Ada Evans Chambers Conference

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Motor Traffic Law:

Selected case law and legislation update

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1. ROAD RULES 2008

Amendments to the Road Rules 2008

A raft of amendments and some new rules were introduced to the *Road Rules 2008* by the *Road Amendment (Miscellaneous) Rules 2012* (Reg No 533 of 2012). They came into force on 1 November 2012.

One of the significant changes has been the tightening of mobile phone laws. There are also new rules for using roundabouts, overtaking, giving way to pedestrians and changes relevant to the heavy vehicle industry. A selection of changes are outlined below.

Mobile phones - rule 300

Drivers are now required to have their mobile phone completely hands free or mounted if they want to talk on the phone while driving. The phone cannot be anywhere on the driver's body, including the driver's lap, even if the phone is on loud speaker. Drivers are prohibited from holding or touching a phone at all times unless a vehicle is parked or they are passing the phone to a passenger. Texting, video messaging and e-mailing are prohibited while driving.

Roundabouts - rr 112, 113

Drivers entering a roundabout and intending to turn either left or right must give sufficient warning to other road users by signalling before entering the roundabout. Before this change a driver had to indicate only when entering a roundabout.

Overtaking - r 143

Circumstances where a vehicle may pass or overtake another vehicle displaying a “do not overtake turning vehicle” sign have been clarified. Such a manoeuvre can occur where it is safe to do so if: the vehicle is on a multi-lane road or, the other vehicle is signalling a turn right or making a u-turn from the centre of the road or, if the other vehicle is stationary.

Pedestrians - rr 67 et al, 235A

A driver must give way, when turning into a road at an intersection, to any pedestrian who may be crossing the particular road the driver is entering.

A pedestrian is prohibited from crossing at a railway level crossing if the pedestrian approaches a crossing showing a red pedestrian light.

Long vehicles - rr 127, 227

A driver of a long vehicle, while driving behind another long vehicle, must keep at least 60 metres behind the long vehicle ahead. This rule applies when not driving in a built-up area or multi-lane road, or if the driver is overtaking.

There are increased obligations for warning triangles to be placed on the road for drivers of heavy vehicles with a GVM greater than 12 tonnes that stop or have a fallen load on a road with a speed limit of 80 km/h or more.

New rules

Newly introduced rules are:

Rule 164A - staying stopped if a tram comes from behind a stopped driver and stops

Rule 235A - crossing a pedestrian level crossing that has a red light

Rule 353 - References to pedestrians crossing a road

rr 287 - Duties of a driver involved in a crash

Driver cannot choose between complying with sub-rule (2) and (3)

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 LEGISLATION REFORM "BACK TO THE FUTURE"

Those who have lamented the demise of the *Traffic Act 1909* and its splintering into numerous separate road transport Acts will soon have cause to rejoice. The following cognate bills were introduced in the Legislative Assembly and had their Second Readings on 19 February 2013:

Road Transport Bill 2013
Road Transport Legislation (Repeal and Amendment) Bill 2013
Road Transport (Statutory Rules) Bill 2013

They were passed without amendment in the Assembly and introduced in the Legislative Council on 27 February 2013. The bills await passage through both Houses and then assent. The first two will commence on proclamation and the Statutory Rules bill on the repeal day in the Repeal and Amendment bill.

In short the proposed *Road Transport Act 2013* will provide for the consolidation of a number of road transport Acts into a Single Act.

Attached are the explanatory notes for each bill.

3. ROAD TRANSPORT (GENERAL) ACT 2005

s 3 - Definitions - "road", "road related area"

Road/road related area: 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.

Road/road related area: "open to or used by the public"

A question arose as to whether a person who was injured in the loading bay of a vegetable merchant's premises was injured on a "road" within the meaning of the *Motor Vehicles Act 1959* (SA). The chief question to be decided in the appeal was whether the loading bay was "open to or used by the public". The majority (Kourakis CJ and Blue J, Gray J dissenting) discussed a number of authorities which they found establish the following general propositions as to whether a road or road related area "is open to or used by the public":

(i) It is not necessary that the land be publicly owned or that there be a public right of access or use. Different considerations apply to private land compared to public land in this sense.

(ii) In the case of private land, the composite phrase "open to or used by the public" encompasses legal entitlement to entry by the public (*de jure*) as well as actual use by the public (*de facto*). The words "open to" are more apposite to the former and the words "used by" are more apposite to the latter.

(iii) In the case of private land, the phrase "open to ... the public" refers to an invitation or licence expressly or impliedly extended to members of the public by the private occupier. The question is not whether the land is physically open to the public, although the existence or non-existence of a physical barrier to entry may be one factor in assessing whether an invitation is extended to the public.

(iv) For this purpose, there is a distinction between a general invitation extended without

discrimination to the public and a series of invitations restricted to specific invitees for the purpose of transacting business with the occupier or otherwise. Much will depend on the circumstances including the restrictions upon those eligible for entrance and the scope of the permitted uses on gaining access.

(v) The mere fact that a fee is charged or that the area is used only by members of the public with a particular interest (for example, swimming or natural history in the case of public pools and museums respectively) does not of itself establish that it is not “open to the public”.

(vi) In the case of private land, the phrase “used by the public” refers to actual use (even without the permission of the occupier) by the public but not to mere use by specific invitees or to an isolated use by a member or members of the public: *Zerella Holdings Pty Ltd v Williams and Another* (2012) 61 MVR 508; [2012] SASCFC 100.

s 20 - Definitions - "consignor"

Consignor: when a consignor - "named or ... identified" - same entity as consignee - "engages" - "immediately"

A person cannot be described as a consignor until he has consigned goods for carriage to a consignee: *Penn Elastic Company Pty Ltd v Sadleirs Transport Co (Vic) Pty Ltd* (1976) 136 CLR 28; [1976] HCA 28, a proposition quoted as consistent with ordinary meaning and applicable to the definition in s 20: *Endycott (Roads and Maritime Services) v Bulga Coal Management Pty Ltd* [2012] NSWSC 1124.

The naming or identifying of the consignor does not have to be evident on the face of the transport documentation. The statutory language is “in” the documentation, not “by” the documentation which is consistent with the very wide ambit of the definition of transport documentation much of which by its very nature would be unlikely to specify parties by name. It is available to look at received evidence to determine whether or not any person is otherwise identified as the consignor (not a consignor) in the transport documentation: *Endycott v Bulga Coal Management Pty Ltd* [2012] NSWSC 1124.

The same entity can be consignor and consignee. It must be a frequent occurrence that a single entity dispatches its own goods from one place to another and it does not challenge logic in such circumstances that the dispatcher is both consignor and consignee: *Endycott v Bulga Coal*

Management Pty Ltd [2012] NSWSC 1124.

“Engages” ((b)(i)) means a contractual engagement. Even if the operator were to act gratuitously, the concept of engagement would still apply: *Endycott v Bulga Coal Management Pty Ltd* [2012] NSWSC 1124.

"Immediately" ((b)(ii)) is open to debate but ambiguity should be resolved favourably to the party in jeopardy of criminal sanction. In this case, a hire company engaged a transport company to pick up a piece of hired equipment that the defendant had finished using. Apart from “small talk” it was held the defendant did not instruct, authorise or otherwise impinge on the transport company driver's independent conduct of the collection activity. On that basis it was held that immediately before the equipment was transported by road, the defendant neither had possession or control of it: *Endycott v Bulga Coal Management Pty Ltd* [2012] NSWSC 1124.

s 20 - Definitions - "loader"

Loader: "supervises" - "manages or controls"

Supervision (d) is not fulfilled by mere observation. To find a person supervised an activity requires some evidence of superintendence or involvement in direction of at least part of the activity of loading: *Endycott v Bulga Coal Management Pty Ltd* [2012] NSWSC 1124.

Management or control (e) must relate to an activity mentioned in the preceding paragraphs. Control of movement of the chattel is not control of loading it: *Endycott v Bulga Coal Management Pty Ltd* [2012] NSWSC 1124.

s 53 - Liability of consignor

Consignor

The defendant (Bulga) needed a large elevated work platform (EWP) and it contracted to hire one from Rapid Access Australia (Rapid). Rapid contracted with a carrier, Griffiths Transport (Griffiths), to deliver and collect it. On the collection journey between Bulga's mine site and the intended destination at Rapid's yard, the EWP, which was being conveyed on a prime mover driven by an employee of Griffiths, struck and demolished a pedestrian overbridge. The RMS commenced proceedings against Bulga, Rapid and Griffiths. The driver was also prosecuted and fined. The RMS

charged Bulga with liability as a consignor of goods or alternatively, as a loader of them. Held, Bulga was not a consignor of the goods. Bulga had no part in the arrangements for collection, the contract was between Rapid and Griffiths. Although Bulga was charged a delivery fee as well as chattel hiring charges as part of its contract with Rapid, that delivery fee was entirely divorced from any contract of carriage between Rapid and Griffiths. Rapid contracted with Griffiths to collect its own goods and return them to its yard. The contract between Bulga and Rapid was entirely fulfilled when Rapid's agent, Griffiths, took possession of the EWP at the mine site. Bulga did not meet the definition of a consignor under either of the bases provided for in s 20. The "transport documentation" (s 20(a)) referred only to Griffiths and Rapid. Rapid was able to be both the consignor and consignee of the EWP. Bulga in no way "engage[d]" (s 20(b)(i)) an operator to transport the EWP. It was only required to yield possession to Griffiths. "Immediately" (s 20(b)(ii)) before the EWP was transported by road, Bulga had neither possession or control of it: *Endycott v Bulga Coal Management Pty Ltd* [2012] NSWSC 1124. See also commentary at ss 20 and 55.

s 55 - Liability of loader

Loader

The defendant (Bulga) needed a large elevated work platform (EWP) and it contracted to hire one from Rapid Access Australia (Rapid). Rapid contracted with a carrier, Griffiths Transport (Griffiths), to deliver and collect it. On the collection journey between Bulga's mine site and the intended destination at Rapid's yard, the EWP, which was being conveyed on a prime mover driven by an employee of Griffiths, struck and demolished a pedestrian overbridge. The RMS commenced proceedings against Bulga, Rapid and Griffiths. The driver was also prosecuted and fined. The RMS charged Bulga with liability as a consignor of goods or alternatively, as a loader of them. The evidence showed that a Bulga employee provided a safety induction upon the driver's entry to the mine site, there was some "small talk" between them and the Bulga employee watched the driver load the EWP. Held, Bulga was not a loader of the goods. Bulga did not meet the definition of a loader under s 20. Supervision (s 20(d)) is not fulfilled by mere observation. To find a person supervised an activity requires some evidence of superintendence or involvement in direction of at least part of the activity of loading. Management or control (s 20(e)) must relate to an activity mentioned in the preceding paragraphs of the definition. Control of movement of the chattel is not control of loading it: *Endycott v Bulga Coal Management Pty Ltd* [2012] NSWSC 1124. See also commentary at ss 20 and 53.

s 171 - Authorised officer may require production of driver licence and name and address from driver or rider

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.

s 177 - Double jeopardy

Ambiguity of provision - possibility of abuse of process notwithstanding s 177 not applying

In the context of analysing multiple charges based upon a single act brought against a company under cll 49, 50 and 64 of the *Road Transport (General) Regulation 2005*, the Court in obiter found that it is doubtful that this section prevents the entry of conviction for more than one offence. Subsection (1) is not easy to understand. It speaks of a person's being "liable" in more than one capacity. The liability must be "in relation to the same failure ..." but whether the section refers to a liability to be convicted or merely a liability to be prosecuted in more than one capacity is not clear. The section is clear when it states that a person may be punished only once. If the parliament had intended the person to be convicted only once it would have presumably had said so. Accordingly, s 177 is not a bar to the bringing of the multiple charges in this case. A concluded view was not required as the Court found the multiple charges arising from the single underlying event were an abuse of process: *Palfrey v South Penrith Sand & Soil Pty Ltd* [2012] NSWSC 1357. See also commentary at cl 49 *Road Transport (General) Regulation 2005*.

s 188 - Disqualification for certain major offences

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.

s 219A - Commutation of forfeiture

Ameliorating operation of forfeiture provisions where extreme hardship demonstrated

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.

4. ROAD TRANSPORT (SAFETY & TRAFFIC MANAGEMENT) ACT 1999

s 9 - Presence of prescribed concentration of alcohol in person's breath or blood

Drives a motor vehicle

Propelling the vehicle through the use of the clutch pedal amounted to driving: *Buxton v Newall* [2011] TASSC 64; (2011) 60 MVR 86.

s 13 - Power to conduct random breath testing

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.

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.

s 32 - Evidence of alcohol concentration revealed by breath or blood analysis in proceedings for offence under section 9

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.

s 22 - Offence – hindering or obstructing health professional taking blood sample

Voluntariness

The following case looks at a cognate Victorian provision. The driver fell out of her vehicle while driving alone late at night. She struck her head very hard when she hit the road. At Hospital shortly

afterwards, she was aggressive and uncooperative. She refused to allow a doctor to take a sample of her blood. She was charged with refusing to allow a blood sample to be taken and convicted. On appeal to the County Court, expert evidence was given both for the Crown and the driver that her behaviour may have been the result of a severe head injury and she might not have understood the request. The judge dismissed the appeal on the basis that it was not an element of the offence that the driver's refusal had been conscious and voluntary. On appeal to the Supreme Court it was held, allowing the appeal, that it is a basic and fundamental principle of the common law that a person is held criminally responsible only for their conscious and voluntary acts. While a voluntary act or omission is the general foundation of criminal responsibility, it is not usually necessary for voluntariness to be expressly proved. It is presumed the act of an apparently conscious person is willed or done voluntarily. Subject to contrary statutory provision, a person cannot be guilty of a crime which they did not consciously and voluntarily commit. The relevant provision in this case did not expressly or impliedly abrogate that principle: *Dover v Doyle* [2012] VSC 117.

See also s 29 - offences related to sobriety assessments and testing for drugs. It would appear the reasoning of this decision would apply in NSW, given that s 29 has no clear abrogation of the common law principle of voluntariness. Note that an additional "medical grounds" defence is provided in s 29(3).

s 27 - Procedure for taking samples following arrest

Exclusion of test results improperly obtained

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 (see commentary at s 20 *Road Transport (Safety and Traffic Management) Act 1999*) 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.

s 33 - Certificate evidence about breath or blood analysis in proceedings for offences under section 9

Admissibility - failure to comply with subs (1)(e)

Subsection (1) provides that a certificate that (i) purports to be signed by a police officer and (ii) certifies the matters in subs (1)(a)-(f) is admissible and prima facie evidence of the particulars certified. One of the matters that must be certified is the concentration of alcohol expressed in grammes of alcohol in 210 litres of breath or 100 millilitres of blood: subs (1)(e). In a Northern Territory case dealing with a cognate provision a certificate was tendered where the concentration in the certificate was expressed as "0.080 % grams of alcohol per 210 litres of exhaled breath". The use of the percentage symbol was an error, in mathematical terms it actually represented a reading of 0.0008 grammes of alcohol. The tender was rejected. On appeal by Police, held, the result as expressed was a meaningless result. The contents of the certificate were therefore irrelevant and inadmissible in evidence. Even if allowed into evidence it could not have proved the charge against the driver. The certifying officer should have crossed out the percentage sign when he completed the certificate. He was not simply filling in a form. He was attesting to the reliability and accuracy of the information contained in the certificate, and was guaranteeing that the result of the analysis shown on, and recorded by, the breath analysis instrument was as stated in the certificate. Accordingly, the magistrate had not erred in rejecting the tender of the certificate: *Wride v Cunnah* [2012] NTSC 63.

s 40 - Races, attempts on speed records and other speed trials

Meaning of race - gaining advantage not required

The driver was charged under s 40(1)(a) with street racing. The evidence in the local court was that as the two vehicles passed an intersection, both accelerated harshly. They continued at about 97 km/h, which was in excess of the 80 km/h speed limit. They travelled side by side for a distance of 500 metres before police stopped the driver. The Magistrate found that there was no prima facie case because the evidence showed the drivers travelled side by side at the same level, whereas a race would require some attempt to overtake, even if incrementally. On appeal to the Supreme Court by the prosecution it was held that it was erroneous to adopt a construction of "race" that required, as an essential element, that one participant or another in the contest or competition in

fact gained some advantage over the other or others. The competitive element of a "race" is the desire, and the attempt, to gain that advantage. It does not necessarily lie in one participant or another in fact securing such an advantage. It is well accepted that a race can end in a "dead heat": *Director of Public Prosecutions v Borg* [2012] NSWSC 1535.

Meaning of race - grossly excessive speeding not required

An argument was advanced by the driver that travelling at approximately 97 km/h in an 80 km/h zone could not be said to amount to racing. The vehicles were capable of travelling at a considerably greater speed, therefore, the drivers were not testing the vehicles to the limit of their capacity. Held, it is not necessary, to constitute a race between vehicles, that the vehicles are extended to their maximum capacity as to speed: *Director of Public Prosecutions v Borg* [2012] NSWSC 1535.

s 41 - Conduct associated with road and drag racing and other activities

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.

s 42 - Negligent, furious or reckless driving

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.

Negligence: wrong side of road

Where the driver travels on a remote, unsealed track, relatively narrow (2 to 2.5 metres wide) gravel in parts with ruts and smoother edges, the driver does not necessarily fail to maintain a safe position on the track if he or she drives on the smoother edges rather than the rutted centre. However when approaching an intersection in the track it is incumbent on the driver to travel at a lower speed in approach, or come to a near stop, so as to gauge the situation of other traffic in the vicinity: *Lutton v Willingham & Nominal Defendant* [2012] NSWDC 92.

In the following case it was noted that dirt roads with dilapidated sides but a hardened centre safer to travel on makes it a common practice that drivers will travel on the centre portion of the road which can lead to traffic travelling in opposing directions competing for space: *Police v Smith* [2012] SASC 114.

Manner dangerous to the public

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.

s 70 - Offence of failing to stop and assist after impact causing injury

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.

s 47 - Photographic evidence of speeding offences

Inspection - adequacy of legislative provision: subs (5)

Section 47(5) requires the certificate to certify, inter alia, that on inspection the approved digital camera recording device was found to be operating correctly. However unlike s 46 (which provides for a testing procedure prescribed by the regulations), there is no regulation or other specification that identifies the manner in which this inspection takes place. The certificate in the present case contained a schedule giving information about the location and type of camera in question, and the date and time of inspection. The certificate also stated as “details”: "observed five vehicles pass the device and then observe images of those vehicles recorded by the device". The certificate said nothing about the certifier having made any observations or checks of the accuracy of the date and time recordings made by the device. It is a matter of concern that the certificate can provide prima

facie evidence of all matters recorded on a photograph, but the legislation does not require the accuracy of all the details recorded on the photograph to be checked periodically and certified to be correct: *Roads and Maritime Services v Addario* [2012] NSWCA 412 per Campbell JA.

s 70 - Offence of failing to stop and assist after impact causing injury

Sentencing considerations

A driver's responsibility for failing to stop after an accident is not mitigated because in practical terms there was little he could have done for the deceased. The driver would not know that for certain. What is important is that assistance be provided as soon as possible. Such assistance may save life, minimise injury, improve the prospect of recovery or, in this instance, preserve the dignity of the deceased: *WW v R* [2012] NSWCCA 165.

s 73A - Rebuttal of evidence of matters of specialised knowledge

Proper construction of s 73A - relationship with s 47 (5) & (6) - not a total bar to lay rebuttal evidence

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, held, the RTA's argument 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 should be rejected. 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 *Roads and Traffic Authority (NSW) v Baldock* (2007) 168 A Crim R 566, [2007] NSWCCA 35:

On further appeal by the RMS, held, the operation of this section is interrelated to and must be cohesive with the operation of ss 46 and 47. The single Judge misunderstood the RTA's position. The admissibility of the evidence was not in issue. Not even the operation of subs (2)(b) prevented its inadmissibility. The evidence's sufficiency to raise a doubt as to the accuracy, reliability or operation of the camera recording device was in issue. The operation of the section was misunderstood. Section 73A(2) is not a provision relating to the admissibility of evidence but rather to the sufficiency of evidence for a specific purpose. "Assertion" in subs (2) does not mean something different from "evidence". "Assertion" in this section refers to an assertion, whether by way of statement or opinion, given in evidence in proceedings in a court. Not only does any such assertion have to be given in evidence by a person with specialised knowledge, but also any such assertion would have to comply with the ordinary rules as to the admissibility of evidence and be given by a person with specialised knowledge within the terms of the section. Thus, hearsay assertions and opinion evidence, even if given by a person with specialised knowledge, would not be admissible except as provide for by the *Evidence Act 1995*.

The effect of this construction is that in a prosecution such as occurred here, as there was no assertion given in evidence by a person with specialised knowledge as to the accuracy, reliability and operation of the devices, the prosecution was not required to call other evidence in respect of those matters. However, the prosecution evidence does not thereby constitute conclusive evidence of the commission of the offence. It is evidence that is to be weighed with all the evidence in the case. In this case, the magistrate was required to determine whether the prosecution had proved its case beyond a reasonable doubt, having regard both to the evidence that the camera recording device was accurate, reliable and operating properly at the relevant time, and to the respondent's evidence: *Roads and Maritime Services v Addario* [2012] NSWCA 412 per Beazley JA, Tobias AJA agreeing, overruling *RTA v Addario* [2011] NSWSC 1285.

The purpose of this section together with ss 46 and 47 is to provide prima facie evidence of the commission of an offence. The provisions in question should be construed with that purpose in mind. There is no basis in the text of the statute for finding an intention that prosecutions for traffic offences alleged to have been detected by recording devices should be made undefendable.

An assertion by a defendant that he was at a different location at the time of the offence is not a

challenge to the accuracy or reliability of the prosecution photographs depicting the time of the offence (subs (2)(b)). It is an assertion by the defendant about where the defendant was on a particular date. It is admissible and its sufficiency to raise a reasonable doubt about the alleged offence would be a matter for the magistrate to assess: *Roads and Maritime Services v Addario* [2012] NSWCA 412 per Campbell JA.

5. ROAD TRANSPORT (DRIVER LICENSING) ACT 1998

s 14 - Demerit points register

Sections 14(2) and (3) - "a person" - foreign driver licence - cl 99 of Regulation does not create exemption to s 14

A foreign driver licence holder in New South Wales accumulated 18 demerit points in the preceding three years on that licence. When he applied for a New South Wales licence those demerit points were transferred to his new New South Wales licence which, as a result, was suspended. The applicant sought a review alleging breach of the *Privacy and Personal Information Protection Act 1998* (the *Privacy Act*) and that the collection of demerit point information was prohibited under cl 99 of the *Road Transport (Driver Licensing) Regulation 2008*. Clause 99(1)(b) provides that a holder of a foreign driver licence is "exempt from the requirements of the Act". Held, there was no breach of the *Privacy Act* and cl 99(1) does not exempt the RMS from its obligations to maintain a demerit point register in respect of all persons, including those driving on foreign licences, given the wording of s 14. Section 14 obliges the RMS to maintain a register where "*a person's* demerit points are recorded". This includes all persons who are driving on New South Wales roads, irrespective of their licence status: *AHS v Roads and Maritime Services (NSW)* [2012] NSWADT 116.

s 25A - Offences committed by disqualified drivers or drivers whose licences are suspended or cancelled

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.