

# **Dangerous driving occasioning death**

No circumstances of aggravation

**From 1 January 2014**

**Transitional Sentencing Provisions:** This table is divided into thirds based on the three relevant periods of Sentencing Provisions:

- Post-transitional provisions period
- Transitional provisions period
- Pre-transitional provisions period

These periods are separated by a row which shows when the transitional provisions were enacted, and another showing when they were repealed.

## Glossary:

imp	imprisonment
susp	suspended
conc	concurrent
cum	cumulative
PG	plead guilty
occ	occasioning
BAC	blood alcohol content
AOBH	assault occasioning bodily harm
GBH	grievous bodily harm
att	attempted
EFP	eligible for parole
DDOGBH	dangerous driving occasioning grievous bodily harm
DDOD	dangerous driving occasioning death
DDOBH	dangerous driving occasioning bodily harm
agg	aggravated
circ	circumstances
TES	total effective sentence
SCP	summary conviction penalty

No.	Case	Antecedents	Summary/ facts	Sentence	Appeal
6.	<p><b><i>Gelmi v The State of Western Australia</i></b></p> <p><b>[2019] WASCA 139</b></p> <p>Delivered 09/09/2019</p>	<p>46 yrs time offending. 47 yrs time sentencing.</p> <p>Convicted after trial (alternative charge to unlawful killing).</p> <p>No prior criminal history.</p> <p>Sound employment history.</p> <p>Single; divorced; frequent contact with teenage daughter; supportive family; assisted his local community.</p> <p>No history of alcohol or substance abuse.</p> <p>Ongoing physical pain and psychological trauma as a result of the crash.</p>	<p>1 x DDOD.</p> <p>The victim, H, was aged 10 yrs. She, her father Mr R, her sister, C, and a family friend were visiting Gelmi on his farm.</p> <p>Gelmi and Mr R were good friends. Throughout the afternoon they drank alcohol at the local tavern and socially back at the farm.</p> <p>At some point Mr Ross, a friend and C set off on a quad bike.</p> <p>Later, H told Gelmi she wanted to find her father and sister. Despite having consumed alcohol he put H on the back of his trail bike and, without either of them wearing helmets, set off to search for them.</p> <p>Gelmi rode his bike onto a public country road. After riding for more than one km he began to ride back towards his home. On the return journey he failed to round a bend, causing him to travel onto the wrong side of the road and onto the grass verge before crashing.</p> <p>H was thrown from the bike. She suffered catastrophic head injuries and died at the</p>	<p>5 yrs 3 mths imp. Disqu holding/obtaining MDL 3 yrs.</p> <p>EFP.</p> <p>The trial judge found it was ‘clear’ the appellant was ‘so intoxicated as to be unable to have proper control of the bike’.</p> <p>Terrible effects on the victim’s immediate and extended family.</p> <p>Genuine expressions of remorse; co-operative; highly unlikely to reoffend in a similar manner.</p>	<p>Dismissed.</p> <p>Appeal challenged length of sentence.</p> <p>At [69] ... the appellant’s offending was very serious. ... The appellant did not require [H] to wear a helmet, despite a suitable helmet being available. ... the appellant was the only adult with [H]. She was highly vulnerable in that she was a child aged 10; ... it was obvious that [H] was at the risk of very serious injury, if not death, if she happened to fall from the bike. The appellant’s culpability arose from the level of his intoxication combined with his decision that [H] should ride on the bike without wearing a helmet, rather than the precise manner in which he rode the bike.</p>

			<p>scene. Gelmi was injured and was pinned underneath the bike.</p> <p>At the time of the accident Gelmi's blood alcohol concentration was 0.136%.</p> <p>The road's speed limit was 110 km p/h.</p> <p>The weather was fine and clear, the bitumen surface was dry and in good condition and the bike did not have any defects.</p>		<p>At [75] ..., when he was drinking, the appellant did not plan or intend to ride. However, he made a deliberate decision to ride the trail bike, with [H] as a pillion passenger ... despite his intoxication.</p> <p>At [76] The ... decision to ride the trail bike may have been made spontaneously and in response to [H's] request. However, the appellant was an adult and [H] was a young child, and he rode for some distance before the crash.</p> <p>At [79]-[80] ... the bike was unregistered and the appellant did not have a motorcycle licence. He should not, in any circumstances, have been riding the bike on the road. ... The appellant rode the trail bike while under the influence of alcohol ... [he] acted</p>
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					recklessly and, ultimately, criminally.
5.	<b><i>Kirby v The State of Western Australia</i></b>  <b>[2016] WASCA 199</b>  Delivered 24/11/2016	47 yrs at time offending.  Convicted after early PG (20% discount).  Previous good character.	1 x DDOD 3 x DDOBH 1 x Driving with BAC of or above 0.08  The appellant drove her 15-yr-old daughter and five teenage friends to a party. There were not enough seats, so the appellant's daughter, along with one of her friends, sat in the luggage compartment without seatbelts.  During the journey the appellant deliberately swerved her vehicle from left to right to scare a moped driver travelling in the same direction in the same lane. She lost control of her vehicle and it veered across both lanes of traffic and rolled onto its roof.  The appellant's daughter suffered fatal internal injuries. Three other passengers were injured.  The appellant had a BAC of 0.110%.	4 yrs 6 mths imp. Disqu holding/obtaining MDL 3 yrs  6 mths imp. Disqu holding/obtaining MDL 3 yrs  3 mths imp. Disqual holding/obtaining MDL 12 mths  Fine \$650. Disqu holding/obtaining MDL 8 mths.  TES 4 yrs 6 mths imp and MDL disqualified 3 yrs.  EFP.  The sentencing judge noted the appellant's remorse and acceptance of responsibility.	Dismissed.  Appellant challenged length of sentence and early plea discount.  At [40] This was no inadvertent, momentary lack of attention. The offence occurred because of the appellant's consumption of alcohol and her decision to drive her vehicle in a deliberately dangerous manner with the object of 'scaring' those on the moped and entertaining those travelling in her car. It was a complete abrogation of her responsibility as a driver.
4.	<b><i>The State of Western Australia v Formica</i></b>	22 yrs at time offending.  Convicted after PG (15% discount).	1 x DDOD  The respondent, his brother and the deceased had been to a local hotel.	2 yrs 6 mths imp susp for 2 yrs.  The sentencing judge described the offending as very serious, noting that it was not a case of	Dismissed.  Appellant challenged type of sentence.

	<p><b>[2016] WASCA 104</b></p> <p>Delivered 24/06/2016</p>	<p>Previous criminal history; minor drug offences and a conviction for driving in excess of 0.08%.</p> <p>Good upbringing and supportive family.</p> <p>Educated to yr 11.</p> <p>Steady employment history. Working at time of offending but struggled to cope with the victim's death and left his employment.</p> <p>Undergoing psychological treatment for depression, anxiety and symptoms of post-traumatic stress disorder since the offence.</p>	<p>The respondent later drove the group to a bottle-shop. On the return journey home the deceased got out of the car when it stopped at traffic lights and started skylarking. The deceased was asked to get back into the car but he instead climbed onto the roof. The respondent travelled through the intersection before stopping. The deceased was again asked to get off the roof and back in the car, but he refused to do so.</p> <p>The respondent drove with the deceased on the roof, reaching speeds of between 40-50 km/h. The deceased fell from the roof onto the road. Nobody noticed until they arrived at the respondent's home and got out of the car. Retracing their path they found the deceased lying on the road.</p> <p>The deceased died as a result of a head injury received in the fall.</p>	<p>momentary inattention. The respondent knew the deceased was drunk and behaving irrationally, he drove with the deceased on the roof for 2km. The risks would have been obvious. The respondent, in a misguided way, thought he was being a good friend by prolonging the trip.</p> <p>The sentencing judge also took into the account the attitude of the deceased's mother who did not want the respondent to receive imp.</p> <p>There is no suggestion the respondent's alcohol consumption played any part in the offence.</p> <p>The sentencing judge noted the respondent had accepted full responsibility, expressed remorse and victim empathy.</p>	<p>At [33] In the face of the victim's intransigence, the respondent made a serious error of judgement in yielding to the victims insistence on travelling on the roof.</p> <p>At [36] In the unusual circumstances of this case, I am not persuaded that a susp term of imp was outside the bounds of a proper exercise of the sentencing discretion. I do not consider the sentence to be manifestly inadequate.</p>
3.	<p><b><i>Rubin v The State of Western Australia</i></b></p> <p><b>[2016] WASCA</b></p>	<p>61 yrs at time offending.</p> <p>Convicted after early PG (25% discount)</p>	<p><u>Indictment</u> 2 x DDOD. 3 x DDOGBH.</p> <p><u>Section 32 Notice</u></p>	<p>2 x DDOD: 18 mths imp each cnt (conc). 3 x DDOGBH: 12 mths imp each cnt (conc).</p>	<p>Dismissed.</p> <p>Appeal concerned findings of fact, general deterrence and type, not</p>

	<p><b>2</b></p> <p>Published 08/01/2016</p>	<p>No prior criminal history.</p> <p>Impeccable antecedents with no risk of reoffending.</p> <p>Well educated with a university degree and good working history.</p> <p>Close supportive family and highly regarded within the community.</p> <p>Co-operated with the police.</p> <p>Deeply and genuinely remorseful.</p>	<p>1 x DDOBH.</p> <p>The appellant lived in the USA and had limited experience of driving on the left-hand side of the road. He drove along a dual carriageway, which converted to a single carriageway in each direction, separated by a double white line.</p> <p>The appellant failed to see various signs and visual markers that indicated he was travelling on a single carriageway. Shortly after the road merged into single lanes the appellant drove onto the incorrect side of the road and collided head on with a vehicle being driven in the opposite direction.</p> <p>As a result of the collision the appellant's wife was killed and his daughter seriously injured.</p> <p>The driver of the other vehicle was seriously injured, along with his father; his 2 yr old daughter died and his partner suffered bodily harm.</p>	<p><u>Section 32 Notice</u> 6 mths imp (conc).</p> <p>TES 18 mths imp.</p> <p>EFP</p> <p>Sentencing judge observed the appellant suffered serious physical injuries as a result of the collision and that it had a profound effect upon his psychological state; the tragic consequences of the accident resulted in adverse consequences to him of a greater scale and dimension than any possible consequences of the range of sentences reasonably open to the sentencing court.</p> <p>Considered a suspended sentence would fail to adequately reflect the serious nature of the offence.</p>	<p>length, of sentence.</p> <p>At [53] Mr Rubin ... erroneously believed that he was still driving on a dual carriageway. When account is taken of the four signs which were clearly and readily visible to drivers travelling south, the line markings on the surface of the road, and the period of time and distance over which Mr Rubin had the opportunity to observe those matters and draw an appropriate conclusion from them, it cannot be said that it is difficult to envisage a case in which the culpability of the conduct could be lower.</p> <p>At [75] The appellant's culpability was not aggravated by such matters as excessive speed, deliberate dangerous driving or the ingestion of illicit drugs or alcohol, his driving</p>
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					<p>nevertheless represented a significant departure from the standards expected of a reasonable driver. The appellant failed to see no less than four signs. Further, he failed to note the change in the road markings which conveyed that he was no longer driving on a dual carriageway. The appellant's failure to see these things speaks of a high degree of inattentiveness which was more than merely momentary.</p> <p>At [78] An additional factor which his Honour took into account, and which cannot be ignored, is the need for general deterrence.</p>
2.	<p><i>Gray v The State of Western Australia</i></p> <p>[2015] WASCA 108</p>	<p>25 yrs at time offending. 27 yrs at time sentencing.</p> <p>Convicted after trial.</p> <p>Poor traffic history, including</p>	<p>1 x DDOD.</p> <p>The appellant drove on a gravel road behind Mr Polkinghorne. Mr Polkinghorne drove behind Mr Armer. Mr Polkinghorne drove just behind a large dust cloud given off by</p>	<p>2 yrs 2 mths imp and driver's licence disqualified for 5 yrs.</p> <p>EFP.</p> <p>Sentencing judge found the</p>	<p>Dismissed.</p> <p>At [122] While no precise findings can be made as to the distance and time over which the appellant</p>

	<p>Delivered 28/05/2015</p>	<p>convictions of speeding and drink driving.</p> <p>After crash, long-term relationship broke down and lost employment.</p> <p>Character references showed good character.</p>	<p>Mr Armer's road train.</p> <p>The appellant must have been aware of the dust cloud created by Mr Armer's road train. After five to 10 minutes, the appellant overtook Mr Polkinghorne and deliberately drove into the dust cloud.</p> <p>The appellant was aware of the hazards of driving in a dust cloud. The dust cloud severely restricted the appellant's vision. He did not drop back out of the dust cloud, as his prior training had recommended. He drove in the dust cloud long enough to become disorientated. His vehicle then travelled to the incorrect side of the road and collided with a car being driven by the victim.</p> <p>The appellant admitted all the elements of the offence, save for the dangerousness.</p>	<p>following mitigating: appellant drove below speed limit of 80 km per hour; unfamiliar with road conditions; remorseful; unlikely to reoffend.</p> <p>Significant trauma caused to victim's loved ones.</p>	<p>drove in the dust cloud, it cannot be said that it was a very short period of time.</p> <p>At [123] Lack of familiarity with road conditions requires greater caution on the part of the driver. I do not regard any lack of appreciation by the appellant as to the danger posed by dust on a gravel road as having any substantial mitigating weight.</p> <p>At [125] I would characterise his conduct as being closer to the mid-range of culpability.</p> <p>At [129] In my opinion, it would not be appropriate, again having regard to the appellant's culpability and the need for general deterrence, to suspend the term of imp.</p> <p>At [142] The period of</p>
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					disqualification in this case is lengthy, but, in my opinion, having regard to all of the circumstances of the case, could not be said to be unjust or unreasonable.
1.	<p><b><i>Kershaw v The State of Western Australia</i></b></p> <p><b>[2014] WASCA 111</b></p> <p>Delivered 23/05/2014</p>	<p>50 yrs at time offending. 51 yrs at time sentencing.</p> <p>Convicted after early PG.</p> <p>Criminal history including dangerous driving causing bodily harm, fail to stop after accident, driving under the influence and fail to report a traffic accident.</p> <p>Left school in Year 8.</p> <p>Professional truck driver with 17 yrs averaging about 120,000 km per year.</p> <p>Employer advised he was a reliable, hardworking employee who had not been involved in any other truck accident in his 13 years of service with him.</p> <p>Suffers depression; did not cause or contribute to the accident.</p>	<p>Ct 1: DDOD. Ct 2: DDOD.</p> <p>The appellant drove a prime mover, towing a semi-trailer, in a southerly direction on Old Coast Road at Myalup.</p> <p>The appellant had been driving for about 13 hours and suffering fatigue. The appellant was driving under the speed limit, was not affected by alcohol or other mild altering substances and had taken driving breaks that were in accordance with industry standards. At the time, due to his depressive condition, the appellant was taking prescribed medication, which, to his knowledge, made him drowsy.</p> <p>Prior to the collision, witnesses observed the appellant, over a distance of about 40 km, driving erratically by drifting across the central broken white line and onto the shoulder of the road on 3 or 4 occasions.</p> <p>The first deceased had parked his vehicle</p>	<p>Ct 1: 4 yrs imp. Ct 2: 4 yrs imp.</p> <p>Ct 2 served partly cumulatively.</p> <p>TES 5 yrs imp.</p> <p>EFP.</p> <p>Extremely remorseful; grieved for the families of the victims and suffered acute post-traumatic stress disorder.</p> <p>Judge said ‘the most likely scenario’ ... because of the effects of fatigue and possibly the prescription medication he was taking for his depression.</p> <p>Characterised by Judge as a bad case of its kind.</p>	<p>Dismissed (McLure P dissenting).</p> <p>At [174] All drivers have a duty to drive in a fully alert state... This is a case where the appellant chose to keep driving when he knew he was not in a condition to do so. The appellant should have pulled over and rested. By continuing to drive, he endangered other road users.</p> <p>At [175] It is the responsibility of all drivers, but particularly of a professional truck driver in control of a heavy vehicle, not to endanger the lives and safety of others by driving in a state on</p>

		<p>Heavy user of alcohol since 16 yrs; reduced alcohol consumption after this collision.</p> <p>A number of character references were provided which spoke highly of the appellant as a worker and neighbour.</p>	<p>on the gravel shoulder area of the road to change a flat type. The second deceased stopped his vehicle behind to assist him. Both men were standing near their vehicles. One of the vehicle's hazard lights were on and could be clearly seen by approaching traffic. The vehicles were clearly visible for at least 300 m.</p> <p>The vehicle was roadworthy with no relevant defects but had a known tendency to pull to the left.</p> <p>As the appellants vehicle approached the deceased's vehicle's, it drifted from the left-hand lane of the carriageway onto the sealed hard shoulder and ploughed, without breaking, in the deceased's vehicles, killing one of the deceased instantly. The second deceased died in hospital a short time later.</p> <p>Appellant's counsel submitted the appellant had been distracted at the critical time and had taken his eyes off the road in order to change radio stations.</p>		<p>fatigue.</p> <p>At [177] I agree with the learned sentencing judge's characterisation that this was a bad piece of driving. This was not mere inattention or a momentary lapse of judgment, but rather a determination by the appellant to keep driving even though he knew he was fatigued and posed a risk to other road users.</p> <p>At [180] The proper approach when dealing with multiple offences of dangerous driving occasioning death which have resulted from the one act of dangerous driving was discussed by this court in <i>Eves</i> and <i>Longbottom</i>.</p> <p>At [183] Some accumulation was required having regard to the fact that the appellant's driving</p>
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					caused two deaths. To have imposed totally concurrent sentences would not have properly reflected this fact.
<i>Transitional Provisions Repealed (14/01/2009)</i>					
<i>Amendments to RTA s59 – reversal of onus of proof (01/01/2005)</i>					
<i>Transitional Provisions Enacted (31/08/2003)</i>					