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CRIMINAL LAW MASTERCLASS

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A PRACTICAL APPROACH TO ROAD TRAFFIC LAW

PART 2

PART B - ROAD TRANSPORT LEGISLATION

CASE LAW UPDATE - 12 MONTHS TO AUG 2012

Presented by

Nic Angelov

Barrister

PROFILE

NIC ANGELOV, BARRISTER, ADA EVANS CHAMBERS (www.adaevanschambers.com)

Nic Angelov has been practising at the bar since 2006. His main area of practice is criminal law. Before being called to the bar he was a solicitor for five years. He was admitted to practice in 2001. He has been a casual lecturer in criminal law at the University of Sydney and since 2008 author of the commentary to Volume One of *Leslie and Britts Motor Vehicle Law NSW*.

PART B – ROAD TRANSPORT LEGISLATION CASE LAW UPDATE

1. ROAD RULES 2008

1.1 r 10-2 NSW Rule: penalties and disqualifications for speeding offences

Case ***Roads and Traffic Authority of New South Wales v O'Sullivan*** **[2011] NSWSC 1258**

Topic **Disqualification commencement - subr (9)**

It is clear that an automatic period of disqualification under this rule results from conviction and must commence on the date of conviction. The court may order a different period of disqualification, subject to the restraints in the rule, but it is not given any power to order the disqualification commencing from a date other than the date of conviction. In so far as a disqualification order under this rule is made to commence on a date other than the date of conviction, it is without power and involves jurisdictional error: *Roads and Traffic Authority of New South Wales v O'Sullivan* [2011] NSWSC 1258.

1.2 r 56 stopping for a red traffic light or arrow

Case ***Director of Public Prosecutions (NSW) v Abouali*** **[2011] NSWSC 110**

Topic **Elements**

The police evidence was that the driver drove through a red light without stopping at all. The defence put a no prima facie case submission, arguing the driver had been issued with an infringement for the wrong offence, an essential element of the offence being charged that the driver actually stops. In the event that a vehicle drives through the intersection without stopping, when the light is red, it is only a breach of r 59 (proceeding through red traffic light) which could result. This submission was accepted and the charge dismissed. On appeal it was held that the finding was illogical and contrary to the express statutory provision. A failure to stop cannot establish the absence of an essential ingredient of the offence. That a breach of r 59 may also have occurred was irrelevant to the question of whether or not r 56 had been breached: *Director of Public Prosecutions (NSW) v Abouali* [2011] NSWSC 110.

1.3 r 287 duties of a driver involved in a crash

Case ***R v Chan*** **[2011] NSWDC 227**

Topic Driver cannot choose between complying with sub-rule (2) and (3) (at scene/later)

The driver was convicted of an offence under r 287. He appealed his conviction. The facts disclosed that the driver was a taxi driver. He stopped to let a passenger out. The passenger opened the right rear hand door. A bus collided with the door. The two drivers spoke to each other. The bus driver requested the taxi driver provide his details. The latter did not provide his details. His case was that he did not want to tell the bus driver until the police arrived. The bus driver had passengers in his vehicle so eventually he gave up and left without any particulars being provided. It was argued that subr (3) provides in effect an option for a driver involved in a crash that he or she can either comply with subr (2) or subr (3). The latter provision allows for particulars to be provided to a police officer at a later time. Held, dismissing the appeal, the argument must be rejected because it either ignores or does not given proper meaning to the word "also" in subr (3). The word "also" means "in addition to". It does not mean "instead of": *R v Chan* [2011] NSWDC 227.

2. ROAD TRANSPORT (GENERAL) ACT 2005

2.1 s 3 definitions - "road", "road related area"

Case ***Lutton v Willingham & Nominal Defendant*** **[2012] NSWDC 92**

Topic Crown land

A motorcycle collision occurred between two motorcycles on an unsealed bush track located in bushland on crown land. Held, in the absence of any evidence that signs had been erected pursuant to s 160 *Crown Lands Act 1989* excluding public entry on the land, given the tracks were used by the public for the driving or riding of motor vehicles, the track was at least a "road related area" within the meaning of the section: *Lutton v Willingham & Nominal Defendant* [2012] NSWDC 92.

2.2 s 3 definitions - "motor vehicle", "vehicle"

Case ***Andy's Earth Works Pty Ltd v Verey*** **[2012] NSWCA 32**

Topic bulldozers and tracked vehicles

It was held (by majority, Young JA dissenting) that a bulldozer is not a "motor vehicle" within the meaning of the Act: *Doumit v Jabbs Excavations Pty Ltd* (2009) 54 MVR 332; [2009] NSWCA 360. *Doumit* was followed in a unanimous three bench decision which held that, to give effect to the words of the statute, a vehicle "on wheels" does not refer to the means by which locomotion is provided to the vehicle. The structure of the vehicle must be "on wheels". The excavator was not "on wheels", it was "on tracks". There was no suggestion that the tracks were the outer cladding of the wheels: *Andy's Earth Works Pty Ltd v Verey* [2012] NSWCA 32.

The *Doumit* decision has been overcome by the introduction of cl 171A *Transport (General) Regulation 2005*. Pursuant to paragraph (b) the definition of "vehicle" in s 3(1), cl 171A prescribes a tracked vehicle, such as a bulldozer, as a "vehicle".

2.3 s 56 liability of operator

Case ***Roads and Traffic Authority of New South Wales v Booth Produce Pty Ltd & Christopher James Edwards*** **[2011] NSWSC 1018**

Topic **"Breach of a ... dimension ... requirement" – no double jeopardy where multiple dimension breaches charged arising from one incident**

"Dimension requirement" is defined in s 20. Each defendant in this case, faced two charges for one vehicle and one incident, one charge alleging the vehicle exceeded the height limitation and the other the width limitation. In both cases, the Magistrate at first instance held that the breach of the width and height requirements constituted one offence and to prosecute for both placed the defendants in double jeopardy. In both cases, a conviction was recorded and penalty imposed for one charge with the other being permanently stayed. On appeal by the RTA, it was held that the breaches of the height and width requirements are separate offences and not mere particulars of the same offence, and that there was no breach of the double jeopardy provision at s 177: *Roads and Traffic Authority of New South Wales v Booth Produce Pty Ltd & Christopher James Edwards* [2011] NSWSC 1018.

2.4 s 171 authorised officer may require production of driver licence and name and address from driver or rider

Case ***State of New South Wales v Quirk*** **[2012] NSWCA 216**

Topic **Production of licence**

An authorised officer's authority under this provision has been described as an "unconditional authority": *State of New South Wales v Quirk* [2012] NSWCA 216 per Tobias AJA at [49]. However the authority is subject to it being used in the execution of the authorised officer's functions under the road transport legislation. In this case the court was also not called upon to consider the issue of entry onto private property to request details[1].

[1] **Entering private property to request details** In the absence of express or implied consent by the owner or person in charge of a property, police entering, or remaining on, private property will be trespassing, unless their presence is authorised by common law or statute. Statutory authority to enter a person's property without consent must be clearly expressed in unmistakable and unambiguous language: see *Coco v The Queen* (1994) 179 CLR 427; 120 ALR 415. The following South Australian case looked at the question of police entering private property to request details. Police officers detected the driver travelling in excess of the speed limit. They activated their siren and lights and followed the driver. She turned into her driveway. The police approached her in the driveway and she requested that

2.5 s 187 court may impose penalty and disqualify driver on conviction

Case ***Davis v Director of Public Prosecutions & Anor*** **[2011] NSWSC 153**

Topic **Requirement for conviction**

If a court for an offence under this division imposes a penalty under s 10A of the *Crimes (Sentencing Procedure) Act 1999* (that is, convicting an offender "without imposing any other penalty") in the belief that, because licence disqualification is a "penalty", there will be no disqualification of the offender from holding a driver licence and then emphasises that intention by purporting to make an order to that effect (ie that the offender is not to be disqualified from holding a driver licence), such an interpretation of the law is incorrect and such an order is beyond power. A penalty under s 10A gives rise to a conviction and the consequence of a conviction, by operation of the provisions in this division, is disqualification: *Davis v Director of Public Prosecutions (NSW) & Another* [2011] NSWSC 153.

Case ***Roads and Traffic Authority of New South Wales v O'Sullivan*** **[2011] NSWSC 1258**

Topic **Commencement and end of disqualification period**

James J adopted the obiter of Rothman J in *Hei Hei*[2], accepting that an interpretation of the power conferred by s 188(2)(d)(ii), that it does not include power to make a period of

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they leave. The police requested her details pursuant to s 42(2) of the *Road Traffic Act 1961* (SA) (an analogous provision to s 171) and she asked them to leave again. The police then attempted to arrest her and a struggle ensued. She was charged with speeding, failing to answer questions pursuant to s 42(2), and resisting arrest. The latter two charges were dismissed on the basis that after she had asked the police to leave, they were trespassing. It was held that s 42 did not authorise police to go onto a person's property to ask questions, and that such an interpretation of the section did not render it inoperative, and that there were alternatives available – such as police using the registration of the vehicle to obtain details of the owner: *Police (SA) v Dafov* [2007] SASC 451; (2007) 49 MVR 225. Affirmed by the Full Court of the South Australian Supreme Court: *Police (SA) v Dafov* (2008) 102 SASR 8; [2008] SASC 247; (2008) 51 MVR 80.

[2] The purpose of the Act is best served by construing this section as granting, to any judicial officer required to exercise the powers under s 188(2)(d)(ii), the discretion and flexibility to set appropriate commencement and conclusion dates for the period of disqualification in question. The power in s 187(1) does not readily imply a restriction on the manner by which courts may set the period. However, Rothman J went on to make the following obiter dictum (not needing to finally determine the issue). *Hei Hei v The Queen* (2009) 52 MVR 473; [2009] NSWCCA 87:

> [t]he difficulty with adopting a construction that implemented the above stated purpose … (and which purpose ought, to the extent possible, be given effect) is that s 188(2)(d) is a sub-paragraph immediately following on a provision relating to automatic disqualification. Section 188(2)(d)(i) provides that the offender is "automatically disqualified for a period of 3 years from holding a driver licence". It is axiomatic that, absent an order varying the period, the automatic disqualification would apply on and from the date of conviction. The jurisdiction and power conferred on the Court by the provisions of the next sub-paragraph, s 188(2)(d)(ii), is a capacity to order "a shorter period ... or longer period of disqualification. Further, it would seem that, once an order for disqualification issues from a court, the period of disqualification is no longer "automatic".
> The context of s 188(2)(d)(ii), following immediately upon the terms of subpara (i) seems to indicate that the "period" is a period that commences on the date of conviction.

disqualification commencing from a date other than the date of the offender's conviction for the major offence, can produce results which would frustrate the evident purpose of the Act. However, the terms and the context of s 188(2)(d)(ii) Act require an interpretation of the provision such that a court ordered period of disqualification can commence only from the date of the conviction of the driver for the major offence: *Roads and Traffic Authority of New South Wales v O'Sullivan* [2011] NSWSC 1258.

Case ***Roads and Traffic Authority of NSW v Higginson*** **[2011] NSWCA 151**

Topic Commencement and end of disqualification period

It is not necessary for the sentencing court to state an end date to the disqualification, since apart from any other matter the end date would be the product of the period of the order (in this case 12 months). Nor could an end date be stated, since the running of the period of disqualification might be interrupted by a stay pending an appeal, whereby the product of the period of 12 months would not be 12 calendar months after [the date of commencement]: *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151.

Case ***Meakin v Director of Public Prosecutions*** **(NSW) [2011] NSWCA 373**

Topic Severity appeals – obligation on appellant to put disqualification in issue

On a conviction and severity appeal against offences of drive manner dangerous and mid-range PCA, the appeals against severity were successful in that the sentences of periodic detention were quashed and the driver was re-sentenced to a period of community service. The Magistrate's disqualification orders for the two offences were not disturbed (the driver was disqualified for longer than the maximum automatic period provided for multiple offences in s 188(4)). The driver's argument, amongst others, on a question of law to the Court of Appeal was that there was a failure to take into account a relevant consideration in respect of a sentence. That is, the District Court judge should have considered, pursuant to s 188(4) whether the offences called for a longer period of disqualification or only the maximum automatic period. Held, there cannot be a failure to take into account a relevant consideration in respect of sentence that was not in issue in the proceedings. The appellant gave evidence in the appeal. His counsel did not ask any question about whether the appellant needed his licence for any purpose, or what his transport needs

were, or how he was managing his transport arrangements without a licence. The only reference to his motor vehicle was a question as to what he had done with it, the appellant's response being he sold it. If the period of disqualification was in issue, questions would have been asked that directly concerned it: *Meakin v Director of Public Prosecutions* (NSW) [2011] NSWCA 373.

2.6 s 188 disqualification for certain major offences

Case *Hugg v Driessen* (2012) 60 MVR 288; [2012] ACTSC 46

Topic Automatic and minimum disqualification periods

If the court is reducing the automatic period of disqualification to a lesser period, it has been held that expressing the reduction as a mathematical percentage was an error that distracted the court from its relevant task. In this case, the magistrate disqualified the driver for 18 months being a "50% discount on the three years which otherwise would have applied". Held, the question is not what mathematical discount should be allowed from the disqualification. The focus should be on what was required by the Guideline Judgment (*Re Attorney-General's Application (No 3 of 2002)* (2004) 61 NSWLR 305; [2004] NSWCCA 303 at [127]), namely, that there be good reason for reducing the default period of disqualification. The period of disqualification is not to be regarded in the same light as the statutory maximum fine or term of imprisonment for an offence. While also a penalty, it has a significant protective element to it: *Hugg v Driessen* (2012) 60 MVR 288; [2012] ACTSC 46.

2.7 s 188 disqualification for certain major offences

Case *Preston v The Queen* [2011] NSWCCA 25

Topic Sentencing

In a case of an offender being sentenced for dangerous driving occasioning death, the offender was at first instance sentenced to four years imprisonment with a non-parole period of three years. He was disqualified from driving for five years commencing from the date of his likely release from prison on parole (a practice that has in any event been criticised by the CCA in *Hei Hei v The Queen* (2009) 52 MVR 473; [2009] NSWCCA 87). He was a 60 year old professional truck driver who was of good character and who, apart from some very old PCA convictions, had a remarkably clean driving record. On appeal to the CCA both

the sentence and the disqualification were reduced (the disqualification to two years and to commence at the same time as the sentence, making it expire six months into the new non-parole period) with Beazley JA making the following observations regarding the disqualification: One of the purposes of a period of disqualification is to impress upon the offender the seriousness of the offences and the necessity of complying with the road rules. Both of these purposes have been brought home to the applicant by his conviction and his imprisonment. I see no other relevant purpose in this case to warrant the applicant not being permitted to drive shortly after his release from prison: *Preston v The Queen* [2011] NSWCCA 25 at [48].

Case ***Roads and Traffic Authority of NSW v Higginson*** **[2011] NSWCA 151**

Topic Severity appeals – appeal against period of disqualification - backdating

Where a person is disqualified from holding a licence, they may appeal to the District Court to have the period of disqualification reduced (or avoided entirely if no conviction is recorded). If the appeal is lodged within 28 days of the conviction then the execution of the sentence is stayed until the determination of the appeal. If the appeal is unsuccessful or only partially successful, the District Court may backdate the commencement of the disqualification period but not set an end date, so that any period to which s 189(6) applies can be taken into account. See s 189(6) of the Act and ss 63 and 68, *Crimes (Local Court Appeals and Review) Act 2001*. See also *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151.

Case ***Meakin v Director of Public Prosecutions*** **(NSW) [2011] NSWCA 373**

Topic Calculation of disqualification periods in case of multiple offences – subs (4)

For multiple traffic offences the Magistrate (and after a severity appeal, the District Court judge also) imposed upon the driver periods of disqualification longer than the maximum automatic period provided for in subs (4). There was no issue that the law allowed them to do so. The issue was, whether in the absence of reference by the Magistrate/Judge to the automatic period provided in s 188(4), it could be said there was a failure to take into account a relevant consideration when imposing the total period of licence disqualification. Held, there was no evidence the Magistrate did not take subs(4) and

the automatic period into account. In any event, the statute does not say the automatic period must be "taken into account". The statute expressly provides that the court may order disqualification, without identifying any relevant criteria, standards or limits (except for relevant minimum periods). On that basis there was no error in the sentence imposed by the Magistrate. As for the appeal, as the licence disqualification was not put in issue, there was no error by the judge in not considering subs (4): *Meakin v Director of Public Prosecutions (NSW)* [2011] NSWCA 373.

2.8 s 189 effect of disqualification

Case *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151.

Topic reconciling subs (6) and s 68 *Crimes (Appeal and Review) Act 2001*

Can s 189(6) be read without conflict with s 68 of the *Crimes (Appeal and Review) Act 2001*? The question was considered in the District Court: *Fewel v Director of Public Prosecutions* (2010) 12 DCLR(NSW) 1; [2010] NSWDC 195. This case decided that there was no conflict and that a District Court hearing a sentence appeal could in effect backdate a disqualification period notwithstanding any stay of execution of the disqualification pursuant to s 63 *Crimes (Appeal and Review) Act 2001*.

The question has subsequently been decided by the NSW Court of Appeal: *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151, a case in which the defendant upon conviction was disqualified in the Local Court pursuant to s 188(2)(d)(ii) for 12 months, to date from 8 June 2010. The defendant lodged an appeal against his sentence to the District Court, resulting in an automatic stay of sentence and disqualification. That stay continued until the disposal of the appeal on 26 July 2010 when the judge ordered, inter alia, disqualification for 12 months, to date from 8 June 2010 and expire on 7 June 2011.

The Court of Appeal also found there was no conflict, although its reasoning lead to a different result. The Court looked at the relationship between ss 188, 189 and ss 63, 68 and 71 *Crimes (Appeal and Review) Act 2001*. It held the District Court could backdate the start date but it could not set an end date. The application of s 189(6) would then mean that any stay of execution of the disqualification pursuant to s 63 was not counted as part of the disqualification. The District Court could not state an end date inconsistent with that which would come from the operation of s 189(6) and purporting to do so would exceed the

court's jurisdiction. That is because the effect of the District Court's order was that the defendant would have been in effect disqualified for less than the 12 months minimum under s 188(2)(d)(ii). By force of s 71 *Crimes (Appeal and Review) Act 2001*, the judge could not state an end date inconsistent with the statutory minimum period of 12 months, any more than the Magistrate could have done so.

Section 68(1A) does not permit a court to disregard other mandatory requirements in respect of sentencing. As for s 68(2), it does not enable an order overriding the length of a period of disqualification calculated as required by s 189(6): *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151.

Topic effect of a stay - subs (6)

As s 189(1) makes it clear that the effect of disqualification is that "the disqualification operates to cancel, permanently, any driver licence held" by that person, the effect of the "stay" is actually to make the relevant person eligible to apply for a fresh licence. There is no automatic revival of the original licence: *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151 per Young JA at [135] (Giles and Basten JA did not discuss this issue).

2.9 s 205 immediate suspension in certain circumstances

Case *Roads and Traffic Authority of New South Wales v O'Sullivan* [2011] NSWSC 1258

Topic subs 6 - disqualification - taking suspension into account

Section 205(6) does not confer any power on a magistrate to make an order under s 188(2)(d)(ii), commencing from a date other than the date of the relevant conviction, notwithstanding the production of a result which frustrates the evident purpose of the Act. In the present case, the mandatory minimum period of disqualification was 12 months. The magistrate could have utilised para (b) of s 205(6) so as to impose a period of disqualification which was less than 12 months (but not less by any more than the period of the suspension) but was not empowered by para (b) to make the period of disqualification commence from a date different from the date of the conviction. The terms and the context of s 188(2)(d)(ii), require an interpretation of the provision such that a court ordered period of disqualification

can commence only from the date of the conviction of the driver for the major offence: *Roads and Traffic Authority of New South Wales v O'Sullivan* [2011] NSWSC 1258.

2.10 s 219 impounding or forfeiture of vehicles on finding of guilt of driver who is a registered operator of the vehicle

Case ***Frohling v Police*** **[2011] SASC 53,** ***Rogers v Police*** **[2011] SASC 215,** ***Spring v Police*** **[2012] SASC 7**

Topic **Ameliorating operation of section where extreme hardship demonstrated – subs 5**

The following case looked at a cognate provision to subs 5 in South Australian legislation that used the phrase "severe physical or financial hardship". It was held that, given that it was the intention of parliament by such a provision to create a measure of hardship over and above the prescribed penalties for the relevant offences, it is clear that if a defendant is to avail him/herself of the hardship provisions, he/she is required to establish something more than ordinary hardship. The magistrate was not obliged to consider that the significant monetary penalty and disqualification imposed for the substantive offence were of themselves matters that brought the case beyond the threshold of ordinary hardship: *Frohling v Police* [2011] SASC 53.

It is incumbent upon a defendant who asks a court to decline to make an order to adduce the evidence necessary to satisfy the court of the severe consequences to the defendant if the order is made. If severe financial hardship will be caused, this will usually require evidence of the defendant's assets and income: *Rogers v Police* [2011] SASC 215.

A primary school relief teacher would be prevented from taking work at more distant schools if his vehicle was forfeited. Held, although without his vehicle the defendant would earn significantly less than he otherwise would have, loss of an opportunity to earn more, is not of itself, severe financial hardship. Forfeiture orders are intended to have an enhanced general deterrence effect by reason of the symbolism inherent in the loss of such an important personal possession: *Spring v Police* [2012] SASC 7.

3. ROAD TRANSPORT (GENERAL) REGULATION 2005

3.1 cl 14 determination of appeals concerning examiner's authorities and proprietor's authorities

Case ***RTA v Love*** **[2011] NSWSC 987**

Topic Determination of appeals - relevant considerations

In considering an appeal made to the Local Court under this regulation by an authorised examiner against a decision by the RTA to cancel his examiner's authority, the Supreme Court held that the Magistrate made the following errors of law in determining the appeal:

(i) failing to consider not only the individual defects that the examiner allowed to pass (rather than withhold a pink slip) but also the totality of the defects, both in number and seriousness, particularly against the background that, under cl 60(3) of the *Road Transport (Vehicle Registration) Regulation 2007*, it was a condition of the examiner's authority that he comply with the RTA rules.

(ii) failing to consider the examiner's deficiencies in record keeping.

(iii) failing to consider the question of the extent to which the examiner's failure to ensure defects were fixed prior to issuing a pink slip was deliberate, accidental or the product of gross negligence or incompetence.

(iv) remarking upon the cancellation of the examiner's livelihood where there was no evidence that suspension or cancellation of the examiner's authority would effectively cancel his livelihood. The impact of any order upon the examiner was a relevant consideration. Undoubtedly, the protection of the public and the effectiveness of the inspection system were of more importance: *RTA v Love* [2011] NSWSC 987.

3.2 cl 20 determination of appeals concerning driver licensing

Case ***Massarani v Roads and Traffic Authority (NSW)*** **[2011] NSWSC 1520**

Topic Decision is "final and binding"

The applicant lodged an appeal to the Local Court under cl 18 against an RTA imposed

suspension. The matter was fixed for hearing. The applicant failed to appear at the hearing and his application was dismissed. He filed an appeal to the District Court. The District Court had no jurisdiction to hear the appeal: *Massarani v Roads and Traffic Authority (NSW)* [2011] NSWSC 1520.

3.3 cl 39 definitions (Part 6 heavy vehicle driver fatigue)

cl 60 counting time, including work and rest time

Case *Roads & Traffic Authority (NSW) v Trinci* [2011] NSWSC 211

Topic "major rest break", "relevant major rest break"

There is no ambiguity or conflict between the definition of "major rest break" in cl 39 and the phrase "relevant major rest break" in cl 60. "Major rest break" is defined flexibly in cl 39 because it is intended to apply to each of the clauses dealing with minimum rest periods for the different regimes and the different categories of driver. It is defined as "at least 5 continuous hours" in recognition of the fact that for a 24 hour work period cl 66 requires a break of 5 continuous hours but other clauses require longer periods.

In any given case it is necessary to identify the clause of the *Regulation* which governs the situation, which will depend on the category of the driver and the regime under which he works. Any rest break under that clause of 5 continuous hours or more will be a major rest break for the purpose of the clause. This is what is meant by "relevant major rest break" in cl 60(3)(a): *Roads & Traffic Authority (NSW) v Trinci* [2011] NSWSC 211.

cl 68 BFM hours - solo drivers

Case *Roads & Traffic Authority (NSW) v Trinci* [2011] NSWSC 211

Topic Counting time

Clause 68 is silent as to the time at which any 24 hour period might begin. It is cl 60(3), in conjunction with one of the definitions in cl 39, which bears on this question: *Roads & Traffic Authority (NSW) v Trinci* [2011] NSWSC 211.

3.4 cl 84 false entries

Case ***Director of Public Prosecutions v Robert Alan Pearce*** **[2011] NSWLC 32**

Topic Sentencing considerations

Although the misconduct is of an outwardly minor nature, it can represent a "mindset of disobedience" on the part of the offender that increases the potentiality for more serious offences: *Director of Public Prosecutions v Robert Alan Pearce* [2011] NSWLC 32.

4. ROAD TRANSPORT (MASS, LOADING AND ACCESS) REGULATION 2005

4.1 cl 63 exercise of direction powers by authorised officers

Case ***Roads and Maritime Services v Mainey*** **[2012] NSWSC 442**

Topic Similar words – subcl (4), validity of subcl (4)

It was held that signs reading "Heavy Vehicle Checking Station 1km. Vehicles Over 8 Tonnes Must Enter" were notices of "similar words" pursuant to subcl (4) and thus properly constituted a direction to stop under s 136(1) of the *Road Transport (General) Act 2005*: *Roads and Maritime Services v Mainey* [2012] NSWSC 442.

Is the regulation itself a lawful or valid regulation pursuant to the regulation making power in s 10 of the *Road Transport (General) Act 2005*? Firstly, there is no inconsistency between the regulation and the Act. Further, the terms of the regulation which provide an acceptable set of words for the purposes of a direction under s 136 of the Act are not an extension of the scope or general operation of the enactment but are ancillary to it. The Act provides that a direction to stop may be given. The regulation provides that the words of that direction may be as prescribed. The regulation does not widen the purpose of the Act, add a new or different means of carrying out or departing from the Act, nor is it in any other way repugnant to the terms of the Act: *Roads and Maritime Services v Mainey* [2012] NSWSC 442.

5. ROAD TRANSPORT (SAFETY AND TRAFFIC MANAGEMENT) ACT 1999

5.1 s 9 presence of prescribed concentration of alcohol in person's breath or blood

Case ***Aloisi v Police*** **[2011] SASC 129**

Topic **Lozenge defence**

An expert in breath alcohol machines gave evidence that the consumption of a "Fisherman's Friend" lozenge shortly before a breath analysis test would affect the proper operation of a breath analysis machine. He said it would cause the machine to produce a reading that was falsely elevated and did not reflect the actual level of blood alcohol concentration. Ultimately no finding was made on the expert's evidence as the court rejected the driver's evidence that he had consumed the lozenges between his roadside breath test and subsequent breath analysis: *Aloisi v Police* [2011] SASC 129.

5.2 s 13 power to conduct random breath testing

Case ***State of New South Wales v Quirk*** **[2012] NSWCA 216**

Topic **reasonable cause to believe**

The focus upon on an extraneous motive on the part of a police officer has nothing to do with whether or not there was an absence of reasonable cause with respect to an allegation that a driver had failed to undergo a breath test. Whether the police officer liked or disliked the driver is irrelevant. Whether he was angry with him or not is equally irrelevant as to whether there was an absence of reasonable cause. There is no lack of bona fides arising from the fact that the driver does not smell of alcohol or appear to have been drinking. The provision does not require any suspicion on the part of the police officer that the person who was required to undergo a breath test should smell of alcohol or otherwise present as having possibly been drinking alcoholic liquor at any relevant time: *State of New South Wales v Quirk* [2012] NSWCA 216.

5.3 s 13 power to conduct random breath testing

Case ***Lawson v Dunlevy*** **[2012] NSWSC 48**

Topic **Breath testing as a bail condition**

There is no power under the *Bail Act 1978* to impose as a condition of bail that a defendant submit to a breath test when requested by a police officer: *Lawson v Dunlevy* [2012] NSWSC 48.

5.4 s 15 breath analysis following arrest

Case ***Murphy v Police*** **[2011] SASC 138**

Topic **"medical grounds" defence subs 5**

After providing a valid first sample, the driver was unable to provide any further valid sample on his subsequent blows. An experienced heart specialist provided evidence that the driver suffered from atrial fibrillation (irregular heart rate) and that in a stressful situation his increased heart rate would lead to breathlessness. The court was satisfied the defence was proved: *Murphy v Police* [2011] SASC 138.

5.5 s 25 police officer may require sobriety assessment

Case ***Director of Public Prosecutions v Langford*** **[2012] NSWSC 310**

Topic **Conscious process of assessment required**

A driver was pulled over for a RBT. A breath test was administered with a negative result. The officer smelt a strong odour of cannabis in the vehicle. He saw an extinguished cigarette butt on the floor (later analysed and found to contain cannabis). He also made a number of observations about the driver, such as bloodshot eyes and slow speech. Based on these observations the driver was taken to a hospital for blood and urine samples.

The court held that there was no evidence that a formal assessment of the driver's sobriety was made. The section requires a conscious process of assessment. Simply making observations which may lead to the formation of a reasonable belief as to the state of a person's ability, as a pre-condition for requiring a person to submit to a sobriety assessment, is not itself a sobriety assessment: *Baulman v The Queen* (2007) 6 DCLR (NSW) 1.

The decision in *Baulman* was followed in *Police v Murray* [2011] NSWLC 1. *Murray* was cited with approval in *Director of Public Prosecutions v Langford* [2012] NSWSC 310.

5.6 s 27 procedure for taking samples following arrest

Case ***Director of Public Prosecutions v Langford*** **[2012] NSWSC 310**

Topic Exclusion of test results improperly obtained

Blood and urine samples improperly or unlawfully obtained might not be admitted into evidence pursuant to s 138 of the *Evidence Act 1995* (NSW): *Baulman v The Queen* (2007) 6 DCLR (NSW) 1.

The following case focussed chiefly on the manner a court should undertake the enquiry posed by s 138 of the *Evidence Act 1995* (NSW) (the Director of Public Prosecutions having conceded that the blood sample was unlawfully obtained the only issue was whether the Magistrate had erred in her exercise of the s 138 discretion). Cited with approval were the observations in *R v Camilleri* [2007] NSWCCA 36 that where the breach of the law is innocent and the alleged offence serious, there must be powerful countervailing considerations before the evidence is rejected: *Director of Public Prosecutions v Langford* [2012] NSWSC 310.

5.7 s 32 evidence concerning concentration revealed by breath or blood analysis in proceedings for offence under s 9

Case ***Police v Tully*** **[2011] SASC 242**

Topic Displacement of statutory presumption – "unless the defendant proves"

In looking at a cognate South Australian provision, it was held that expert evidence that the driver's blood alcohol concentration at the time of driving "could have been as low as 0.04%" was insufficient to rebut the statutory presumption. That it is possible that there was a lower reading at the time of driving is not enough: *Police v Tully* [2011] SASC 242. NB - the above opinion was the expert's revised evidence. Initially his opinion was the driver's blood alcohol concentration "was probably about 0.04%". The court made no comment at to what it would have found had the expert remained of his initial opinion. Arguably it would have been sufficient to displace the presumption, subject to further clarification of his use of the word "about".

Case ***Police v Douglas*** **[2011] SASCFC 148; (2011) 60 MVR 78**

Topic **Displacement of statutory presumption – conflicting breath analysis and blood test readings**

The defendant's breath analysis sample provided at 10.20pm returned a reading of 0.098 grams of alcohol in 100 millilitres of his blood. Two hours and ten minutes later at 12.30am the defendant provided a blood sample which was analysed and returned a reading of 0.034 grams. This was an elimination rate of 0.027 grams per hour. There was no issue about the conduct of the breath analysis nor any operator error. The expert evidence at first instance was that the discrepancy between readings was outside the normal process of metabolism and elimination, however it was possible for a very high elimination rate to be achieved by a chronic alcoholic. There was no evidence before the court that the defendant was a heavy drinker or chronic alcoholic. The magistrate found that the two results were reconcilable allowing for the defendant having a higher than normal elimination rate. On appeal it was held that the presumption as to the accuracy of the result had been rebutted and that the magistrate erred in reconciling the results in the absence of any evidence: *Douglas v Police* [2011] SASC 50, affirmed in *Police v Douglas* [2011] SASCFC 148; (2011) 60 MVR 78.

In the Full Court appeal the Crown argued that it was unsafe to rely on statistical analyses of alcohol elimination rates and that if the defendant wanted to rebut the presumption he needed to undergo tests to establish his own particular elimination rate. This argument was rejected with the Court finding that the evidence of the expert was relevant and probative notwithstanding his opinion relied in part on statistical analyses. Statistical evidence based on matters of medical science is commonly presented in court through expert opinion: *Police v Douglas* [2011] SASCFC 148; (2011) 60 MVR 78.

5.8 s 41 conduct associated with road and drag racing and other activities

Case ***R v Mohamed Gebara*** **[2012] NSWDC 68**

Topic **The disqualification period is mandatory – subs (7) and (8)**

The driver was convicted of an aggravated burnout offence under s 41(2)(b). He was fined and disqualified for twelve months. On a severity appeal to the District Court, it was

argued by the driver that the use of the word "Any" in subs (8) necessarily implied the existence of a residual discretion with the court to reduce the disqualification period in subs (7). Held, although the court was of the view the disqualification provision was ambiguous, it relied on s 34 of the *Interpretation Act 1987* (NSW) to refer to the Second Reading Speech of the relevant bill relating to the provision. That speech made it clear that parliament did intend that the court should have no discretion to reduce the period of disqualification: *R v Mohamed Gebara* [2012] NSWDC 68.

5.9 s 42 negligent, furious or reckless driving

Case *R v Stanyard* [2012] NSWDC 78

Topic manner dangerous

Speed is an element which may be properly considered when the charge is one of "driving in a manner dangerous": *Ex parte Stone* (1909) 25 TLR 787; *Beresford v Richardson* [1921] 1 KB 243. Evidence that the driver's speed was only slightly above the speed limit does not necessarily lead to a conclusion that the driving was not dangerous. Just because an area is governed by a particular speed limit it does not mean that a person is entitled to drive at that speed everywhere in that area and in all circumstances. A speed limit says nothing about whether it is safe to travel at that speed in all circumstances. For example it may be dangerous to drive around a hairpin bend at the maximum speed allowed. A driver must always be prepared to drive at a speed below the speed limit because the conditions in the particular area where the driver is travelling make it unsafe to travel at the speed limit: *R v Stanyard* [2012] NSWDC 78.

5.10 s 42 negligent, furious or reckless driving

Case *Hansen v Slattery Transport (NSW) Pty* (2012) 60 MVR 516; [2012] NSWCA 145

Topic Negligence: speed

At trial the judge found one of the drivers was travelling too fast in the circumstances, however negligence was not established as the driver could not have avoided the collision. She was not persuaded that the driver's speed caused or contributed to the

accident. On appeal, held, having accepted the driver was travelling too fast in the circumstances, the trial judge should have concluded that negligence was established. The finding that the driver was not negligent involved the implicit conclusion that, on the assumption he was keeping a proper lookout, it was not unreasonable for him to be travelling at a speed which did not allow him to stop or avoid a slow moving vehicle in his lane. That conclusion should not be accepted. A reasonable driver would have taken the precaution of lowering his or her speed so as to be able to stop or take evasive action if the risk materialised: *Hansen v Slattery Transport (NSW) Pty* (2012) 60 MVR 516; [2012] NSWCA 145.

5.11 s 42 negligent, furious or reckless driving

Case ***Hansen v Slattery Transport (NSW) Pty*** **(2012) 60 MVR 516; [2012] NSWCA 145**

Topic **sentencing**

Where the occasioning of death is an element of the offence, it is not a circumstance of aggravation: *Lute v The Queen* (2012) 60 MVR 475; [2012] NSWCCA 67.

5.12 s 46 certificates concerning use of approved speed measuring devices

Case ***RTA v Addario*** **[2011] NSWSC 1285**

Topic **Evidence to the contrary**

Amendments to s 46 and 47 after the decision in *Baldock*[3] need to be born in mind when applying its principles: *RTA v Addario* [2012] NSWSC 1285.

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[3] Spigelman CJ held that "'evidence that the device was not accurate or not reliable', within the meaning of s 46(2) must be evidence relating to the device as such, not the product of the application of the device in the form of one or more measurements of speed": *Roads and Traffic Authority (NSW) v Baldock* [2007] NSWCCA 35 at [49].

Nonetheless it is important to bear in mind that a defendant's evidence that the vehicle was travelling at a lower speed than that measured by a speed measuring device is admissible on the ultimate issue of whether an offence has been committed: *Roads and Traffic Authority (NSW) v Baldock* [2007] NSWCCA 35 at [45].

5.13 s 70 offence of failing to stop and assist after impact causing injury

Case ***R v Sully*** **[2012] SASCFC 9**

Topic involved in an impact

The following case looked at a cognate South Australian provision, where the issue was the interpretation of the words "involved in an accident". The driver was a participant in a road race with another vehicle. That other vehicle impacted with a third car. The driver was convicted, inter alia, of leaving an accident scene after causing death by careless driving. On appeal, the driver argued that he could not properly be convicted of the offence because the statutory obligation to stop and render assistance falls only upon the driver of a vehicle "involved in an accident", which, he argued, he was not. He argued only the drivers of the two vehicles which came into collision were involved in the accident and that being a penal provision, it had to be read narrowly. Held, dismissing the appeal against conviction, involvement in an accident need not take the form of coming into collision with another vehicle. As a matter of commonsense there is no reason why several drivers of vehicles cannot be involved in the same accident some colliding with another car and some not. The essence of involvement is the connection or association or concern in the accident. It was not in issue here that the driver was aware of the accident. Further, it would be perverse given the driver's other conviction (for aiding and abetting the dangerous driving of the other defendant) to find that he was not the driver of a vehicle involved in an accident which directly resulted from that dangerous driving: *R v Sully* [2012] SASCFC 9.

5.14 s 73A rebuttal of evidence of matters of specialised knowledge

Case ***RTA v Addario*** **[2011] NSWSC 1285**

Topic Section 73A does not prevent lay evidence that contradicts a s 46 certificate

A driver was charged with speeding in a school zone. Along with the s 46 certificate were tendered photos that indicated he was detected at 9.16am. The driver's evidence was that, at that time, he was at a service station 200 metres away. He tendered two dockets, one obtained when he started filling up with petrol and the other once he had finished. The former bore the time 9.15am and the latter 9.23am. These dockets raised a sufficient doubt in the magistrate's mind and the charge was dismissed. On appeal, the RTA argued that "assertion" in subs (2) should be understood as "evidence" and that no evidence other than by a person with relevant specialised knowledge was admissible. Held, as a matter of simple

statutory construction, given the word “evidence” is used in subs (1) and (2), the use of a different word “assertion” reflects a different meaning. An enactment that denies a defendant a right to tender exculpatory evidence is not to be given a wider interpretation that it clearly bears and the Court rejected the argument that because the defendant’s evidence was not adduced from a person with specialised knowledge it was inadmissible. Section 73A does not prohibit all evidence other than from someone with specialised knowledge. The magistrate was entitled to take into account the defendant’s evidence and regard that evidence as leading to the existence of a reasonable doubt and this was consistent with the decision in *RTA v Baldock* [2007] NSWCCA 35, (2007) 168 A Crim R 566: *RTA v Addario* [2011] NSWSC 1285.

6. ROAD TRANSPORT (DRIVER LICENSING) ACT 1998

6.1 s 25A offences committed by disqualified drivers or drivers whose licences are suspended or cancelled

Case ***Director of Public Prosecutions v Sukhera*** **[2012] NSWSC 311**

Topic **Double jeopardy**

The driver's licence was suspended due to fine default. Shortly thereafter he was stopped for a random breath test and returned a reading of 0.029. By reason of the suspension the driver was a special category driver so was charged with the special range PCA offence (in addition to being charged with driving while suspended). The Magistrate convicted him of driving a motor vehicle while suspended contrary to s 25A(3A)(a)(i) *Road Transport (Driver Licensing) Act 1998* but dismissed the special range PCA offence under s 9(1)(a) on the basis the driver was in a "Catch 22" situation because "he can't qualify for one unless he's got the other". Held, if the Magistrate believed he was applying the principle of double jeopardy or autrefois convict, or that in proceeding on both charges there was some abuse of process, he was in error. The constituent elements and factual allegations relied upon in proof of each were quite different. The only relevance of the driver's suspended licence in regards to the PCA offence was that it dictated the blood alcohol level which applied to him because of his status as a suspended driver. Neither offence was wholly included in the other. The offences were quite separate and distinct: *Director of Public Prosecutions v Sukhera* [2012] NSWSC 311.

6.2 s 25A offences committed by disqualified drivers or drivers whose licences are suspended or cancelled

Case ***Police v Anton Karel Tocin*** **[2011] NSWLC 24**

Topic **sentencing**

The gravamen of the offence of driving whilst disqualified is the direct disobedience of a court order. The maintenance of the rule of law requires that citizens comply with court orders: *Police v Anton Karel Kocin* [2011] NSWLC 24.

7. ROAD TRANSPORT (VEHICLE REGISTRATION) ACT 1997

7.1 s 16B register of written-off vehicles

Case ***K & M Prodanovski Pty Limited v Calliden Insurance Limited*** **[2011] NSWSC 738 (affirmed in** ***K & M Prodanovski Pty Limited v Calliden Insurance Limited*** **[2012] NSWCA 117)**

Topic "written-off vehicle"

For a case that looks at evidence of whether a vehicle is written-off pursuant to subs (3)(f) see *K & M Prodanovski Pty Limited v Calliden Insurance Limited* [2011] NSWSC 738.

8. ROAD TRANSPORT (VEHICLE REGISTRATION) REGULATION 2007

8.1 cl 83C non-repairable damage

Case ***K & M Prodanovski Pty Limited v Calliden Insurance Limited*** **[2011] NSWSC 738 (affirmed in** ***K & M Prodanovski Pty Limited v Calliden Insurance Limited*** **[2012] NSWCA 117)**

Topic " non-repairable damage "

For a case that looks at evidence dealing with the factors in subs (1)(c) see *K & M Prodanovski Pty Limited v Calliden Insurance Limited* [2011] NSWSC 738.

POSTSCRIPT

I hope you found this paper useful. Comments and feedback are welcome at angel@adaevanschambers.com

Nic Angelov

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