LEGAL}{ EAGLES CLE

Continuing Legal Education for Criminal Lawyers

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RECENT DEVELOPMENTS IN SENTENCING FOR TRAFFIC OFFENCES INCLUDING POST O'SULLIVAN HIGGINSON AND MEAKIN

INTRODUCTION

I begin by thanking my good friend and Criminal Law Committee colleague Jane Sanders for delivering this paper to the Criminal Law Conference in Nha Trang, Vietnam. I am sorry I cannot be there with you.

It is now generally recognised that sentencing in all areas has become more complicated and in many ways it is no different as it relates to sentencing for serious traffic offences.

In talking about serious traffic offences I mean repeat PCA offences, driving in a manner/speed dangerous, driving whilst disqualified, particularly when combined with other PCA offences, and negligent driving causing death and/or grievous bodily harm.

Much of this paper relates to disqualifications, especially following on from **O'Sullivan's case**, but I have also included material relating to the guideline judgment, interlock licences, traffic offender programs, ICOs and habitual traffic offender declarations. I have also made reference specifically to negligent driving causing death and/or gbh because it is obvious that the Local Court is dealing with these types of matters with more severe penalties than what was previously imposed.

I trust the material is of assistance.

O'SULLIVAN

Tamara O'Sullivan was stopped in the early hours of the morning of 19th February 2011 having driven at a speed in excess of 45kph and subsequently returned a HPCA reading.

She appeared at Penrith Local Court on 1st April 2011, when both charges were dealt with, and she was disqualified for a total period of 18 months.

The imposition of the minimum period of disqualification of 12 months for HPCA and the automatic period of 6 months for the speeding, cumulative on the other, was not enough for the RTA/RMS.

The mischief or wrong that the RTA/RMS sought to remedy was the backdating of the disqualification for the HPCA matter to the date of the offence i.e. the date her licence was suspended by Police pursuant to **Section 205** of the Road Transport (General) Act and then

dating the disqualification for the speeding offence from the expiration of that 12 month period i.e. to became a cumulative disqualification.

After unsuccessfully trying to get the Local Court to "fix" the error pursuant to Section 43 of the C (S.P) Act 1999 the RTA /RMS headed off to the Supreme Court and James J heard the matter on 19th October 2011.

His subsequent judgment is **RTA –v- O'Sullivan [2011] NSWSC1258.**

In the Supreme Court the RTA/RMS challenged the power of the Local Court to backdate the disqualification for the HPCA offence and also challenged the power of the Local Court to postdate the disqualification for the speeding offence.

In relation to the speeding offence James J examined the legislation and in particular Rule 10-2(9) and held that the Local Court does not have the power to order that the disqualification commenced from a date other than the date of conviction. Rule 10-2(9) provides as follows;

"(9) <u>Disqualification period commences on date of conviction</u>; A period of disqualification imposed by or under this rule commences on the date of conviction for the offence to which it relates."

The Court held that the disqualification order made by Penrith Local Court was without power and therefore constituted jurisdictional error.

In relation to the HPCA offence the Court noted that **Section 188** of the Road Transport (General) Act 2005 deals with disqualification periods for PCA and other major offences and **s188 (2)(d)** applied to Ms O'Sullivan as she had no previous major offences within the last five years.

Section 188(2)(d) provides for an automatic period of disqualification of 3 years **[(2)(d)(i)]** and a minimum period of disqualification of 12 months **[(2)(d)(ii)].**

After noting the power set out in Section 205 of the Road Transport (General) Act 2005 of the Police to suspend licences the Court held that **Section 188(2)(d)** provides for either an automatic period of disqualification **[(2)(d)(i)]** which must commence from the date of conviction or a shorter or longer period **[(2)(d)(ii)]** and the Court is given no power to order that the disqualification commence from a different date than the date of conviction.

The Court also held that **Section 205** of the Road Transport (General) Act 2005 does not confer any power on a Local Court to order that the disqualification commence from a date other than the date of the relevant conviction.

Before dealing with the consequences of **O'Sullivan** and the way that the Local Court is now dealing with matters of this type it should be pointed that the Court in **O'Sullivan** made reference to and followed **Hei Hei –v- R.[2009]NSWCCA87**.

Mr Hei Hei had been sentenced in the District Court for aggravated dangerous driving causing death and Bennett DCJ wanted to disqualify him from driving to commence from when he was released on parole having served a non-parole period of 3 years.

The Court disqualified him from driving for 3 years commencing on 20 February 2011, being the date he was due for release on parole.

The Court of Criminal Appeal, after holding that **188(2)(d)(i)** meant that the automatic period of disqualification would apply from the date of conviction, also held that **188(2)(d)(ii)** meant that a period of disqualification other than the automatic period commences on the date of conviction.

The Court then used **188(2)(d)(ii)** to impose a period of disqualification for longer than 3 years, being a period that concluded on 19 February 2014, which was the equivalent of 6 years.

SAD (Suspension and Disqualification) ORDERS

In **O'Sullivan**, James J at para 30 indicated that the Local Court could have utilised **Section 205(6)(b)** of the Road Transport (General) Act 2005 so as to impose a period of disqualification which was less than the mandatory minimum of 12 months but was not empowered by **s205(6)(b)** to make a period of disqualification commence from a date different from the date of conviction.

The wording of **s205(6)** is important. It provides as follows;

"205(6) If, on the determination of the charge by a court, the person is disqualified from holding or obtaining a licence for a specified time:

(a)the court must take into account the period of suspension under this section when deciding whether to make any order under section 188, and

***(b)to the extent (if any) that the court so orders, a suspension under this section may be regarded as satisfying all or part of any mandatory minimum period of disqualification required by that section to be imposed when the charge is proved*.**"

Section 205(6)(b) is now, since O'Sullivan, being used in the Local Court for the making of what are known as **SAD** orders.

This involves the Court imposing a period of disqualification which, in accordance with O'Sullivan, has to date from the date of conviction. The Court then makes an order in which it notes that **s205(6)(b)** applies and this is noted on the Court papers.

The effect of this is that because a suspension period under **s205** has been in force leading up to the matter being finalised the period of suspension under **s205(6)(b)** is used to form part of disqualification order that is made. It is a form of giving credit for the suspension period.

It is however reliant on the appropriate order being noted on the Court papers and this then being transmitted electronically to the RTA/RMS.

In correspondence last year with the Law Society the Minister for Roads indicated that the RTA/RMS "will take into account the period of the roadside suspension in accordance with any court order". In addition a Local Courts Bulletin at the time set out how the orders are to be noted on the Justicelink system.

From a practical point of view it is vital in those cases where a **s205** suspension has been in place that you ensure that you ask the Court to make a SAD order. You should also get your client to check with the RMS to make sure their records accurately reflect the orders made by the Court.

By doing this you will be ensuring that the suspension period that your client has served forms part of the overall disqualification period that is imposed even though it is dated from the date of conviction.

It is now over 12 months since O'Sullivan and the system of sentencing persons for traffic offences seems to have come to grips with the consequences. The end result for our clients should still be the same but it can seem a bit bizarre explaining to clients that disqualifications date from the date of conviction but that the suspension period is used in calculating what ends up being the period "off the road".

It is vital however that the Courts are consistent in making the appropriate SAD orders and not simply recommendations. The order also has to be noted on the Court papers in order to be transmitted electronically to the RMS/RTA.

HIGGINSON

Mr Higginson had been dealt with by the Local Court for Negligent Driving causing grievous bodily harm and disqualified for 12 months. There had been no Police suspension imposed so therefore, unlike O'Sullivan, there were no **Section 205** issues that arose. Mr Higginson lodged an appeal to the District Court and pursuant to section 63(2) of the Crimes (Appeal and Review) Act 2001 an automatic stay of proceedings came into force pending the hearing of his appeal.

The appeal was lodged 8 days after the disqualification was imposed in the Local Court. Some 5 weeks later the appeal was dealt with and the 12 month disqualification was confirmed on appeal but the District Court dated the disqualification from the date the matter was dealt with in the Local Court (as the licence had been surrendered) even though there was a stay of proceedings in place and Mr Higginson would have been entitled to drive pending the hearing of his appeal.

The order of the District Court had the effect of the disqualification period being less than the statutory 12 month period. Again, after unsuccessfully attempting to get the District Court to reopen the proceedings pursuant to section 43, the RMS/RTA was off to the Supreme Court, but this time the Court of Appeal, because the decision being challenged was from the District Court not the Local Court.

The Court held that the District Court, in disposing of the appeal, exceeded its jurisdiction by nominating an incorrect end date of disqualification. The order that had been made by the District Court (incorrectly) had the effect of reducing the period of disqualification by 40 days during which the disqualification did not operate.

Giles JA (Young J agreeing) noted that the end date of a disqualification could be affected by other statutory provisions and that the running of the period of disqualification might be interrupted by a stay pending an appeal.

However it should also be pointed out that at para 24 Giles JA, in highlighting the incorrect end date, also said that it is not to say that a judge cannot or should not inform a disqualified person of an end date and the problem in the present case was the incorrect end date caused of course by the incorrect start date.

What is also important to highlight is that in **Higginson**, because there was no period of Police imposed suspension to either take into account or use to form part of a disqualification and the making of a **SAD** order (as now required by **O'Sullivan**), the issue only arose because there was a stay of proceedings pending the hearing of the appeal which was clearly in conflict with the order made by the District Court when disposing of the appeal.

In those cases where there is a **s205** Police suspension in place then **Section 63(2A) of the C(A and R) Act 2001** would apply and it would be appropriate for the District Court, using its powers under **Section 68 of C(A and R) Act 2001**, to order any disqualification orders made by the Local Court to continue to apply, including **s205(6)(b)** orders.

Section 63(2A) of the C(A and R) Act 2001 provides as follows;

(2A) Subsection (2) *[the stay of proceedings]* does not operate to stay a suspension or disqualification of a driver licence that arose as the consequence of a conviction if, immediately before the proceedings giving rise to the conviction, a suspension was in force under Division 4 of Part 5.4 of the Road Transport (General) Act 2005 for the offence to which the conviction relates.

Therefore the problem raised and addressed in **Higginson** can be seen as applying in those cases where there is no **s205** Police suspension and also those cases dealt with on appeal in the District Court.

I feel that Parliament should legislate to make the situation clear. Ensuring that those people who come before it for sentencing leave the Court fully understanding the implication of the orders that have been made is vitally important and those people being aware of something as important as a disqualification is part of this process.

In **O'Sullivan** James J suggested that the interpretation required could produce results that would frustrate the evident purpose of the Act.

In **Hei Hei** Rothman J suggested that it was necessary to give the court the power to fix the commencement and conclusion dates of any disqualification period.

TRAFFIC OFFENDER PROGRAMS PRIOR TO SENTENCING

It is not uncommon for traffic offenders to enrol and complete a traffic offenders program (TOP) before being sentenced.

In the initial period after **O'Sullivan** there was a concern that having clients enrol and complete such a program would no longer be of any added value if the period during which they took to complete the program did not form part of their overall disqualification.

This should now not be a problem provided the Courts continue to make the **SAD** orders referred to above and the RTA/RMS continue to properly recognise the orders that are made.

Whilst I have outlined above the need to ask Courts to make the appropriate **SAD** orders it is also possible for the Court to only use **Section 205(6)(a)** rather than make a SAD order using **205(6)(b).**

Section 205(6)(a) provides that a Court, when imposing a disqualification under section 188**,.."must take into account the period of suspension under this section when deciding whether to make any order under section 188".**

I have seen some Courts decide to use **s205(6)(a)** rather than having to worry about making SAD orders under **s205(6)(b).**

CUMULATIVE DISQUALIFICATIONS AND MEAKIN.

Meakin –v- DPP [2011]NSWCA373 was a case heard by the Court of Appeal before **O'Sullivan** but judgment was delivered after **O'Sullivan**.

The timing is important because **Meakin**, in dealing with a case where a cumulative disqualification had been imposed made no reference to **O'Sullivan** even though **O'Sullivan** had been heard and judgment delivered in the period between when **Meakin** was heard and judgment delivered.

The facts in **Meakin** and how the matter came to be before the Court of Appeal are worth outlining.

The defendant was dealt with in the Local Court in 2005 for MPCA and drive manner dangerous and received periods of disqualification of 3 years and 5 years for the two offences which arose out of the same course of conduct. The disqualification periods were made cumulative for a total period of 8 years and an appeal in 2006 to the District Court did not alter those disqualification orders. An attempt to have the District Court reconsider the disqualification periods(again pursuant to section 43) in 2010 was unsuccessful and the defendant, in what was obviously a desperate attempt to get to try and get his licence back, had nowhere to go other than the Court of Appeal.

But his efforts were without success and he continues to serve his 8 year disqualification period.

However in dismissing his appeal the Court of Appeal did not indicate that there was any difficulty or problem with the cumulative disqualification periods that had been imposed in the Local Court even though **O'Sullivan** (where judgment had been delivered on 27 October 2011) had held that disqualifications are required to date from the date of conviction.

Section 188 of the Road Transport (General) Act 2005 deals with disqualifications for certain major offences and ss(4) of Section 188 deals specifically with calculating disqualification periods in the case of multiple offending for driving arising out of a single incident.

However it should be remembered that when imposing disqualification periods for section 25A offences of drive whilst disqualified and the like **s25A(7)** specifically provides for a cumulative disqualification.

Section 25A(7) of the Road Transport (Driver Licensing) Act 1998 provides that if a person is convicted of an offence of driving whilst disqualified or driving whilst suspended or cancelled then the relevant disqualification period to be imposed by the Court dates from the expiration of the disqualification or suspension being served and which created the offence **or** the date of conviction, whichever is the later.

INTERLOCK LICENCES POST O'SULLIVAN

Such orders are made pursuant to Division 2 of Part 5.4 of the Road Transport (General) Act 2005 (Sections 190 to 197).

The need for Courts to now make **SAD** orders pursuant to s205(6)(b) as outlined may effect the orders made the Court if they choose to order an interlock licence.

In addition to ordering a disqualification period, which would date from the date of conviction and a related **SAD** order pursuant to s205(6)(b), a Court is required to note the **disqualification compliance period** that applies before a person can obtain an interlock licence.

The Court is then required to impose a **disqualification suspension order**, which is the period during which the person can apply, obtain and drive on an interlock licence. There are minimum suspension orders that apply and they can be extended but not reduced.

Pursuant to **s192** the disqualification period originally imposed is suspended to allow participation in the interlock program. **Section 192** begins as follows;

192. If a court convicts a person of an alcohol-related major offence and the person is disqualified from holding a driver licence by or under section 188(2) or (3) for a period (the "disqualification period"), the court may order that the disqualification of the person be suspended if the person participates in an interlock program…….

Whilst the section refers to s188 there is no reference to s205. As I have indicated, s205 provides the Court with the power to make the appropriate **SAD** order.

I was initially of the view that because there was no reference in s192 to s205 that it would not be possible for a SAD order to be made in relation to the disqualification compliance period i.e. the period of disqualification to be served before obtaining an interlock licence, meaning that any compliance period would have to run from the date of conviction.

But this would not appear to be the case. It seems that the RMS/RTA is happy to allow any period of suspension to form part of the compliance period and Courts are happy to make it clear that any period of suspension is to be used to make up all or part of any compliance period.

It could be argued that there does not have to be any reference to section 205 in section 192 and that the orders made by the Court for the interlock licence flow automatically from the

disqualification that is imposed pursuant to section 188 (in conjunction with the 205(6)(b) order). This is in circumstances where the length of the disqualification compliance period cannot be altered and is referred to in Section 193 as a period that is required to have expired.

THE GUIDELINE JUDGMENT

There is no doubt since the delivery by the Court of Criminal Appeal in 2004 of the Guideline Judgment on High Range PCA that we have seen in Local Courts of New South Wales an increase in the use of more severe penalties and a reduction in the use of Section 10 for High Range PCA Offences.

For those that do not know, the Guideline Judgment is more commonly known as *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment concerning the offence of High Range Prescribed Concentration of Alcohol under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1993 (No 3 0f 2002) (2004) 61NSWLR 305.*

Since the delivery of the judgment over 8 years ago it has become regularly quoted, analysed, followed, not followed, criticised or at least read by practitioners, prosecutors and judicial officers alike.

I have not regurgitated the guideline itself as it is now commonly known and applied in Local Courts throughout New South Wales.

What I can do is again refer you to a number of papers that have analysed the impact of the Guideline Judgment on sentencing. The two papers are

(a) *Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW*, being part of the Sentencing Trends and Issues series published by the Judicial Commission of New South Wales (No 35, September 2005) by Patrizia Poletti and;

(b) *The Impact of the High Range PCA Guideline Judgment on sentencing for PCA offences in NSW*, being part of the Crime and Justice Bulletin published by the New South Wales Bureau of Crimes Statistics and Research (No 123 November 2008) by Stephanie D'Apice.

The first of these papers analyses sentencing patterns both before the guideline judgment and after the guideline was delivered. The second of these papers examines the longer term impact of the guideline judgment on sentencing severity and overall penalties for the offence of High Range PCA.

For example, the second paper demonstrates that in relation to High Range PCA offences the use of Section 9 Bonds increased 19%, the use of Community Service Orders increased 153%, the use of suspended prison sentences increased 156%, the use of periodic detention increased 100% and full time custody increased 45%.

There is no doubt that the guideline judgment has had an effect on sentencing for not only High Range PCA offenders but repeat drink driver offenders particularly when the second offence is a High Range PCA offence.

The guideline seeks to set out a broad range of circumstances that need to exist in some way before a client can be categorised into a particular part of the guideline.

For example, paragraph 6 of the guideline provides that when the moral culpability of the offender of a second or subsequent High Range PCA offence is increased a sentence of any less severity than imprisonment of some kind would generally be inappropriate and where any number of aggravating factors are present to a significant degree or where the prior offence is a High Range PCA offence a sentence of less severity of less severity than full time imprisonment would generally be inappropriate.

It is my view that this still gives a Court a wide sentencing discretion in relation to particular offenders even when a person is a second offender and the prior offence is a High Range PCA offence. Where the prior offence is not a High Range PCA offence then the guideline gives some scope for alternatives to full time custody.

It is important to demonstrate that you are familiar with the guideline judgment and more importantly, where in the guideline your client may sit. However that is not the end of the road for your client and it should always be remembered that the sentencing by the Court is a balancing exercise.

It is always good to remember the observations by the CCA in **R v Whyte (2002) 134A Crim R** regarding the Guideline Judgment;

(a) Sentencing Courts are required to "take into account" a Guideline Judgment.

(b) Guideline Judgments should be expressed so as not to impermissibly confine the exercise of the sentencing discretion. They are to be taken into account as a "check" or "sounding board" or a "guide" but not as a "rule" or "presumption".

(c) Numerical guidelines have a role to play in achieving equality of justice where, as a matter of practical reality, there is tension between the principle of individualised justice and the principles of consistency.

It should always be remembers that the judgment is a guideline not a straight jacket.

ICOs

This form of sentencing was introduced in late 2010 and replaced periodic detention.

In **R –v- BOUGHEN & CAMERON [2012] NSWCCA 17 (27th February 2012)** Simpson J had indicated that ICOs should not be used as a substitute for periodic detention and that

the orders were meant for rehabilitation and were inappropriate when there was little risk of reoffending. Simpson J expressed a similar view in **R–v-AGIUS & ZERAFA [2012] NSWSC 978**. However ICOs were being used extensively in all jurisdictions and in a variety of cases i.e. **R –v- Bateson (Supreme Court, 24/6/11), R –v- Dalzell (Supreme Court, 20/5/11) and R –v- Darby (Supreme Court, 1/4/11)** and the CCA in **Whelan –v- R [2012] NSWCCA147.**

As a result of the uncertainty that had been created the CCA sat as a five-judge Bench on 6th August 2012 and delivered its decision in **R –v- POGSON, LAPHAM & MARTIN [2012] NSWCCA225** on 22nd October 2012**.**

The Court provided a detailed analysis of the history of ICOs and how the District Court dealt with **Boughen.** In noting that the view expressed by Simpson J had not been the consistent view of judges of the Supreme Court or the CCA, the Court (vide McClellan CJ at CL) concluded that they could not share the view of Simpson J and in particular could not find the restriction on the use of ICOs which Simpson J had relied on as being in the second reading speech.

The Court also said at para 108 that *"….it should be kept in mind that an ICO is a substantial punishment to be utilised in an appropriate case. However, as with all sentencing options which do not involve immediate incarceration, it may also reflect a significant degree of leniency".*

And further at para 111 the Court said *"….the stringent conditions attached to an ICO ensure that an offender subject to such an order is not living a carefree existence amongst the community. An ICO deprives an offender of his or her liberty in a real and not merely fictional sense."*

As a result of the clarification by the CCA in **Pogson** we are now able to ensure that ICOs are still widely available as an alternative to full time custody and not restricted in the way envisaged by Simpson J.

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The timing is important because **Meakin**, in dealing with a case where a cumulative disqualification had been imposed made no reference to **O'Sullivan** even though **O'Sullivan** had been heard and judgment delivered in the period between when **Meakin** was heard and judgment delivered.

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disqualification periods (again pursuant to section 43) in 2010 was unsuccessful and the defendant, in what was obviously a desperate attempt to get to try and get his licence back, had nowhere to go other than the Court of Appeal.

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Despite **Meakin** I am of the view that cumulative disqualifications are not possible in light of **O'Sullivan**. It has been suggested that a way around the issue is for the Court to impose one period of disqualification for the initial offending and then a longer period for the second offending, with both date from the date of conviction. But for obvious reasons this offends numerous sentencing principles.

HABITUAL OFFENDER DECLARATIONS

The provisions in the **Road Transport (General) Act 2005** relating to **Habitual Traffic Offenders (Sections 198 to 203)** can cause additional hardship to our clients and practitioners should be aware of when the provisions apply and what can be done to either avoid them or at least lessen their effect.

Section 199 provides that a person is declared to be a habitual traffic offender if in a 5 year period they have had 3 convictions for certain offences occurring at different times (i.e. not arising out of the same incident).

The offences required for the declaration to be imposed include **"major offences"** (your full range of PCA, drive manner/speed dangerous etc) speeding **greater than 45 kph**, a **second unlicenced conviction**, and **drive whilst disqualified, suspended or cancelled**.

By **Section 198(2)** it also includes matters dealt with under section 10 and pursuant to **Section 198(1)(b)** equivalent matters from interstate can be used to make up the required 3 convictions.

If not imposed or quashed by the Court at the time of the third conviction then the RMS/RTA will add the additional 5 year period of disqualification automatically.

Even though it has been added or imposed by the RMS/RTA the entry that will appear on your client's traffic record will make reference to the date and court of the third conviction. This creates the impression that the declaration has been made by the Court in circumstances where it has been added by operation of law.

Section 201(1) provides for the declaration and **Section 201(2)** gives the Court power to increase the 5 year period if they see fit. Pursuant to **Section 201(6)** the additional 5 year disqualification is cumulative on whatever disqualification has been imposed by the Court.

Section 201(3) gives the Court the power to reduce the 5 year period (to no less than 2 years) if they feel the period is an unjust and disproportionate consequence having regard to the total driving record and the special circumstances of the case.

Section 202(1) also gives the Court the power to quash the 5 year period in similar circumstances.

It is not uncommon for Courts to be prepared to quash the 5 year period at the time of the 3rd conviction. However if they do not then it is possible to bring an application at a later date to have the declaration quashed.

In many cases your client will need to be able to demonstrate their ability to comply with the Court imposed periods of disqualification before consideration is given to quashing or reducing any HTO declaration period/s either partly or in full.

As a result of amendments made in 2009 it was made clear that any order of a Court quashing HTO declarations would operate from the date of quashing and not have any retrospective effect. Any part of the 5 year period already served is not effected by any quashing and any driving that occurs during that period would considered to be driving whilst disqualified even if the balance of the term is quashed. This is provided for in **Section 202(4)**.

It should also be pointed out that **Section 204(3)** prevents decisions about HTOs being appealed to the District Court if the Local Court refuses to either quash or reduce.

It is therefore vital to ensure that relevant material is placed before the Court at the time of the 3rd conviction or at the time of the application. In my experience evidence regarding your clients change in circumstances over the period of the Court imposed disqualification will greatly assist in convincing the Court to quash any additional period, either at the beginning of the 5 year period or during its currency.

Query whether it is possible to bring more than one application to quash and/or reduce? I am of the view that you can but the Court should be informed that it is a subsequent application.

Practitioners should also be aware of the common problem of having HTO declarations quashed but your client then finding that they have a period of Court imposed disqualification still to serve. The timing of any application to quash therefore becomes important and they sometimes involve a close and thorough analysis of the driving record over a lengthy period of time.

DRIVE WHILST DISQUALIFIED

Penalties under Section 25A of the **Road Transport (Driver Licencing) Act 1998** can be severe, especially for repeat offenders.

In 2007 Drive Whilst Disqualified ranked 4th and Drive Whilst Suspended ranked 7th of the most common proven statutory offences in the New South Wales Local Court. Drive Whilst Disqualified was 5.1% of cases and Drive Whilst Suspended was 4.2% of cases.

Corrective Services statistics also show that the number of persons serving full time custody for Driving Whilst Disqualified constitute a large proportion of those persons in our gaol system.

How often do you hear Drive Whilst Disqualified being equated to contempt of court? Whilst not contempt, it is serious and is reflected in the fact that offenders have appeared in Court, have been disqualified for a particular period of time and usually warned by the Court not to drive but have done so in clear defiance of a Court imposed disqualification.

In 2009 Section 25A was amended to insert a new offence in Sub-Section (3A) of driving whilst suspended or cancelled under the Fines Act and providing for an automatic disqualification period of 3 months for a first offence.

This was a sensible amendment and reflected the fact that some Courts took a less serious view of Driving Whilst Suspended or Driving Whilst Cancelled when it occurred after fine default as opposed to driving after being disqualified by a Court or driving after being suspended by the Police or RTA.

The CCA in **Tsakonas v. R [2009]NSWCCA 258** at para 39 (22 October 2009) reiterated that driving whilst disqualified involves a conscious and deliberate decision to flout the law.

You will recall that Section 25A was amended late in 2009 to overturn **DPP v Partidge [2009] NSW CCA75**.

In **Partridge** the Court of Criminal Appeal had held that the automatic period of disqualification for an offence under Section 25A is 12 months when the previous conviction within 5 years was not a similar 25A offence. In other words if the previous offence was a drink driving offence or other type of major traffic offence the increase in automatic disqualification period from 12 months to 2 years did not apply. The decision in **Partridge** clarified the Section as a number of District Court decisions had expressed different views and there were differing views in the Local Court.

However the Road Transport Legislation Amendment (Miscellaneous) Act 2009 amended Section 25A to make it clear that the automatic period of disqualification for a second offence is 2 years.

NEGLIGENT DRIVING CAUSING DEATH/ GBH

Sentencing for these matters is still one of the most difficult sentencing exercises entrusted to the Local Court.

The offences arise out of the concept of driving a motor vehicle negligently but if death is occasioned a person can be imprisoned for up to 18 months and if a person suffers grievous bodily harm a person can be imprisoned for up to 9 months. In addition the offences carry disqualification periods similar to High Range PCA. i.e. automatic period of 3 years and minimum of 12 months.

The sentencing process is a difficult one because the criminality that the section seeks to punish is negligence and the section seeks to distinguish between death and grievous bodily harm and simple negligent driving in which nobody is killed or suffers grievous bodily harm. This final category type of offence is usually dealt with by the issue of a Traffic Infringement Notice by Police.

Judicial commission sentencing statistics show that the whole range of penalties available in the Local Court can be imposed for these types of offences. As the offence can cover a wide range of circumstances and driving, such statistics are really of limited value.

In **Mitchell v R [2009] NSW CCA95** the Court of Criminal Appeal dealt with an Appeal from a Sentence imposed for Section 42 matters in the District Court after the accused had been acquitted of culpable driving charges. The Court recognised the offences as serious, which in this case involved a collision involving a prime mover with a gross weight of 55 tonnes. Another motorist was killed and another suffered what was described as "catastrophic injuries". The sentencing Judge was of the opinion that the seriousness of the offences justified a sentence of full time imprisonment but that the matter could be dealt with by way of a Community Service Order. The decision relates more directly to the appropriate period of disqualification and the Court said,

"……an important component of punishment for [this offence] is the suspension of the offenders licence to drive. It is a salutary reminder that a licence to drive a vehicle is a privilege which will be removed when negligence occasions the death of another…..the Parliament anticipated that the suspension of a driver's licence would have social consequences for an offender".

The Court went on to hold that the automatic period of disqualification of three years was appropriate.

In 2006 then Deputy Chief Magistrate Henson sentenced an 81 year old driver for an incident involving the death of two people and the grievous bodily harm to a third. The case is reported as **DPP v Foggo [2006] NSW LC39.**

In assessing the objective seriousness of the offence the Court did so against the background of the guideline judgments in **Jurisic** *and* **Whyte.** The Court acknowledged that these were guidelines in relation to the more serious offence under Section 52A of the Crimes Act which carried far greater maximum penalties than an offence under Section 42, however, the Court held that

"……*the identification of what constitutes a typical case in aggravating circumstances is pertinent to the approach to be taken on sentence for what is commonly described as the lessor offence of negligent driving occasioning death*".

The Court also made reference to the

"level of moral culpability, even in prosecution under Section 42 and acknowledged that the object seriousness of this offence is demonstrably less, by reference to the maximum penalty available so that whilst the level of moral culpability can be high and the consequences aggravated by the fact of two fatalities, it must be abundantly clear that whilst a term of imprisonment is available and required to be considered, all other things being equal, it is less likely to be imposed from an offence in this category than in the more serious category under the Crimes Act 1900".

The Court went on to reject a submission that the matter be dealt with under Section 10 and said

"….*the role of the Court to protect the community through, at the very least, the recording of a conviction and imposition of a penalty is a responsibility no sentencing Court can readily abandon, even in the knowledge that it is punishing an honourable, decent and contributing member of society in circumstances where many will regard the outcome as harsh and uncaring. Ultimately, the interests of justice and what I perceive the need to promote the principles of general deterrence persuade me to the view that I should record a conviction*".

Also the Chief Magistrate, Judge Henson passed sentence in another prosecution under Section 42 following the death of a three year old girl who was being carried by her mother at a pedestrian crossing when they were hit by a large lorry. The decision is **Police v Curkovic [2008] NSW LC1.**

After referring to matters under Section 21A of the Crimes Sentencing Procedure Act 1988 and the consideration of the facts the Court placed the offence in the upper range of seriousness of an offence of this category. The Court acknowledged that this type of offence is typically committed by people of otherwise good character with no or limited prior convictions. The Court again made reference to the issue of moral culpability and also recognised that

"…*when the prosecution relied on momentary inattention as being the identifiable cause of the accident, together with the nature of the offence, being one of less severity in the eyes of Parliament, it required a cautious approach by the Court when considering whether imprisonment is the appropriate penalty*."

The Court referred to Section 5 of the Crimes Sentencing Procedure Act 1999 but also held that the sentence was one that must emphasise general deterrence and indicated that this

was the approach generally adopted in relation to driving offences where death or serious injury occurs. The Court went on to say that

"*the protection of the community is the fundamental obligation of the Courts in the exercise of the criminal jurisdiction. General deterrence is an important objective in the pursuit of that ultimate outcome but not an objective to be emphasised as highly in relation to this category of offence as it is in relation to more serious driving offences. This is because the objective seriousness of the two categories of offences is significantly different. So too is the nature of the conduct required to be proven*".

The Court decided that whilst a sentence of imprisonment was required it was appropriate for it to be suspended pursuant to Section 12. The Court reduced the period of disqualification from the automatic period of 3 years to 2 years.

In **Bonsu v R [2009] NSWCCA 316** Howie J (sitting as the CCA) made some comments regarding Section 42(1) matters. Mr Bonsu had been sentenced to a Community Service Order for a Section 42(1) matter by the District Court after being found not guilty of a culpable driving charge. On breaching the Community Service Order the offender was sentenced to 3 months imprisonment for the original offence. After referring to the statistics that showed a markedly lenient approach to sentencing for this offence, having regard to the maximum penalty, Howie J said;

"*I have difficulty in understanding how s10A or s9 of the Crimes (Sentencing Procedure) Act 1999 can be used for such an offence. It seems to me, that these statistics reveal that little regard or insufficient regard is being paid in the Local Court or the District Court on appeal to the fact that the offender being sentenced has caused the loss of life."*

He went on to refer to the Chief Magistrate's decision in **Curkovic** as looking at the issues and concerns in sentencing for this type of offence. He concluded by emphasising that nothing that he had said should be taken in any way…to indicate that a good behaviour bond is an appropriate penalty for this offence. He felt the range of penalties being imposed for this offence is inadequate and fails to reflect the fact that offenders charged with this offence have taken a human life.

Following on from **Bonsu** the Chief Magistrate in **DPP v Victoria Bhandari [2011] NSWLC 7 (8 February 2011)** sentenced a lady with a disabled son for negligent driving causing death and imposed a period of imprisonment of 10 months and 15 days by way of Home Detention. In sentencing he said at para 28,

"…*that the sentence to be imposed …must be one that emphasises general deterrence. That is the approach commended at the second reading speech at the time the penalty for this offence was introduced in 1998. It is the approach generally adopted in relation to driving offences where death or serious injury occurs".*

See also the Chief Magistrate's decision in **DPP v Robert Pearce[2011]NSWLC32** (negligent driving causing death; Section 12 bond and 2 years disqualification) and the decision of Magistrate P.S.Dare SC in **DPP v Anthony Markovski [2011]NSWLC31** (negligent driving causing death; 2 months full time imprisonment and 12 months disqualification).

CONCLUSION

I hope this material assists you when dealing with clients who are being sentenced for serious traffic offences.

Many of the matters that we have to deal with can be complicated and the consequences serious for our clients.

Disqualifications, SAD orders, interlock licences and HTO declarations are only part of what we have to deal with.

Finally can I suggest that if you have a matter of some seriousness that goes beyond a simple plea of guilty then it is not inappropriate to ask a busy list Court to provide more time in its diary to deal with the matter, even if that means it being listed on a date other than list day.

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