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| IN THE COUNTY COURT OF VICTORIA | ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES |

AT Melbourne

CRIMINAL DIVISION

Case No. CR-ZZ-ABABAD

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| DIRECTOR OF PUBLIC PROSECUTIONS |  |
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| v |  |
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| HAFIZ NAMDAR (A PSEUDONYM) |  |

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| JUDGE: | Her Honour Judge Davis  |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 24 April 2015 |
| DATE OF SENTENCE: | 20 May 2015 |
| CASE MAY BE CITED AS: | DPP v Namdar (a pseudonym) |
| MEDIUM NEUTRAL CITATION: | [2015] VCC AAB |  |

REASONS FOR SENTENCE

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Subject: Criminal – plea – sentence

Catchwords: Culpable driving causing death

Sentence: 5 years imprisonment with a non-parole period of 2 years and 9 months.

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| APPEARANCES: | Counsel | Solicitors |
| For the Director of Public Prosecutions | Mr O. Dexter | OPP |
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| For the Accused | Mr L. Lock | HRM & Associates |

HER HONOUR:

# Hafiz Namdar,[[1]](#footnote-1) you have pleaded guilty to one charge of culpable driving causing death. On a Friday in February 2012, when you were just 21, you were operating a jetski near Mordialloc Pier in Port Phillip Bay.[[2]](#footnote-2) You were operating the jetski in a highly inappropriate and negligent manner, and travelling at very high speed, when you struck Henry Orchard[[3]](#footnote-3) who was swimming in the area surrounding the pier, a swimming only zone, that is, an area where vessels, such as yours, had been excluded by law or were required, if present within 50 metres of the pier and 200 metres of the shore, to not exceed a speed of 5 knots (or about 9 kilometres per hour). Your jetski struck Mr Orchard in the head, causing life threatening injuries. He was taken from the water, treated by ambulance staff and taken to the Alfred Hospital where he was placed on life support. Two days later his treating doctors determined that he had suffered irreversible brain damage as a result of the head injuries suffered when struck by your jetski, and was incapable of surviving. His life support was removed and he died that day. A post mortem conducted two days later concluded that the cause of death was head injury sustained in a jet ski accident.

# It is necessary to detail the circumstances in which this tragic collision occurred. You had completed an accredited recreational boat and personal watercraft assessment course on 8 February 2012. In that course, you received instruction on how to use a PWC at a safe speed and distance, and you successfully completed an examination confirming that you had an adequate understanding of the rules of use of such craft. On 9 February 2012 you attended Vic Roads with your exam results and received a Recreational Boat Licence with PWC endorsement. On the day of offending, you registered your jetski, a 2008 Model Seedoo RXT 215, which weighed around 363 kgs, had a top speed of about 100 kph and was capable of accelerating from 0 to 50 kph in about 3 seconds. It had an idle speed of about 7-9 kph and would rise out of the water as it gained speed, reaching a planing position at about 35 kph.

# On the day of the offending the weather was fine and hot, and the wind from the southwest was averaging around 26 to 30 kph. There were many swimmers in the water, including a number swimming near Mordialloc Pier, and a number of people were fishing from the pier.

# At around 5 00 pm, Mr Orchard, his daughter and her then boyfriend were at the beach close to Mordialloc Pier. Mr Orchard swam inside the “swimming only” or “no boating zone”.

# At around 5.30 pm, according to your passenger Archie Webster,[[4]](#footnote-4) who was sitting on the rear seat[[5]](#footnote-5), you launched your jetski from St Kilda Marina and rode towards Mordialloc Pier. Mr Orchard was still swimming inside the swimming only zone.

# A number of witnesses described the manner and speed at which you were operating the jetski. Your passenger estimated that you were travelling at about 15 kph. A person fishing on Mordialloc Pier, Hayden Arnot,[[6]](#footnote-6) said you were show boating up and down the foreshore area in close proximity to the beach: driving fast and cornering fast. Another person fishing on the pier, Vo Lee[[7]](#footnote-7), said that you were travelling at about 50 kph so close to the pier that you nearly crossed the fishing lines of those fishing from the pier. A third person fishing on the pier, Ben Thomson,[[8]](#footnote-8) noted that you were driving the jetski within five to ten metres of the pier, spinning around and splashing water, going side to side and doing spins. Cindy Blackmore,[[9]](#footnote-9) who was lying on her towel at the end of Mordialloc Pier noticed that your driving of the jet ski was upsetting some fishermen on the pier; she said you were closer in than the end of the pier, zooming dangerously close around the pier, increased your speed “ridiculously close to both sides of the pier and even closer to the beach where other people were swimming, ever increasing your speed and recklessness”. Elwood Warren[[10]](#footnote-10) was with Ms Blackmore and saw you operating the jetski inside the no boating zone around Mordialloc Pier, “hooning past the pier towards the spirit of Tasmania and then back again”, spraying fishermen on the pier from about 30 metres away, travelling as close as 50 metres from the shore, and at about 70 kph. Another witness sitting on the end of Mordialloc Pier, Wang Chu,[[11]](#footnote-11) said you were driving the jetski as fast as a car and very close to the beach, in the swimmer only zone.

#  At around 5.50 pm, Mr Orchard was swimming on the eastern side of Mordialloc Pier when he was struck in the head by the jetski you were operating. A number of witnesses were looking in your direction when you collided with Mr Orchard. A person fishing on the pier, Sven Ivancic,[[12]](#footnote-12) saw your jet ski “coming straight at the swimmer”, who was in the swimming only area. He said that immediately before the collision, you were not looking forward but were talking to the passenger behind you. Mr Lee who was on the pier said at the time of the collision your jet ski was going very fast, 60 or 70 kph. Craig Pollsworth,[[13]](#footnote-13) who lives across the road from the beach, watched you through his telescope travelling from left to right at about 50 kph, unusually close to the shore. He saw many swimmers in the water, and noticed a head lying in the middle of a red circle. He told his wife to call 000 and he called the water police.

# You did not realise that you had struck anyone. People on the pier who saw the collision were jumping and waving and yelling at you to go back. You then approached Mr Orchard, who was lying face down in the water surrounded by blood, and your passenger jumped in the water, pulled him close to the jetski, and you towed him into shore.

# While Mr Orchard was being treated by ambulance personnel, you were sitting in the sand, talking to yourself and punching your fist into the sand. Witnesses heard you call yourself stupid, a dufus and a dickhead, and saying “I’m going to kill myself, I’m going to kill myself, …I was being such a dickhead”.

# Water police arrived at the scene at around 6.10 pm. You were cautioned and arrested and taken to the St Kilda police station, where you were interviewed. You told police that you had been licenced for 1 to two months, that you had experience riding a jetski outside Australia, that you were operating the jetski round and round, but not too close to people, further out than the yellow poles, that you were not being careless and were keeping a proper lookout for swimmers and other watercraft and were not being distracted. You were not sure if you were travelling at a safe speed or not. Things happened in a few seconds. There were waves up and down and you were accelerating and not accelerating. You did not see him and did not know what happened. You were not sure whether the swimmer was inside the swimmers only zone. It was an accident.

# The police conducted various investigations to determine the positions of your jetski and of Mr Orchard at the time of the collision. You were originally charged in early February 2013 with summary marine safety charges but in October 2013 you were charged with culpable driving. A contested committal was held in February 2014, at the end of which you pleaded not guilty. Your legal representative received a trial indictment alleging culpable driving on alternative bases of recklessness or negligence on 5 January 2015 and in February 2015 you offered to plead guilty to culpable driving on the basis of negligence. The offer was accepted by the Crown.

# By your plea you admit that you were operating the jet ski negligently in that you were: 1) operating it in the swimming only zone where the use of vessels was prohibited at a speed in excess of 5 knots; and 2) you were operating it inappropriately close to the beach users and at an inappropriate and dangerous speed in that area: within 50 metres of Mordialloc Pier, within 200 metres of the water’s edge; and, where, to your knowledge, people were swimming. The prosecution conceded that you are a youthful offender with no prior convictions with good prospects of rehabilitation, and therefore that protection of the community and specific deterrence are less important sentencing considerations. The prosecution also accepted that there was evidence that you are of low intelligence. However, the prosecution submitted, there is no evidence that you are intellectually disabled and for this reason, the case of *R v Verdins* [2007] VSCA 102 has no application and there is no reduction in your moral culpability.

# In relation to sentencing disposition, the prosecution submitted that sentencing practice in culpable driving cases was to the effect that terms of immediate imprisonment were imposed in the vast majority of cases. Given the primacy of the principles of denunciation, general deterrence and just punishment, it was submitted that the only appropriate sentence was one involving a term of immediate imprisonment, notwithstanding the guideline judgment in *Boulton v The Queen* [2014] VSCA 342, and notwithstanding that a suspended sentence remained open. The prosecution opposed an assessment for suitability for a Community Corrections Order. However, I acceded to your counsel’s request that you be assessed, and the report of Corrections Victoria dated May 2015 concluded that you were suitable to undertake a Community Corrections order.

# I turn first to the seriousness of the offence. In terms of gross negligence, it is necessary to characterise the extent to which your conduct fell below the standards expected of all operators of watercraft. This was your first day operating the powerful jetski you had just registered. The community is entitled to expect that you would exercise extreme caution on your first day out operating such a watercraft, slowly getting the feel of the machine and of the water, far away from any contact with people or other watercraft. Instead, within minutes of launching your jetski you were travelling at excessive speed, inside the swimmers only zone, when there were swimmers in the water, not keeping a look out ahead of you, and operating your jet ski deliberately in an unpredictable fashion, accelerating and decelerating, turning sharply in circles, coming very close to shore and to Mordialloc Pier. On any view, your driving constituted a gross breach of driving standards, giving rise to a high degree of risk that something untoward would happen. I consider that your moral culpability is significant on the basis that this was not just a momentary lapse of attention for a second or so as part of otherwise careful and blameless driving, but part of deliberate conduct which took place over about twenty minutes before the accidental collision occurred. Even though that is a relatively short period of time, you were driving at excessive speed in a swimmers only zone where there were swimmers and you must have known there would be swimmers. The consequences of your actions were devastating.

# I turn to the impact of your offence. Mr Orchard was 51 years old when he was struck in the head by your jet ski. Victim impact statements were tendered from his two daughters, by his ex-wife, by his brother, and by his current partner. Each of these statements was read out in court at the request of the authors. I will not repeat their contents in full. They reflect the devastating impact that the death of Henry Orchard has had on his family and loved ones.

# Mr Orchard’s younger daughter was just 15 when he died. Her perfect life was turned upside down. He was a loving, proud and devoted father who came to all of her school appointments and who was going to take her to New York for her 16th birthday. She found VCE difficult because of her distress over losing him, has struggled with some health issues and misses his support. The legal process has been drawn out and traumatic for the family. She cannot imagine what it will be like not having him at her wedding or when she has children.

# Mr Orchard’s older daughter was just 17 and doing Year 12 at school when her father died. She was a happy, outgoing teenager and he was a wonderful father. Her life was completely changed by his death. She was with him on the beach, and traumatised at seeing him there looking lifeless, traumatised at saying good bye to him in hospital, discussing organ donation with the doctors, and witnessing him pass away. After his death she was very distressed, missed a lot of school and had to work very hard to catch up and graduate. She has been able to attend university but still finds birthdays, Christmas and Father’s Day very sad. She worries constantly about her mother and sister, particularly if they are even a few minutes late. The legal process has been extremely traumatic as it has brought back terrible memories of the incident. She suffers at the thought of all that he has missed and will miss as a result of the incident, and will always miss him.

# Mr Orchard’s ex-wife wrote that he was a wonderful father who co-parented extremely well with her in spite of the fact that they were separated. She misses his daily support with their daughters and has found it impossible to move on from her loss. She braces herself for the grief she will feel at future milestones.

# Mr Orchard’s brother, noted that his brother died a catastrophic, horrific and senseless death. He was a strong and safe swimmer enjoying a swim with his daughter at the time he was struck. His death continues to be a source of deep emotional pain for the family. Mr Orchard’s own parents survived him, and his mother died with a deep sadness in her heart. Their father is aged 85 and lost his wife and son within a short period of each other. He said that some of the scars left by Mr Orchard’s death will never heal. His final image and memory is of the family sitting by Mr Orchard’s hospital bed, holding his hand in silence, as a new dawn was breaking on a beautiful Melbourne summer’s day, shortly before his ventilator was turned off.

# Mr Orchard’s partner, spent four years with him and still relives the dreaded details of the evening that he was struck in the water. She described him as her soul mate, the love of her life, who was a wonderful father to his daughters, and a wonderful friend to her two daughters. Three years on, she is still suffering greatly, and has lost her zest for life, finding it hard to laugh, hard to enjoy herself and feeling anxious in social situations. She mourns his loss daily, and the fact that with his death, their plans together will never eventuate.

# I turn to your personal circumstances and the matters put in mitigation by your counsel.

# You are now aged 24. You have no prior convictions and no matters pending. You were born in Iraq but your family fled religious persecution in 2000, moving to Jordan and then to Lebanon (where you worked long hours daily in the family fruit shop), before settling in Australia as refugees in 2003, when you were 13. You attended a language centre here for some months, then attended school until part-way through Year 10, when you left school to help your family financially. You worked with your father painting houses and continue that work, now with your two older brothers. You have a younger sister and a younger brother. Your father is aged 56 but unable to work due to old shrapnel wounds in his leg. Your mother, aged 50, cares for him. You have lived at home all your life and had a caring upbringing. You had one serious relationship with a young Iraqi woman and were planning to become engaged with her; however this relationship broke up after the accident. You have never abused alcohol or taken illicit drugs.

# A psychologist, provided a report dated 19 March 2015. The report does not mention any discussion with you about what occurred on the day of the collision, but rather contains references to a selection of questions and answers from your Record of Interview. He reports that you told him that your action was not intentional, that you remained quite devastated over the incident, and have become withdrawn and socially isolated. You had poor sleep, were impatient with others, and took sleeping medication for 6 months. You were unable to work for 2 months after the tragedy but are now working full time. You have trouble sleeping, feel guilty about the incident, feel low, have some suicidal ideation and loss of interest in previous activities. Intellectual testing revealed a full scale IQ of 71, with reasonable powers for delayed recall but marked confusion of sequence. The psychologist noted that he had read the case of *R v Verdins* [2007] VSCA 102 and considered that it applied to you because your low level of intellectual capacity, would have impaired your ability to exercise appropriate judgment and your ability to think clearly”. He felt that imprisonment would be a greater burden on you than on a person of better intellect. I will return to these conclusions in a moment. Personality testing by the psychologist indicated depression and anxiety arising from the distress, guilt and shame you experienced over the current offence.

# Your counsel tendered references from your younger sister, a friend, and from your accountant and friend. They describe you as a hardworking, caring and law-abiding young man from a respectable and religious family who are deeply distressed by what has happened. They say you are extremely remorseful for your actions, and have changed from being a fun loving young man to one who is generally miserable and unwilling to enter a relationship without knowing what lies ahead for you. Your sister says that you have always had trouble with your studies, have a poor memory and poor English and she always helped you with your schoolwork and then with the paperwork involved in your business. She says that your concentration has worsened since the accident.

# Your counsel did not take issue with any matters raised in the prosecution opening. He submitted that it was necessary to test the evidence at committal before a plea of guilty could be entered. He noted that you contribute to the family finances and to the support of your parents. You hold a current drivers licence which you need for your work. He relied on your expressions of sorrow at the scene, in your record of interview and to the psychologist.

# Your counsel submitted, in reliance on the psychologist report, that limbs 1-5 of *R v Verdins* [2007] VSCA 102 were enlivened. He submitted that the guideline judgment of *Boulton v The Queen* [2014] VSCA 342 opened the possibility of imposing a term of imprisonment coupled with a Community Corrections Order in this case, and he urged the Court to take into account your age, absence of priors, low level of intellectual functioning, plea of guilty and remorse and to impose a community corrections order, either alone or in combination with a term of immediate imprisonment.

# I accept the matters put in mitigation on your behalf. You pleaded guilty, albeit not at the earliest opportunity. Your plea has spared the family and friends of the victim from the ordeal of a trial. I accept that you are genuinely remorseful for what you have done. I accept that you are a youthful offender and will have a significant portion of your life ahead of you after your release. I accept that you have good prospects of rehabilitation as you have no addictions or other mental health conditions requiring treatment, have solid employment prospects and a supportive family. I also accept that you are of low intelligence as evidenced by the IQ testing conducted by the psychologist.

# However, for a number of reasons I reject the psychologist’s conclusions that *R v Verdins* [2007] VSCA 102 applies. Firstly, it is the role of the court, and not an examining expert, to determine whether a legal test has been satisfied. Secondly, the IQ test results establish only that you are of low intelligence, nothing more. Thirdly, the psychologist provides no basis in the body of his opinion for the conclusion he draws at the end of his report. Fourthly, I note that you passed the exam and received a licence to operate the jetski just over two weeks before your offending, obtained your registration on the day of the offending, and told police that you had experience operating a jetski outside Australia. Finally, your solid work history, absence of prior convictions, and the references provided on your behalf concerning your personality and role as friend and family member sit at odds with the so-called “conclusion” expressed by the psychologist. For these reasons, I am not satisfied on the material before me that the case of *R v Verdins* [2007] VSCA 102 has any application in your case.

# I note the assessment of Corrections Victoria that you are at low risk of reoffending and for this reason I consider that specific deterrence and protection of the community are less relevant sentencing considerations in your case,

# The offence of culpable driving causing death is a very serious offence, as is reflected in the maximum sentence of 20 years imprisonment prescribed by Parliament for this offence. It involves, in your case, the taking of a life by gross negligence. General deterrence in this case is the principal sentencing consideration. Denunciation and just punishment are also important considerations. It does not matter that the conduct occurred on the water as opposed to on the road. All too often it is young, relatively inexperienced drivers who kill or injure others on the road. Sadly, the same may be said in the future about people like yourself who kill or injure others in the water. The community must understand that such conduct will bring substantial punishment to deter others from repeating this conduct.

# I have extensively reviewed current sentencing practice and have had regard to the relevant Sentencing Snapshot dated May 2015 in relation to culpable driving offences. While your offending took place over a short space of time, it had the most devastating consequences. I consider that nothing short of a sentence wholly comprised of an immediate term of imprisonment will suffice to satisfy the requirements of general deterrence, denunciation and just punishment.

# I have reflected a great deal over the appropriate length of your sentence. I recognise that a lost life is irreplaceable, and that no punishment can compensate for that loss. On the other hand, I accept that you are otherwise a relatively young man of otherwise good character; you have not offended while on bail, are unlikely to reoffend and have a supportive family, a good work history and therefore very good prospects of rehabilitation.

# Weighing all these matters, I have come to the following conclusion. Would you please stand. On the charge of culpable driving causing death, you are sentenced to a term of imprisonment of 5 years with a non-parole period of 2 years and nine months.

# Pursuant to s.6AAA of the Sentencing Act, I indicate that but for your plea of guilty, I would have sentenced you to 7 years’ imprisonment with a non-parole period of 4 years.

# I note that there is no objection to the forfeiture order and forensic sample order which were sought by the prosecution.

# I will sign the forfeiture order which provides that the items in the Schedule, namely, the jetski, the jetski trailer and two personal flotation vests be forfeited to the Minister.

# I will also make the order sought pursuant to s.464ZF of the Crimes Act in relation to the retention of a forensic sample. I need to inform you, Mr Namdar, that I am signing an order that requires you to undertake a forensic procedure for the taking of a scraping from the mouth and/or a blood sample until a sample of sufficient standard is obtained for the placement on the database. I advise you that if at the time of the request for such a sample you do not consent for the taking of a mouth scraping under the supervision of an authorised member of the police force, then the sample to be taken will be a blood sample and the police may use reasonable force to enable that forensic procedure to be conducted. Do you understand?

# OFFENDER: Yes.

# HER HONOUR: I also note that this case is subject to the mandatory licence cancellation and disqualification provisions of section 171(2) of the *Marine Safety Act* 2010. I order that your marine licence be cancelled and I order that you be disqualified from obtaining a marine licence for a period of 5 years.

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1. Hafiz Namdar is a pseudonym [↑](#footnote-ref-1)
2. Mordialloc Pier, Port Phillip Bay is a pseudonym. [↑](#footnote-ref-2)
3. Henry Orchard is a pseudonym. [↑](#footnote-ref-3)
4. Archie Webster is a pseudonym. [↑](#footnote-ref-4)
5. Page 264 of depositions [↑](#footnote-ref-5)
6. Hayden Arnot is a pseudonym. [↑](#footnote-ref-6)
7. Vo Lee is a pseudonym. [↑](#footnote-ref-7)
8. Ben Thomson is a pseudonym. [↑](#footnote-ref-8)
9. Cindy Blackmore is a pseudonym. [↑](#footnote-ref-9)
10. Elwood Warren is a pseudonym. [↑](#footnote-ref-10)
11. Wang Chu is a pseudonym. [↑](#footnote-ref-11)
12. Svene Ivancic is a pseudonym. [↑](#footnote-ref-12)
13. Craig Pollsworth is a pseudonym. [↑](#footnote-ref-13)