and objectively reasonable but it is the accused person's belief which is of central relevance. An accused person may hold an honest and reasonable but mistaken belief as to a state of things even though another ordinary, reasonable person may not have made that mistake. This distinction, which is admittedly subtle, was noted by this Court in *R v Julian*[16] when discussing self defence under s 271 *Criminal Code* and more recently in *R v Mrzljak*[17] when discussing s 24. The primary judge instructed the jury to focus on whether the mistake was reasonable in that the jury "must be satisfied beyond reasonable doubt that an ordinary, reasonable person would not have made that mistake". The judge told the jury to "picture yourselves the theoretical, ordinary, reasonable person pulling up to overtake at whatever speed you think he did and consider whether an ordinary, reasonable person could have made that mistake". The judge instructed the jury that the case really came down to "would an ordinary, reasonable person have looked closely and carefully enough to observe Mr Wood's oncoming motorcycle". The judge asked the jury whether they were "satisfied beyond reasonable doubt that any reasonable person in Mr Wilson's position would have or should have observed the oncoming motorcycle". Nowhere in the judge's directions on s 24 did his Honour emphasise to the jury the need to focus on whether they were satisfied beyond reasonable doubt that Mr Wilson's *belief*, that there were no oncoming motor vehicles when he overtook the Pulsar, was not reasonable.

Section 668E(1A) *Criminal Code*

[21] Mr Copley submits that, despite the judge's flawed directions on s 24, no substantial miscarriage of justice has actually occurred so that this Court should dismiss the appeal under s 668E(1A) *Criminal Code*. In making that submission, Mr Copley relies on *Weiss v The Queen.*[18] He contends that the erroneous direction would have had no significance in the jury's return of the guilty verdict: if they were satisfied that a reasonable person would not have made the mistake that it was safe to overtake, then they should have also been satisfied that it was not reasonable for Mr Wilson to believe that it was safe to overtake. Mr Copley further submits that this Court can be satisfied beyond reasonable doubt that Mr Wilson operated the vehicle dangerously, causing death and grievous bodily harm.

[22] It was uncontroversial, both at trial and in this appeal, that Mr Wilson operated his motor vehicle dangerously in overtaking the Pulsar on the wrong side of the Pacific Highway when Mr Wood's motorcycle was travelling in the northbound lane. Nor was it controversial that this caused Mr Wood's death and grievous bodily harm to Ms Neilsen.

[23] The distinction between the directions given by the primary judge and those which should have been given consistently with *Julian* and *Mrzljak* may appear at first to be hair-splitting semantics but on careful reflection the differences are potentially significant, at least in this case. The consequences of Mr Wilson's mistake were horrific, namely the death of Mr Wood and the serious injuries to Ms Neilsen and

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16 (1998) 100 A Crim R 430 at 434 (Pincus JA), 438 – 440 (Thomas J).

17 [2005] 1 Qd R 308; [2004] QCA 420 at 315 [21] (McMurdo P), 321 [53] (Williams JA) and 326 – 327 [79] – [81] (Holmes J).

18 (2005) 224 CLR 300; [2005] HCA 81 at 314 [35], 316 [41] and 317 [43].

Mr Wilson himself, as well as causing Mr Drendel to come off his motorcycle. A jury apprehending those consequences could be expected to conclude, putting themselves in Mr Wilson's position, that no theoretical, ordinary, reasonable person would, could or should have made such a grave mistake. Had the jury been directed to focus on Mr Wilson's honest but mistaken belief as to there being no oncoming traffic when he overtook the Pulsar, they may have been more willing to conclude that the prosecution had not proved beyond reasonable doubt that Mr Wilson's honest but mistaken belief was unreasonable in the circumstances.

[24] The relevant facts pertaining to the offence as particularised by the prosecution are outlined at [2] – [7] of these reasons. After reviewing the evidence, I consider that this was a case where a jury, equally reasonably, could have found Mr Wilson guilty or not guilty of dangerous operation of a motor vehicle causing death and grievous bodily harm. The central issue, whether the prosecution established beyond reasonable doubt that Mr Wilson's honest but mistaken belief that it was safe for him to overtake the Pulsar was not a reasonable belief, was one which, equally reasonably, could have been determined either way by a jury. Had the correct direction been given on s 24, the scales may have tipped in Mr Wilson's favour. I am not satisfied that, despite the misdirection on s 24, no substantial miscarriage of justice has actually occurred in the jury's return of the guilty verdict.

[25] It follows that in my view the appeal against conviction should be allowed, the verdict of guilty set aside and a re-trial ordered.

The application for leave to appeal against sentence

[26] My conclusion that the appeal against conviction should be allowed means that it is unnecessary to determine the application for leave to appeal against sentence. It may, however, be helpful to make the following observations. The maximum penalty was 10 years imprisonment.[19] The learned sentencing judge imposed a sentence of four years imprisonment with parole eligibility after 18 months, that is, on 19 April 2009. In fixing that sentence, the judge seems to have wrongly considered that, because Mr Wilson went to trial, he did not have remorse for the serious consequences of his offending. Certainly in respect of Ms Neilsen, the transcript patently demonstrates that Mr Wilson expressed his remorse to her at an early stage and again through his barrister during her cross-examination. The fact that accused persons exercise their right to go to trial does not in every case equate to a lack of remorse. More significantly, the comparable decisions of this Court to which we have been referred, do not support a sentence higher than about three years imprisonment for an offence of this kind, involving a serious error of judgment over a short period by someone with a concerning traffic history but without prior convictions and without the exacerbating factor of intoxication, even after a trial: see *R v Gruenert, ex parte Attorney-General (Qld)*;[20] *R v Manners, ex parte Attorney-General (Qld)*;[21] *R v Price*;[22] *R v Hart*[23] and *R v Newman*.[24] Mr Wilson also sustained permanent injuries in this tragic accident including the amputation of most of his right leg, serious leg and other fractures and a right

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19 *Criminal Code* 1899 (Qld), s 328A(4)(a).
20 [2005] QCA 154.
21 (2002) 132 A Crim R 363; [2002] QCA 301.
22 (2005) 43 MVR 573; [2005] QCA 52.
23 (2008) 50 MVR 424; [2008] QCA 199.
24 [1997] QCA 143.

pneumothorax. As the primary judge recognised, it was appropriate to make some allowance for this by setting an earlier parole eligibility date than otherwise, because those injuries would mean that his period in custody could be expected to be more onerous than for an able-bodied offender. Mr Wilson has now spent over one year in custody. It is a matter for the prosecuting authorities to determine whether, in all these circumstances, the interests of justice are best served by conducting a re-trial.

Orders:

1. Appeal against conviction allowed.
2. Verdict of guilty set aside.
3. A re-trial is ordered.

FRASER JA:

[27] I have had the advantage of reading the reasons of McMurdo P and I gratefully adopt her Honour's summary of the evidence at trial. I can therefore turn directly to the issues agitated in the appeal.

The judge's omission to direct the jury that fault was an element of an offence against s 328A *Criminal Code*

[28] I agree with McMurdo P's conclusion and reasons for the conclusion that the trial judge did not err by failing to direct the jury that fault was an element of the charge of an offence against s 328A of the *Criminal Code*.

The directions on s 24 *Criminal Code*

[29] Section 24 of the *Criminal Code* provides:

> "24 Mistake of fact
>
> (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
>
> (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

[30] In order to consider the application of s 24 in this case it is necessary also to bear in mind the relevant provisions of s 328A of the *Criminal Code*:

> "328A Dangerous operation of a vehicle
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> …
>
> (4) A person who operates, or in any way interferes with the operation of, a vehicle dangerously in any place and causes the death of or grievous bodily harm to another person commits a crime …."

[31] The present point falls to be considered on the premises that, but for any application of s 24, the Crown proved the elements of s 328A(4) and that the appellant discharged the evidential onus of raising the ground of exculpation in s 24.

[32] So far as appears from the summing up, the Crown did not ask the jury to conclude that the appellant did not honestly believe that there was no oncoming vehicle from the time when he started to overtake the car in front of him (by riding his motorcycle from his (southbound) lane across to the northbound lane) up to a point in time when it was too late to avoid the collision with the oncoming motorcycle in the northbound lane. On the evidence any such belief was obviously mistaken. (When the northbound motorcycle first appeared within the appellant's field of vision is a different question: I will return to this topic when I discuss the possible application of the proviso in s 668E(1A) of the *Criminal Code*.) The issue under s 24 therefore was whether the Crown had proved beyond reasonable doubt that the appellant's belief that the road was clear whilst he was overtaking and before it was too late to avoid a collision was not a reasonable belief.

[33] McMurdo P's reasons set out the following directions give by the trial judge:

> "Members of the jury, our law provides that a person cannot be found guilty of an offence if the actions which constitute the offence were done because he made an honest and reasonable mistake. What Mr Wilson has essentially told you, members of the jury, is that when he pulled out to pass to overtake the Nissan Pulsar he believed that the road ahead was clear in the northbound lane, that there was nothing within any sort of proximity which would pose any danger. You might take the view that he was wrong, because you might take the view that it's obvious that Mr Wood's motorcycle was within very close proximity and because of that close proximity that constituted a danger. So under those circumstances, Mr Wilson made a mistake. However, to excuse a person from criminal responsibility for dangerous operation of a vehicle, the mistake must be both honest and reasonable.
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> You might have little difficulty coming to the conclusion that Mr Wilson's mistake was honest. There is no suggestion that he wanted to commit suicide or kill or injure anyone particularly, including Ms Neilsen. So you might have no difficulty coming to the conclusion that his mistake was honest.
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> The real question you have to consider, members of the jury, then is was it reasonable? He doesn't have to prove it's reasonable. In order to reject the defence of honest and reasonable mistake, you have to be satisfied beyond reasonable doubt that his mistake was not reasonable. And whether his mistake was reasonable, once again, is to be determined by the objective standard of ordinary, reasonable people. An ordinary, reasonable person in the position that Mr Wilson was in. In order to reject the mistake of defence you must be satisfied beyond reasonable doubt that an ordinary, reasonable person would not have made that mistake.
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> Once again, you look at the whole of the circumstances. It was a long, straight stretch of road ahead of Mr Wilson. If there was nothing coming then it wouldn't have been particularly dangerous to pass. So you picture yourselves the theoretical, ordinary, reasonable person pulling up to overtake at whatever speed you think he did and

consider whether an ordinary, reasonable person could have made that mistake. It really comes down to this, members of the jury, would an ordinary, reasonable person, keeping a reasonably good lookout, that you would expect an ordinary, reasonable person to do when starting to overtake a vehicle in front at that speed, would such an ordinary, reasonable person have looked closely and carefully enough to observe Mr Wood's oncoming motorcycle.

So, members of the jury, you consider that in the whole of the circumstances. You may take into account of course that Mr Parry observed the motorcycle - Mr Wood's motorcycle from some considerable distance away; Ms Paul who was in the Nissan also observed the motorcycle coming from - obviously not as far away as Mr Parry did, but saw it coming. Bear in mind of course they would have been a little in front of Mr Wilson when he commenced his overtaking manoeuvre. You also have the evidence of Mr Drendel who was behind Mr Wilson. He observed the oncoming motorcycle. Now, the fact that they saw the motorcycle at various times - at different times - is not definitive of the issue, but it is evidence which gives you, or may give you, a clue as to the ability that an ordinary, reasonable motorist, pulling out to pass would have had, had that ordinary, reasonable person taken reasonable care to ascertain the presence or otherwise of oncoming vehicles.

You have Mr Wilson's evidence that the Pulsar moved over to the right and even came across the centreline to some degree. It's a matter for you whether you believe him or not. Both Ms Paul and Mr Parry rejected such a proposition. It's for you to decide who or what you believe.

However, if the Nissan Pulsar did pull over to the right a bit then it would not be unreasonable for Mr Wilson to be at least distracted by that to momentarily glance at it before moving over himself, and he also told you that he looked in the rearview mirror and saw a bike behind him. So you take that into account as well.

On the other hand, you can take into account that those two instances were a small part of the total movement between when he started to overtake and when the collision occurred. So it's a matter for you, you assess it.

Are you satisfied beyond reasonable doubt that any reasonable person in Mr Wilson's position would have or should have observed the oncoming motorcycle and thereby gave off the overtaking manoeuvre and simply remained there?

Once again, it's a matter for you, members of the jury. You call on your own objective experience and your own vast collective experience of driving on roads, being overtaken and overtaking yourselves. What do you expect of the ordinary reasonable person, or what would you expect of the ordinary reasonable person in that particular situation in which Mr Wilson was?

> So if you are satisfied beyond reasonable doubt that his mistake was not reasonable, then you go on to consider other matters. If you are not satisfied beyond reasonable doubt that his mistake was unreasonable, you return a verdict of not guilty and you don't need to consider the further aspects."

[34] In addition, the trial judge subsequently gave the jury the following directions in the course of summarising the issues:

> "The first thing you need to find, on your path to a verdict, is, you must be satisfied beyond reasonable doubt that Mr Wilson operated his motorcycle dangerously. If you are not satisfied beyond reasonable doubt that he operated his motorcycle dangerously, your verdict will be not guilty. If you are satisfied beyond reasonable doubt that he operated his motorcycle dangerously, you go on to the next step. The next step is this: Are you satisfied beyond reasonable doubt that his mistaken belief that the road was clear was unreasonable, was a belief that no ordinary, reasonable person in his position could have had?
>
> If you are satisfied beyond reasonable doubt that his mistaken belief was unreasonable, you move onto the next step. If you are not satisfied beyond reasonable doubt that his mistaken belief was unreasonable, your verdict will be not guilty."

[35] The trial judge's directions may be put into three categories.

[36] The first category comprises directions that a person could not be found guilty of an offence if the person's actions constituting the offence were done because he made an "honest and reasonable mistake", that "the mistake must be both honest and reasonable", that the real question the jury had to consider about the appellant's apparently honest mistake was "was it reasonable?", and that to find the appellant guilty the jury had to be satisfied beyond reasonable doubt "that his mistake was not reasonable". Each of those directions appropriately focussed upon the appellant's belief and directed the jury to consider whether the Crown had proved to the requisite standard that the appellant's mistake was not reasonable.

[37] It is the second and third groups of directions that are in issue.

[38] In the second group of directions the trial judge directed the jury that whether the appellant's mistake was reasonable was to be determined by reference to the standards of an ordinary, reasonable person in the appellant's position. That required the jury to apply the wrong test. In my opinion the vice in this direction was that it denied the possibility that different people in the appellant's position might have held different beliefs, each of which was nevertheless a reasonable belief.

[39] The Crown was required to prove beyond reasonable doubt that the appellant's belief was not a reasonable belief. It did not discharge that onus by proving beyond reasonable doubt only that "a" reasonable person would not have held that belief. The principles of criminal responsibility embodied in s 24 do not operate by reference to what might be expected of a reasonable person but by reference to the

reasonableness of an accused person's belief. In that way, s 24 allows for the possibility that reasonable people in an accused person's situation might have held a variety of beliefs, perhaps even diametrically opposed beliefs, about the relevant state of affairs.

[40] In that respect I would apply in the context of s 24 the following passage in Dowsett J's reasons in *R v Julian*[25] (in which his Honour was construing the expression "believes, on reasonable grounds" in s 271(2) of the *Code*):

> "The word "reasonable" is widely used in the law. Great issues are often resolved by reference to it. It is not, however, a term of art. It is an ordinary word having the meaning attributed to it by ordinary people. The Shorter Oxford English Dictionary defines the word relevantly as:-
>
> > "Having sound judgement; sensible; sane ... Agreeable to reason; not irrational, absurd or ridiculous ... Not going beyond the limit assigned by reason; not extravagant or excessive; moderate ... of such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose ..."
>
> Inherent in all of these meanings is the element of judgment. This inevitably implies the possibility that reasonable people will differ in their judgments without departing from the bounds of reasonableness. …The defender's belief must be reasonably open on the facts, not the only belief open on those facts."

[41] The standard of care of the "reasonable person" supplies the touchstone of civil liability for injury alleged to have been caused by a defendant's negligence.[26] The effect of the trial judge's direction that the jury must test the application of s 24 by reference to the theoretical conduct of a reasonable person, rather than by reference to the reasonableness of the appellant' belief, was in that respect to assimilate proof of criminal responsibility to proof of civil liability for negligence. That must be regarded as a substantial error.

[42] In the third group of directions the trial judge departed from the touchstone of "a" reasonable person and referred to "any" reasonable person. For example, the trial judge directed the jury to consider whether "any reasonable person in the appellant's position would or should have observed the oncoming motorcycle". The reference to "should", however, suggests that this test was not substantially different from the earlier test that referred to "the reasonable person". And there is the further difficulty that the trial judge immediately returned to the earlier, incorrect formulation: "What do you expect of the ordinary reasonable person #…?"

[43] The judge's last direction in this third category required the jury to consider whether it was satisfied beyond reasonable doubt that "his mistaken belief that the road was clear was unreasonable, was a belief that no ordinary, reasonable person in his position could have had". Had that direction appeared in the context of earlier, appropriate directions it might not have prejudiced the appellant. On the authority

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25 (1998) 100 A Crim R 430; [1998] QCA 119.

26 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

of a majority in *R v Mrzljak*,[27] such a direction might have prejudiced an accused about whom there was evidence of a language or psychiatric disability not possessed by an "ordinary, reasonable person" that contributed to the accused's mistaken belief. But there is nothing like that here. On the facts of this case it is not easy to postulate a difference between the reasonable belief to which s 24 refers and a belief that "no" ordinary, reasonable person in Mr Wilson's position "could" have held.

[44] But this last direction was given after directions requiring the jury to consider the theoretical belief of some ideal reasonable person had been repeated more than half a dozen times. The jury may well have overlooked this subtle change in the language and applied the earlier directions to the potential disadvantage of the appellant.

[45] The appellant's counsel did not seek any re-direction on the topic, but the wrong directions could not have operated to the advantage of the appellant and they might have operated to deny him a fairly open chance of an acquittal. In my opinion there was here a miscarriage of justice that requires that the verdict be set aside and a re-trial ordered unless there is room for the application of s 668E(1A) of the *Code*.

Section 668E(1A) *Criminal Code*

[46] Because the error in the trial judge's directions was potentially significant I would decline the respondent's invitation to attribute significant weight to the jury's verdict in the resolution of the question under s 668E(1A) of the *Code* whether a substantial miscarriage of justice actually occurred.[28] It is necessary to review the record as a whole to answer that question. Because I agree with McMurdo P's conclusion that this Court should not apply the proviso it is necessary only briefly to record my reasons for that view.

[47] The appellant gave evidence that justified an inference that during his overtaking manoeuvre, whilst he was to the right of the car he was overtaking, he was distracted from seeing the oncoming motorcycle by an apparently dangerous movement of that car. His evidence (which was contradicted by the driver and passenger in that car) was that the car drifted to its right to a point that was very close to the appellant's left foot, requiring him to move further to the right, so that he ended up near the centre of the northbound lane. He said that he then checked his rear vision mirror (to make sure that he was not himself drifting in front of another overtaking motorcycle – his was part of a convoy of motorcycles) and he saw a motorcycle behind him.

[48] On the evidence of Mr Drendel he was the rider of that motorcycle following the appellant. Although the evidence of all witnesses that it was a clear, sunny day and that the collision occurred on a long straight section of road, and the evidence of the driver and passenger of the car that they saw the oncoming motorcycle long before the collision, might justify an inference that the appellant should have seen the oncoming motorcycle well before he claimed to have been distracted, only Mr Drendel seems to have given clear evidence to the effect that the oncoming

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27 *R v Mrzljak* [2005] 1 Qd R 308, per Williams JA at 321 [52]-[54]; Holmes J at 329-330 [89]-[92].

28 In other cases a guilty verdict might be of significant assistance: *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43].

motorcycle was visible to someone very close to the appellant's position at the time when the appellant started to overtake.

[49] But Mr Drendel admitted that his motorcycle collided with either the appellant's or the oncoming rider's motorcycle. That is consistent with the effect of the appellant's evidence that he saw Mr Drendel's motorcycle in the northbound lane shortly before the collision. Mr Drendel declined to answer the question whether he started to overtake the car and was in the northbound lane behind the appellant at the time of the collision, on the ground that the answer might incriminate him. But if it be accepted that Mr Drendel was in the northbound lane shortly before the collision it is a legitimate question to ask why he was there if he had seen the oncoming motorcycle as early as the time when the appellant started to overtake.

[50] It is evident that the resolution of the issue arising under s 24 depends at least to some extent upon an assessment of the reliability of the oral evidence. Bearing in mind the limitation that this Court does not have a jury's advantage of seeing and hearing the witnesses, I am not persuaded that it would be right for this Court now to conclude that the Crown proved beyond reasonable doubt that the appellant's mistaken belief that it was safe for him to overtake was not a reasonable belief.

Disposition

[51] For these reasons I agree with the orders proposed by McMurdo P.

DOUGLAS J:

[52] I agree with the reasons and orders proposed by the President and Fraser JA. When one focuses on the correct test, whether the prosecution established beyond reasonable doubt that Mr Wilson's honest but mistaken belief that it was safe for him to overtake was not reasonable, there is a relevant difference. The test expressed by the learned trial judge, in emphasising the behaviour of ordinary, reasonable people, shifts the focus away from an objective examination of Mr Wilson's belief. In those circumstances, it seems to me that a substantial miscarriage of justice has occurred and there should be a retrial.