**38/09; [2009] VSC 600**

**SUPREME COURT OF VICTORIA**

# *HOE v VELLA & ANOR*

**Osborn J**

**10 November, 17 December 2009**

**MOTOR TRAFFIC – CHARGE OF DRIVING WHILST DISQUALIFIED – LICENCE SUSPENDED DUE TO UNPAID FINES – DRIVER LICENCE EXPIRED – DRIVER DETECTED DRIVING AFTER LICENCE EXPIRED – CHARGED WITH BREACH OF S30(1) OF THE *ROAD SAFETY ACT* 1986 – CERTIFICATE TENDERED BY PROSECUTOR TO EFFECT THAT DRIVER WAS DISQUALIFIED – CHARGE FOUND PROVED – APPEAL TO COUNTY COURT – APPEAL DISMISSED – ORDER IN THE NATURE OF *CERTIORARI* SOUGHT QUASHING COUNTY COURT ORDER – WHETHER DRIVER SHOULD HAVE BEEN CHARGED WITH A BREACH OF S30AA OF THE ACT – NATURE OF THE RECORD ON APPEAL – CLAIM EVIDENCE DID NOT SUPPORT CHARGE, THE CHARGE WAS NOT APPLICABLE AND THAT DRIVER COULD NOT AT LAW HAVE BEEN CONVICTED – EVIDENCE RELIED ON BY THE DRIVER NOT PART OF THE RECORD – DRIVER'S CLAIM DISMISSED: *ROAD SAFETY ACT* 1986, SS3, 28A, 30(1), 30AA, 84; *INFRINGEMENTS ACT* 2006, SS3, 30(1), 188, 189.**

H.'s driver licence was suspended on 8 November 2004 for unpaid fines. On 26 November 2005 his licence expired. On 18 October 2006 H. was intercepted driving a motor vehicle and was subsequently charged with driving whilst disqualified pursuant to s30(1) of the *Road Safety Act* 1986 ('Act') and convicted. H.'s appeal to the County Court was dismissed. At that hearing, the prosecutor tendered a certificate under s84 of the Act stating that on 18 October 2006 H. was not licensed to drive a motor vehicle, that his driver licence was suspended for unpaid fines and that when his driver licence expired he was disqualified from driving until the fines were paid. H. appealed to the Supreme Court on the grounds that he should have been charged with a breach of s30AA of the Act and that he could not have been in breach of s30(1) of the Act given that his licence had been suspended. It was submitted that he should have been charged with unlicensed driving pursuant to s18 of the Act.

**HELD: Appeal dismissed.**

**1. In relation to the submission that H. should have been charged with a breach of s30AA of the Act, the offence of driving whilst disqualified in breach of s30 of the Act was not at the relevant date itself an 'infringement offence' nor was it a 'traffic infringement' as defined by s3 of the Act. It was not the subject of infringement notice procedures as provided for in Part 7 of the Act and was not relevantly affected by the transitional provisions upon which the plaintiff seeks to rely.**

**2. Further and more fundamentally, H. could not be regarded as a person whose driver licence was 'suspended in accordance with Part 8 of the *Infringements Act*'. Part 8 provides for such suspension but in the present case the suspension in fact occurred pursuant to the provisions of the *Road Safety Act*. In turn, the transitional provisions did not deem such a suspension to be a suspension under the *Infringements Act*. It followed that H. could not be charged under s30AA.**

**3. In relation to the submission that H. should have been charged with unlicensed driving pursuant to s18 of the Act, whether the expiry of the licence ended the suspension or whether disqualification continued after expiry of the licence on 26 November 2006 was a critical piece of evidence technically dependent upon proof of the records of the Roads Corporation.**

**4. The s84 certificate tendered in evidence comprised an exhibit and on the authority of the High Court in *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 such certificate did not ordinarily comprise part of the record nor was it incorporated in the reasons given by the County Court judge. Accordingly, having regard to the limitations in the record, H. was unable to establish his entitlement to relief in the nature of *certiorari*.**

## OSBORN J:

1. On 26 March 2008 his Honour Judge Parsons of the County Court refused an appeal from the Magistrates' Court by the plaintiff against conviction upon a charge of breach of s30(1) of the *Road Safety Act* 1986 ('the RS Act').

2. No further right of appeal lies with respect to the decision of his Honour, but the plaintiff now seeks an order in the nature of *certiorari* quashing the County Court order.

3. He further seeks a consequential order directing the County Court to record that the charge under s30(1) should be dismissed.

4. The orders are sought on the following grounds:

> (a) That his Honour Judge Parsons, under the circumstances, erred in law in refusing to dismiss a charge under s30(1) of the *Road Safety Act* 1986 brought against the Plaintiff.
>
> (b) That his Honour Judge Parsons denied the Plaintiff natural justice and/or erred at law and/or there was an error on the face of the record in convicting the Plaintiff of an offence under Section 30(1) of the *Road Safety Act* 1986 where under the circumstances:
> (i) the evidence did not support the charge alleged; and/or
> (ii) the charge alleged was not applicable to the Plaintiff insofar that the proper charge to bring against him was a charge under s30AA of the *Road Safety Act* 1986; and/or
> (iii) the Plaintiff could not at law have been convicted of a charge brought under s30(1) of the *Road Safety Act* 1986 given that his licence had been suspended under the *Infringements Act* 2006.

**Background**

5. The plaintiff was found guilty at first instance of a charge of driving whilst disqualified at Preston on 18 October 2006 in breach of s30(1) of the RS Act.

6. On appeal to the County Court it was not contested that the informant had established his case but a defence of honest and reasonable mistake of fact was advanced.

7. In particular it was suggested the plaintiff believed that his driver's licence was not suspended and that he was not disqualified from driving, because satisfactory arrangements had been made to pay motor vehicle related fines, as contemplated by a letter from the Sheriff's Office dated 6 November 2006 (some 19 days after the date of the alleged offence).

8. Evidence was first given of notice given to the plaintiff when he was pulled over in 2004 by a Sheriff's officer. The notice of proposal to suspend his drivers licence was countersigned by the plaintiff at the time. It stated the plaintiff's licence number, his date of birth, the date of issue, 26 September 2004, and the proposed suspension date 26 October 2004. It further stated:

> Roads Corporation has been notified by an authorised person that you currently have unsatisfied fines for vehicle related offences with a total value, including costs, of $2,650 and proposes to suspend your vehicle driver licence permit.

9. It further noted reference to 11 different vehicle related warrant numbers.

10. A copy notice of suspension dated 8 November 2004 was also tendered which stated:[1]

> A Notice of proposal to Suspend Driver Licence/Permit was personally delivered to you on 26/09/04, in relation to unpaid motor vehicle related fines.
> note that you have not made satisfactory arrangements to finalise the matter, applied for an internal review of the decision, nor appealed against the decision in the Magistrates' Court. Accordingly, your Driver Licence/Permit has been suspended in accordance with the Notice served upon you. The effective commencement date of the suspension was the **8 November, 2004**.
>
> Within **7 days** of receiving this letter, you must surrender your Licence/Permit by
> • Sending it to: Information Services, GPO Box 1644N, Melbourne Vic 3001 or
> • Taking it, together with this letter to your local VicRoads office.
>
> The suspension will not be lifted until such time as all fines have been paid, satisfactory arrangements for their payment have been made or the fines have been otherwise enforced.
>
> You cannot drive a motor vehicle in Victoria during the period of such suspension. The *Road Safety Act* provides for penalties of up to $3,000 or imprisonment for 4 months for driving whilst a licence is suspended.

11. The prosecutor had also at the outset of the hearing tendered a certificate under s84 of the RS Act, stating matters which appear or are calculated from the records kept by Roads Corporation. The certificate stated:

> This is to certify that on 18 October 2006, Mr Alex Hoe, born on 25 June 1976 of 36 Ardgower Ct, Lower Templestowe Vic 3107, was not licensed to drive a motor vehicle.
>
> On 8 November 2004 his Victorian motor vehicle driver licence number 81259555 was suspended by the Roads Corporation under Regulation 303(1)(d) of the Road Safety (Drivers) Regulations 1999 (suspension of licence for unpaid fines).
>
> On 26 November 2005 his motor vehicle driver licence expired, thus disqualifying him from driving or obtaining any licence or permit until such time as all outstanding fines are paid.

12. In turn the informant gave evidence of intercepting the plaintiff when driving his motor vehicle on 18 October 2006. He gave evidence of the following conversation:

> After I discovered that he was disqualified from driving in Victoria I returned to him and I said, "I've performed a check on your licence and discovered that you are disqualified in Victoria. What can you tell me about that?"
> He said, "When I spoke to the licence department they said it was for fines and I could drive regardless."
> I said, "You've spoken to VicRoads?"
> He said "Yes. It was for some unpaid fines. I have an appointment this Friday. Next week it should be resolved."
> I said, "You have a Victorian licence?"
> He said, "Yes, but I handed it back to VicRoads in Burwood."
> I said, "When was that?"
> He said, "About a year ago."
> I said, "Where have you been living since then?"
> He said, "Western Australia and South Australia."
> I said, "Why did you hand in your licence?"
> He said, "There was an unresolved fine for a trade plate. It was supposed to be expired but it wasn't. I'm still disputing that."
> I said, "Are you aware that you are disqualified?"
> He said, "I spoke to Civic Compliance and Legal Aid and I can't be disqualified until I go to court. I was suspended for the fine."
> I said, "When did you get your South Australian licence?"
> He said, "I got that when I moved two months ago."
> I said, "When was your licence suspended in Victoria?"
> He said, "A year and a half ago."
> I said, "Is that when you handed it in?"
> He said, "Yes."
> I said, "What did you use for a licence then for the year between handing it in and getting a South Australian licence?"
> He said, "I was going back and forth from my country. I'm a Singaporean."
> At that stage he's then produced a Singaporean driver's licence as well in the name of Alex Hoe (indistinct) with a date of birth 26th of the 6th '76.
> I said, "You may also receive a summons in relation to these matters."
> I also would have informed him that he could not drive as he was disqualified from driving in Victoria.

13. At the conclusion of the prosecution case the plaintiff was called to give evidence. He disputed the accuracy of the informant's note of the conversation with him. He said that at the time of the alleged offence he had made arrangements for payment of relevant fines and had previously disputed responsibility for some of the fines in issue. He said he 'assumed that it was resolved for me' and 'I believed that that was resolved cause (sic) I'd not heard from any of the departments.'

14. In cross-examination however Mr Hoe conceded that before the letter of November 2006 he had never entered into arrangements with the Sheriff's Office to pay the fines in issue. In answer to a question from his Honour the plaintiff said:

> Q: Pardon me Mr Hoe. You gave evidence to Mr Nicalosi that you don't recall any of that conversation with the policeman about your licence being disqualified in Victoria?
>
> A: Disqualified? No. Suspended. I told him that I was suspended in 2004 and I didn't tell him exactly 2004. I tell him yes I know I was suspended but I told him it was resolved, (indistinct) and either way I think it's going to be resolved.

15. In answer to further cross-examination the plaintiff stated:

> Q: So this is what you are saying you told the police officer on the night that he pulled you over, is that right? Are you saying that what you told him was that yes, you knew you were suspended but you hoped that it would be resolved in the near future?
> A: I knew I was suspended in 2004, that's what I told him. Okay. I did not know that I was disqualified. I told him I spoke to Legal Aid and Legal Aid told me I had to go to court and a judge had to disqualify me from driving.
> Q: So your understanding at the time?
> A: That's why I was driving. I didn't know – yes.
> Q: Your understanding was that you were suspended from driving but you weren't disqualified, is that right?
> A: My understanding was I was suspended in 2004. I made the arrangements. I wrote in, I sent the statutory declarations. I paid most of my fines and I thought the issue was resolved, but then he informed me and I just was telling him what that was what happened.

16. At the conclusion of the evidence his Honour enquired of counsel whether there were any legal issues they wished to address on. Counsel for the plaintiff said, 'No, Your Honour. Obviously it is a reasonable and honest defence.' His Honour stated he understood that. Counsel continued:

> There is just one matter in relation to that Your Honour. The belief has to be that it is innocent as opposed to the belief that it is merely suspended.

17. His Honour then stated: 'Yes. In the circumstances I find the offence proved. Is anything known?'

18. Although his Honour's reasons were no more than a statement of conclusion, no request was made for further reasons at the time. Nor is the inadequacy of reasons attacked in this Court. Indeed it was expressly conceded on behalf of the plaintiff that his Honour was entitled to conclude as he did with respect to the defence advanced below. It is apparent that his Honour's conclusion was expressed immediately following questions which clarified the plaintiff's evidence as to his state of mind. Obviously a further request for reasons could have been made at the time, but it was not. Further if reasons had been requested then they would presumably have addressed the defence put in issue on the appeal.

**The s30AA argument**

19. Mr Billings now seeks to make a more fundamental attack on his client's conviction. He submits that the plaintiff has been convicted of the wrong charge. In his submission the plaintiff should not have been charged under s30 of the RS Act having regard to the terms of that section coupled with the terms of s30AA. This submission confronts a significant procedural hurdle because in effect the plaintiff wishes this Court to examine the evidence before the County Court and consider whether on that evidence it was open to the Court to convict the plaintiff of the charge in issue. The primary point now raised was not raised either in the Magistrates' Court or the County Court. The core of the submission is that, as the plaintiff's grounds state 'the evidence did not support the charge alleged'.

20. The right to relief in the nature of *certiorari* is narrower than a right of appeal. The leading case is *Craig v South Australia.*[2] It concerned directly analogous proceedings, namely an application to quash a decision of the District Court of South Australia (the equivalent of the County Court in this State). Mr Craig was charged with offences of dishonesty and property damage. He sought a stay from a District Court judge pending a grant of legal representation at public expense. The judge considered evidence as to the circumstances of the case and made specific findings (including findings as to Mr Craig's lack of means). These findings supported the conclusion that Mr Craig 'could not receive a fair trial unless represented by counsel'. In turn, having regard to the decision in *Dietrich v The Queen*[3] he adjourned the matter. The proceeding was subsequently re-listed and the Crown advised the Court that it was not intended to provide legal aid to Mr Craig. The proceeding was then stayed until further order.

21. The Full Court of the Supreme Court of South Australia quashed this order and Mr Craig appealed to the High Court. The Court (comprising Brennan, Deane, Toohey, Gaudron and McHugh JJ) recorded first that it was common ground that the Court's jurisdiction to grant relief corresponded for all relevant purposes with the Supreme Court's previous inherent jurisdiction to order the issue of the prerogative writ of *certiorari.*[4]

22. The same is true of the jurisdiction I am now asked to exercise pursuant to r456 of the *Supreme Court Rules*. So much is plain from the terms of R56.01.[5]

23. In *Craig*'s case the High Court described the scope of *certiorari* in the following terms:[6]

> Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement or procedural fairness, fraud and "error of law on the face of the record". Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for *certiorari* can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the fact of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.

24. The Court then addressed the difficulties that may arise in distinguishing between jurisdictional error and error on the face of the record:[7]

> In considering what constitutes "jurisdictional error", it is necessary to distinguish between, on the one hand, the inferior courts which are amenable to *certiorari* and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ. Putting to one side some anomalous exceptions, the inferior courts of this country are constituted by persons with either formal legal qualifications or practical legal training. They exercise jurisdiction as part of a hierarchical legal system entrusted with the administration of justice under the Commonwealth and State Constitutions. In contrast, the tribunals other than courts which are amenable to *certiorari* are commonly constituted, wholly or partly, by persons without formal legal qualifications or legal training. While normally subject to administrative review procedures and *prima facie* bound to observe the requirements of procedural fairness, they are not part of the ordinary hierarchical judicial structure. In what follows, the anomalous courts or tribunals which fall outside the above broad descriptions can be ignored. Since the District Court of South Australia is undoubtedly a court, the primary focus of discussion will be upon what constitutes jurisdictional error on the part of an inferior court.
>
> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since *certiorari* goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.

25. The Court drew attention to the fundamentally different functions of a court and a tribunal.[8]

> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.

26. In the present case the Court's jurisdiction is invoked expressly first on the basis that the County Court judge 'erred in law' and secondly on the basis that he 'denied the plaintiff natural justice and/or erred at law and/or there was error on the face of the record.'

27. I should say immediately that the allegation of want of natural justice was not pursued in argument before me. The plaintiff's true complaint is not that he was denied procedural fairness before the County Court, but rather that the Court was not alerted to a defence which he now wishes to run.

28. It follows that the grounds raised are ones of alleged error of law. In order to succeed the plaintiff must in my view establish that the error is one on the face of the record.

29. In *Craig* the High Court went on to elucidate this concept. After referring to the ancient history of the remedy the Court observed:[9]

> One finds in some recent cases in this country support for the adoption of an expansive approach to *certiorari* which would include both the reasons for decision and the complete transcript of proceedings in the "modern record" of an inferior court. As Priestley JA pointed out in *Commissioner for Motor Transport v Kirkpatrick* (1988) 13 NSWLR 368, that approach is not precluded by any direct decision of this Court. Nonetheless, it should, on balance, be rejected. For one thing, it is inconsistent with the weight of authority in this Court which supports the conclusion that, in the absence of some statutory provision to the contrary, the record of an inferior court for the purposes of *certiorari* does not ordinarily include the transcript, the exhibits or the reasons for decision. More importantly, the approach that the transcript of proceedings and the reasons for decision constitute part of "the record" would, if accepted, go a long way towards transforming *certiorari* into a discretionary general appeal for error of law upon which the transcript of proceedings and the reasons for decision could be scoured and analysed in a search for some internal error. It is far from clear that policy considerations favour such an increase in the availability of *certiorari* to correct non-jurisdictional error of law. In particular, a situation in which any proceeding in an inferior court which involved a disputed question of law could be transformed into superior court proceedings notwithstanding immunity from ordinary appellate procedures would represent a significant increase in the financial hazards to which those involved in even minor litigation in this country are already exposed. On balance, it appears to us that the question whether there should be such an increase in the availability of *certiorari*, or of orders in the nature of *certiorari*, is one that is best left to the responsible legislature.

30. In Victoria the rigour of the common law has been ameliorated by s10 of the *Administrative Law Act* 1978 which provides:

> Any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under s8 of its reasons for decision shall be taken to form part of the decision and accordingly to be incorporated in the record.

31. In the present case however the reasons of the Court do not deal with the defence now sought to be run, nor do they incorporate the evidence by reference to which it might be raised,[10] in the sense contemplated in *Craig*:

> The qualification should be understood as referring only to so much of the reasons or transcript of proceedings as is referred to in the formal order in a way which brings about its incorporation as an integral part of that order and 'the record'. If, for example, the formal order incorporates undertakings given by a party 'as set out' in a particular designated document or is said to be made 'in terms of proposed orders set out in the reasons for judgment', the order in the record will incorporate only those parts of the particular document or the reasons for judgment which set out, qualify or otherwise affect the content of those undertakings or proposed orders. Conversely, a merely introductory or incidental reference will not suffice to incorporate ... reasons given for making the formal order which do not in fact constitute part of it.[11]

32. Accordingly, the case is one of the ordinary sort in which 'in the absence of statutory prescription, the record will comprise no more than the documentation which initiates the proceedings and thereby grounds the jurisdiction of the tribunal, the pleadings (if any) and the adjudication.'[12] I do not accept the submissions made by Mr Billings that this is a case analogous to *Hansford v Judge Neesham*[13] or *Wilson v County Court of Victoria*,[14] where the cases were founded upon the reasons stated by the judge.[15]

33. I respectfully agree with the statement of Hedigan J in *Sidebottom v County Court*:[16]

> ... There does not appear to be much doubt that as a consequence of the decision in *Craig* and other decisions made in this State, and by virtue of s10 of the *Administrative Law Act* 1978 (Vic), the record, for the purpose of orders by way of *certiorari*, includes any statement by the inferior court

of its reasons for decision. Thus in this case the record is constituted by the original charges, and notice of appeal and reasons for judgment disclosed in the transcript, and the record of the appeal decision. The transcript of evidence does not form part of that record.

34. I turn then to explain the error of law first asserted on behalf of the plaintiff. Section 30 and s30AA of the RS Act provided at the date of the alleged offence as follows:

> **Section 30. Offence to drive while disqualified etc.**
> (1) Subject to section 30AA, a person must not drive a motor vehicle on a highway while the authorisation granted to him or her to do so under this Part is suspended or during a period of disqualification from obtaining such an authorisation.
> Penalty: For a first offence, 30 penalty units or imprisonment for 4 months;
> For a subsequent offence, imprisonment for not less than 1 month and not more than 2 years.
>
> (2) Section 49 of the *Sentencing Act* 1991 does not apply with respect to proceedings for an offence against sub-section (1).
>
> **Section 30AA. Offence to drive while licence suspended under *Infringements Act* 2006**
> A person must not drive a motor vehicle on a highway while that person's driver licence or permit is suspended in accordance with Part 8 of the *Infringements Act* 2006.
> Penalty: 10 penalty units.

35. The primary submission of the appellant is that if the plaintiff was driving whilst suspended then he should have been charged pursuant to s30AA.[17] This submission is not attractive. The affidavit material demonstrates the plaintiff's licence to drive a motor vehicle was suspended on 8 November 2004.

36. Section 30AA was inserted into the RS Act by s185 of the *Infringements Act* 2006 which came into operation on 1 July 2006.

37. As a matter of history the plaintiff's licence was suspended pursuant to s24(2) of the RS Act as it was in 2005. This gave Roads Corporation the power in accordance with the relevant regulations to suspend for any time that it thought fit the driver licence of any person. Regulation 303(1) of the *Roads Safety (Drivers) Regulations* 1999 in turn provided that the Corporation might suspend a person's driver licence if it appeared to the Corporation that:

> (d) A court order requires a person to pay a sum of money by way of a fine, penalty, costs or restitution or any two or more of those things and—
> (i) the order was made in respect of an offence arising out of the use of a motor vehicle in Victoria, including a parking infringement or traffic infringement; and
> (ii) a person authorised by law to issue or execute a warrant for the enforcement of a court order notifies the Corporation that the order is wholly or partially unsatisfied ...

38. Regulation 305(4) provided that the Corporation must not suspend a driver licence unless it notified the licence holder in writing at least 28 days before the suspension took effect:

> (a) that the Corporation proposed to suspend the licence; and
> (b) the reasons for the proposed suspension; and
> (c) the effect and date of the proposed suspension; and
> (d) action that may be taken by the person in order to avoid the suspension; and
> (e) the date by which the person must take that action; and
> (f) if the person must return the licence to the Corporation, the date by which this must be done.

39. The regulation further provided:

> (2) A driver licence or permit is varied, suspended or cancelled in accordance with the terms of a notice served under this regulation unless the Corporation, by further notice in writing, withdraws the notice.

40. As I have indicated above, the notice of proposal to suspend gave notice of proposed suspension from 26 October 2004.

41. In turn s28A of the RS Act provided at the date of the alleged offence:

**Section 28A. Effect of suspension of licence or permit**

A driver licence or permit suspended by a court or by the Corporation or by operation of this Act or the *Infringements Act* 2006 is, during the suspension, of no effect and a person whose licence or permit is suspended is, during the suspension, disqualified from obtaining a further licence or permit.

42. Mr Billings submits that this regime was fundamentally altered by the transitional and savings provisions of the *Infringements Act* 2006, ss188 and 189 of which provide as follows:

**Section 188. Infringement offences**

Subject to this Part and anything to the contrary in this Act, this Act applies to any infringement offence irrespective of whether the infringement offence was committed before, on or after the commencement of section 176(2).

**Section 189. Infringement notices**

(1) Subject to this Part and anything to the contrary in this Act, this Act applies to any infringement notice irrespective of whether the infringement notice was issued or served before, on or after the commencement of section 176(2).

(2) Despite sub-section (1) and anything to the contrary in this Act, if an infringement notice was issued to or served on a person before the commencement of section 176(2)—

(a) the date or period of time specified in the infringement notice as the time by which the person issued or served with the notice must pay the penalty specified in the infringement notice is the date or period of time by which that person must pay that penalty, irrespective of whether that date or period of time specified is less than 28 days after the infringement notice was issued or served; and

(b) if any matter specified in the infringement notice conflicts with the requirements of this Act, the matter specified in the infringement notice prevails.

43. Section 190 makes further provisions with similar effect as to the form of infringement notices.

44. Section 3 of the *Infringements Act* defines infringement offence as meaning an offence which may be the subject of an infringement notice under any Act or statutory rule. In turn infringement notice means a notice in respect of an infringement offence served or to be served in accordance with Part II of the Act. It can be seen however that the requirements with respect to the service of infringement notices are materially amended by ss189 and 190.

45. The first defendant submits however that the offence of driving whilst disqualified in breach of s30 of the RS Act was not at the relevant date itself an 'infringement offence'. It was not a 'traffic infringement' as defined by s3 of the RS Act.[18] It was not the subject of infringement notice procedures as provided for in Part 7 of the RS Act. It is not relevantly affected by the transitional provisions upon which the plaintiff seeks to rely. I accept these submissions.

46. Further and more fundamentally, I do not accept that the plaintiff can be regarded as a person whose driver licence was 'suspended in accordance with Part 8 of the *Infringements Act*'. Part 8 provides for such suspension but in the present case the suspension in fact occurred pursuant to the provisions of the RS Act. In turn, the transitional provisions do not deem such a suspension to be a suspension under the *Infringements Act*. It follows the plaintiff could not be charged under s30AA.

47. If however I am wrong in these conclusions, the plaintiff still faces the fundamental difficulty that neither the charge and summons, certified extract of the decision of the Magistrates' Court, notice of appeal, notice of the decision of the County Court, nor the County Court judge's reasons, indicate the basis of his disqualification. It is necessary to go to the transcript of evidence and exhibits in order to establish this. It follows that the plaintiff's primary contention must fail first because he was not a person whose licence was suspended in accordance with Part 8 of the *Infringements Act* 2006 and, secondly, because in any event the evidence concerning the basis of his disqualification is not part of the record before this Court.

**The licence expiry argument**

48. Despite the positive assertion in the grounds of originating motion that the proper charge was under s30AA of the RS Act, it was further submitted that because the plaintiff's licence expired

on 26 November 2005, it could not relevantly be said to have been suspended at the date of the alleged offence. As the argument went, the proper charge (if any) was one of unlicensed driving under s18 of the RS Act.

49. This submission gains some force both from the words of s28 which at the date of the alleged offence referred to disqualification 'during the suspension' and Regulation 201 of the *Road Safety (Drivers) Regulations* 1999 which also provided that a person whose Australian driver licence has been suspended was not eligible to apply for a driver licence permit 'during the period of that suspension'.

50. Regulation 208 further provided:

> A driver licence expires at the end of the day that is recorded in the records maintained by the Corporation as the end of the term specified in that licence.

51. Mr Billings summarised the factual situation as follows submitting the facts appear to be common ground between the parties:

> (i) The Plaintiff was served with a Notice of Proposal to Suspend Driver Licence on 26 September 2004 in relation to unpaid fines and outstanding warrants thereto;
> (ii) The Plaintiff's licence was suspended by notice on 8 November 2004;
> (iii) The suspension would not be lifted until such time as all fines have been paid, satisfactory arrangements for their payment have been made or the fines have been otherwise enforced;
> (iv) On the date of the charge, being 18 October 2006, none of the conditions stipulated for lifting the suspension had occurred;
> (v) Pursuant to s28A of the *Road Safety Act* 1986 as in force on 26 November 2005, the effect of the suspension of the licence is that during the period of suspension:
> (i) The driver licence is of no effect; and
> (ii) The person is disqualified from obtaining a further licence or permit;
> (iii) <u>During the period of the suspension.</u>
> (vi) Pursuant to s28A of the *Road Safety Act* 1986 as in force on 18 October 2006, the effect of the suspension of the licence under the *Infringements Act* is the same effect *mutatis mutandis* as in sub-paragraph(v) above;
> (vii) The disqualification from obtaining a further licence or permit can only relate to a Victorian licence or permit;
> (viii) There is no evidence that the Plaintiff applied for a further Victorian licence or permit during the period of suspension;
> (ix) On 26 November 2005, the suspended licence held by the Plaintiff expired and was not renewed.

52. If the view be taken that expiry of the licence also ended suspension of that licence then the fact of expiry was the critical piece of evidence and technically dependent upon proof of the records of the Corporation.

53. Alternatively, if the view be taken that the combined effect of the statutory provisions is that disqualification consequent upon suspension may continue after expiry of the relevant licence, then potentially critical evidence was the form of the notice itself, stating the terms in accordance with which suspension was effected.[19] In my view, neither of these matters appear from the record.

54. The plaintiff submits the fact of expiry appears from the s84 certificate and that this certificate forms part of the record 'not directly, but impliedly, insofar that it is a matter that must have formed part of the reasons for decision of the learned County Court judge.'

55. In my view the s84 certificate comprised an exhibit and as the High Court observed in *Craig*, exhibits do not ordinarily comprise part of the record. Further, the exhibit was not incorporated in his Honour's reasons, indeed it was not referred to. It was not relevant to the defence put in issue in the County Court.

56. A like analysis applies to the notice stating the effect of suspension.

57. The first defendant relies upon the limitations of the record.

58. Accordingly the plaintiff's claim must fail. The plaintiff cannot establish his entitlement to

relief in the nature of *certiorari* having regard to the limitations in the record in this matter. The Court's jurisdiction in this matter is not appellate but supervisory in nature. The limits of that jurisdiction are well established. *Craig*s' case makes clear that it is not open to seek to transform an application of the type before the Court, into a general right of appeal. In essence this is what the plaintiff seeks to do. He seeks to run a new case on the evidence, which was not run either before the magistrate or on appeal to the County Court. A deliberate forensic choice was made as to the basis on which the appeal to the County Court was conducted. The plaintiff must now accept that finality has been achieved in the opportunity to challenge the evidentiary basis of the case against him.

---

[1] Omitting formal parts.
[2] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[3] [1992] HCA 57; (1992) 177 CLR 292; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176.
[4] [1995] HCA 58; (1995) 184 CLR 163, 174; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[5] See *Lednar v Magistrates' Court* [2000] VSC 549; (2000) 117 A Crim R 396.
[6] [1995] HCA 58; (1995) 184 CLR 163, 175-176; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[7] Ibid, 176-177.
[8] [1995] HCA 58; (1995) 184 CLR 163, 179-180; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[9] [1995] HCA 58; (1995) 184 CLR 163, 180-181; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[10] Ibid, 181-182.
[11] *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, [182]; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 applied in *Matson v The Racing Appeals Tribunal* [2001] VSC 264, [88] (emphases as in *Matson*).
[12] *Hockey v Yelland* [1984] HCA 72; (1984) 157 CLR 124 at 143 approved in *Craig* at 182.
[13] (1994) 7 VAR 172.
[14] [2006] VSC 322; (2006) 14 VR 461; (2006) 164 A Crim R 525; (2006) 46 MVR 117.
[15] See also *RSL v Liquor Licensing Commission* [1999] VSCA 37; (1999) 2 VR 203 at [29] at p215; 15 VAR 96.
[16] [2001] VSC 18; (2001) 117 A Crim R 574 [8] at p579.
[17] See ground B(2) and (3) of the originating motion.
[18] See Rule 601 and Schedule 4 of the *Road Safety (General) Regulations* 1999 Version No 030.
[19] See Regulation 305(2) above.

**APPEARANCES:** For the plaintiff Hoe: Mr P Billings, counsel. John V Hayes & Co Pty Ltd, solicitors. For the first defendant Vella: Ms D Piekusis, counsel. Director of Public Prosecutions.

---