CITATION:	*Flynn v Harker* [2019] NTSC 36
PARTIES:	FLYNN, Steven
	v
	HARKER, Brendan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	LCA 26/18 (21741739)
DELIVERED:	24 May 2019
HEARING DATES:	8 October 2018

CATCHWORDS:

CRIMINAL LAW – TRAFFIC OFFENCES – APPEAL AGAINST SENTENCE – offence of drive without due care – whether failure to take into account harm suffered by victims in assessing seriousness of offence amounted to error – whether sentencing Judge erred in assessment of offending at lower end of the scale – whether sentence was manifestly inadequate in all the circumstances – s 5(2) of the *Sentencing Act 1995* (NT) – seriousness of offence can be measured by harm to victim – harm was reasonably foreseeable – consideration should have been given to victims' injuries – offending above mid-range of cases when both driving and consequences are considered – penalty was manifestly inadequate – appeal allowed – offender resentenced.

Criminal Code Act 1983 (NT) ss 22, 26(1), 30(3), 38, 174F
Local Court (Criminal Procedure) Act 1928 (NT) ss 177(2(b), 177(2)(c)
Road Traffic Act 1961 (SA)
Sentencing Act 1995 (NT) ss 5(2), 5(2)(b), 5(2)(d), 5(2)(da), 6A(g)
Traffic Act 1987 (NT) s 30
Traffic Regulations 1999 (NT) reg 18

Cranssen v The King (1936) 55 CLR 509; *Crispin v Rhodes* (1986) 40 SASR 202; *Dayman v Gill* [1941] SASR 408; *Gumbinyarra v Teague* (2003) 12 NTLR 226; *Holden v Nicholas* [2018] NTSC 76; *Ihor Krawec* [1985] RTR 1; *Inkson v The Queen* (1996) 6 Tas R 1; *Kruger v Kidson* (2004) 14 NTLR 91; *McCormack v The Queen* (Unreported, Supreme Court of South Australia Court of Criminal Appeal, King CJ, Cox and Matheson JJ, 6 June 1991); *Millar v Brown* [2012] NTSC 23; *Pavli v Prestwood* (1979) 21 SASR 478; *Royall v The Queen* (1991) 172 CLR 378; *Staats v The Queen* (1998) 123 NTR 16; *The Queen v Austin* (2001) 35 MVR 302; *The Queen v De Simoni* (1981) 147 CLR 383; *The Queen v Gathercole* (2001) 34 MVR 156; *The Queen v Little* (1976) 14 SASR 556; *The Queen v Mossman* [2017] NTCCA 6; *The Queen v Wilson* (2011) 30 NTLR 51; *Thompson v Leech* (1985) 3 MVR 201, referred to.

Douglas Brown, *Traffic Offences and Accidents* (LexisNexis Butterworths Australia, 4th ed, 2006)

REPRESENTATION:

Counsel:

Appellant:	T Grealy
Respondent:	P Maley

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Maley's Barristers & Solicitors

Judgment category classification:	B
Judgment ID Number:	BLO1904
Number of pages:	23

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Flynn v Harker [2019] NTSC 36
No. LCA 26/18 (21741739)

BETWEEN:

STEVEN FLYNN
Appellant

AND:

BRENDAN HARKER
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 24 May 2019)

Introduction

[1] On 18 April 2018, the respondent pleaded guilty to one count of drive without due care, contrary to reg 18 of the *Traffic Regulations 1999* (NT) ('*Traffic Regulations*').[1] The Local Court sentencing Judge imposed a conviction and fine of $400 with a victim's levy of $150.

[2] This is a Crown appeal against sentence on the following grounds:[2]

1 Two counts of drive a motor vehicle dangerously causing serious harm contrary to s 174F of the *Criminal Code Act 1983* (NT) were withdrawn.

2 Notice of Appeal filed 11 May 2018.

1. The learned sentencing Judge erred by failing to take into account the harm suffered by the victim in assessing the seriousness of the offence.

2. The learned sentencing Judge erred in assessing that the offending was at the lower end of the scale.

3. The learned sentencing Judge erred in imposing a sentence which was manifestly inadequate in all the circumstances of the offending and the offender.

Outline of the proceedings before the Local Court

[3] Following the entry of the plea of guilty to the offence of drive without due care, the Crown facts were read. In summary, the facts presented were as follows:[3]

> On 23 June 2017 the respondent was driving his Ford Ranger utility inbound along McMillians Road, Karama. He moved into the right most lane, next to the median strip, in preparation for right hand turning into Moray Street. McMillians Road is a dual carriage road, with a raised grass median along the middle. The speed limit is 80 kilometres per hour. There are no permanent visual disruptions at the intersection of McMillians Road and Moray Street.
>
> At the same time, [RD] was driving a Mazda 3 car outbound along McMillians Road. She was travelling with her daughters, 12-year-old [TD] and 11 month old [AD]. [TD] was sitting directly behind [RD] and [AD] was in an approved child restraint directly behind the front passenger seat. [RD] was driving in the outside lane of McMillians Road, close to the curb, at no more than 80 kms per hour. At the same time, a Landcruiser was also driving outbound along McMillians Road in the lane closest to the median. The driver of the Landcruiser slowed down as he approached the intersection of Moray Street and McMillians Road, with a view of doing a U-turn if possible. The Landcruiser slowed to approximately 20 km per hour. The respondent pulled into the break in the median, directly in front of Moray Street and slowed his car. He then turned right into Moray Street, passing in front of the Landcruiser, but failing to give way to

3 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 2-4.

[RD]'s Mazda. As a result of failing to give way, the front of [RD]'s Mazda collided with the passenger side door of the respondent's vehicle. At the time of impact, the respondent's vehicle was travelling at approximately 21 km per hour. The collision caused the Mazda to spin and stop, facing toward Moray Street. Its bonnet and engine were crushed by the impact. The respondent's Ford Ranger stopped on the verge of Moray Street. There was crush damage to the passenger side of his vehicle.

The respondent was not injured. [AD] was not breathing and required immediate CPR until ambulances arrived. [RD] had to be extricated from the vehicle. All of the occupants of the Mazda were taken to Royal Darwin hospital.

[RD] was found to have the following injuries. Accumulated sacral fracture, a fracture to part of the pelvis where the bone is broken into numerous pieces, thoracic fractures of the T10 transverse process and the T8 to T9 spinous processes, fractures to the mid-back spine, encapsulated splenic laceration or a ruptured spleen, lower abdominal wall contusions or bruises. She was admitted to Royal Darwin hospital from the 23 June 2017 until 27 June 2017. She was transferred to Royal Adelaide Hospital for a minimally invasive pre-cutaneous spinopelvic fixation on 3 July 2017, which involved fixation by two rods and six screws in her lower back. Without monitoring, it is more likely than not, that [RD] would have died from intra-abdominal bleeding.

[AD] was admitted to the intensive care unit from 23 June 2017 to 30 June 2017 and then to the general paediatric ward until 10 July 2017. She was found to have suffered the following injuries. A traumatic brain injury; specifically a left frontal subdural haemorrhage and subarachnoid haemorrhage, and abdominal bleed, a right lung contusion, seizures and right arm and leg weakness. She was intubated and ventilated while in intensive care. She had intracranial pressure monitoring from 23 June 2017 to 26 June 2017 which required surgical insertion and removal. She underwent a laparotomy, an operation to explore the abdominal cavity. She was also given anti-convulsants and antibiotics. Without treatment, it is more likely than not that she would have died. [TD] was examined and found to have a right ankle strain and graze to her left lateral nasal bridge. She was given pain relief and referred to a trauma social worker.

The respondent spoke to police at the scene. A roadside breath test returned a negative result. He told police he was heading inbound along McMillians Road and attempted to make a right hand turn into

> Moray Street, but he knew there was a car in the closest lane to him and he assessed that he had plenty of time to get across the road. He did not see the other car until they collided. He nearly stopped when doing the right hand turn. He was going 30 km per hour, or a bit slower at the time of the crash and the other cars appeared to be doing the speed limit.
>
> In September 2017, the respondent was given a notice to appear. At the time of the offence, the road was sealed and dry and traffic flow was steady. The weather was clear. It was day light.

[4] The Crown also tendered a victim impact statement, which in part set out the injuries and medical treatment referred to in the Crown facts. Additional significant consequences were outlined in a victim impact statement including psychological and emotional consequences for the children, continuing medical difficulties and ongoing treatment. RD referred to significant mental health consequences for herself and TD. She stated she is unable to care for her children without the support of her partner, carer and family members. All members of the family have regular counselling appointments to deal with the ongoing consequences of their injuries. RD expressed her fear that the injuries to AD will impact on her life well into the future. She has been unable to work since the incident and has experienced financial difficulties. Her partner has been paying all of their mortgage and she receives only a percentage of her former earnings from insurance payments.

[5] In submissions on the facts before the Local Court, counsel for the Crown acknowledged it was possible that the respondent's view of the Mazda was obscured by the Landcruiser. The sentencing Judge appeared to accept this

was the case. Part of the relevant exchange in relation to that issue is as follows:[4]

Ms Grealy:	Well the victim's vehicle, because it was moving at a faster speed behind the Landcruiser which was slowing, it's possible – and the basis.
His Honour:	I see, so it was behind the Landcruiser?
Mr Maley:	It was.
Ms Grealy:	It was in the line of sight.
His Honour:	I though you said it wasn't?
Ms Grealy:	Sorry you're Honour, it wasn't in the lane behind the Landcruiser.
His Honour:	It was only in the last split second that the Mazda emerged from behind the Landcruiser?
Mr Maley:	Correct. That's right.
Ms Grealy:	Well, it – possibly, yes. So it's possible that the view of the Mazda was obscured by the Landcruiser.
His Honour:	Okay and that's why you've proceeded in the way that you have?
Ms Grealy:	And that's why we we're dealing with this charge, your Honour.

[6] There was also significant argument about whether the injuries could be taken into account in assessing the gravity of the offending given counts one and two, charged against s 174F of the *Criminal Code Act 1983* (NT)

---

4 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 6.

('*Criminal Code*'), had been withdrawn.[5] In the Local Court, counsel for the Crown submitted that while causing harm or serious harm was not an element of the offence, the injuries which were part of the Crown facts were a consequence of the offending. That being the case, it was submitted the *Sentencing Act 1995* (NT) ('*Sentencing Act*') required the Court to consider the impact the offending has on victims. The Crown submitted the Court was to sentence for the lack of care on the particular facts, given there is an onus on drivers to ensure they are exercising proper care at all times because the consequences of offending of this kind can be serious. Further, the Crown emphasised the respondent should have realised that he did not have a clear view of the road and that if he had slowed down or paused before turning across the road into Moray Street, it was likely he would have seen the Mazda. The relevant lack of care was said to be that the respondent should have realised the possibility there might be another vehicle in the second lane, while he knew there was a large vehicle approaching, and was aware that his view was obscured. The respondent therefore failed to exercise appropriate care because he made the turn when there was an obstruction, and a driver exercising the appropriate level of care would have paused to ensure an unobstructed view of the road.

[7] The sentencing Judge expressed concern that given the respondent was not charged with dangerous driving or with the withdrawn counts, the Court

---

5 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 6.

could not take into account the resulting damage as the consequences of the collision did not increase the level of the breach of care. Counsel for the Crown did not accept the proposition that the breach of duty of care was at the lower level. Rather, it was submitted that in terms of a charge of driving without due care, the gravity of the offending should be assessed towards the higher end for cases of this kind.[6] The sentencing Judge expressed concern about what was contemplated by the charge. His Honour indicated he had a serious problem with dealing with the matter in the way counsel for the Crown had submitted.[7]

[8] Counsel for the respondent submitted the unforeseen and unexpected results of careless driving are not relevant to the penalty. Additionally, that the offending was a minor example of driving without due care as the respondent had slowed down and made a genuine mistake. The accident investigation report was cited,[8] which his Honour was told concluded that the likely cause of the crash was that the driver of the Ford Ranger (the respondent) did not properly check for oncoming traffic due to an obstruction from the oncoming Landcruiser. Further, the respondent submitted that while the consequences were tragic and the respondent was

---

6 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 9-10.

7 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 11.

8 Exhibit P2 before the Local Court.

very upset about the injuries caused, it was still a genuine accident.[9] The respondent's counsel submitted the plea was sound and that the respondent should be dealt with by way of fine, that this should be treated as a lack of perfect driving, where the lack of vision was obvious on the particular occasion and the minor driving error justified the charge of drive without due care.[10]

[9] The respondent had no previous convictions of any kind.

[10] After the conclusion of the various exchanges with counsel his Honour remarked as follows:[11]

> It seems to me that this is-apart from what happened which is extremely unfortunate, that the actual driving offence was at the lower end of the scale; notwithstanding that.
>
> And I cannot take into account – it seems to me, in working out the level of the breach of care, the damage that was caused which was quite horrendous in this case; but I'm sure that there are other remedies available for these victims who are unfortunate enough to be in this situation. I have no doubt they will be advised to take them.

Ground 1: That the learned sentencing Judge erred by failing to take into account the harm suffered by the victims in assessing the seriousness of the offending.

[11] Although the sentencing remarks were limited this is not uncommon in traffic cases, nor unexpected with respect to routine matters before the Local

---

9 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 11.

10 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 11.

11 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 12.

Court.[12] No error arises from the brevity of reasons. It is clear from the exchanges largely summarised above that the sentencing Judge did not think injuries which occur as a result of minor or relatively minor traffic offences should form part of the assessment of the gravity of the offending. I do not agree with counsel for the respondent's submission that his Honour did have regard to the injuries in assessing the gravity of the offending. Counsel for the respondent argued this was so as the sentencing judge accepted the victim impact statement, engaged in the discussion with counsel on the topic and referred to the 'extremely unfortunate' consequences.[13] Counsel for the respondent pointed out that his Honour said he 'cannot take that into account… in working out the level of the breach of care…'[14] While it is the case that the extent of the injuries cannot inform the gravity of the actual breach of care, that conclusion does not shed light on the issue of whether the injuries were considered in the overall assessment of the seriousness for sentencing purposes.

[12] This appeal does raise a sentencing dilemma. As above, the sentencing Judge clearly acknowledged the same during the course of exchanges with counsel, even to the point of consideration of whether the charge was properly made out. It has been held that the law does not expect a driver to

---

12 *Millar v Brown* [2012] NTSC 23 at [19].

13 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 12.

14 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 12.

drive 'perfectly',[15] rather the law requires drivers to exercise reasonable care and skill, in other words, 'due care' or adequate caution in all of the circumstances.[16] Whether 'due care' has been exercised is an objective assessment made when all of the relevant circumstances confronting the particular driver are considered. Given the facts that were accepted before the Local Court, there was no need for hesitation to determine whether the charge was made out. Ultimately his Honour accepted that it was.

[13] It is not necessary that a collision, property damage or personal injury be proven to make out the charge of drive without due care.[17] Damage or injury is not an element of the offence. However, after considering the relevant authorities to be discussed, it is concluded that consequences of that kind may increase the assessment of the gravity of the offending for sentencing purposes. At the same time, a person being sentenced for drive without due care must not in reality or surreptitiously be dealt with for a more serious offence which would breach the rule or spirit of the principle described in *The Queen v De Simoni* ('*De Simoni*').[18]

[14] The relevant maximum penalty for drive without due care is 20 penalty units (at the relevant time equal to $3,080) or imprisonment for 6 months, the general penalty prescribed under reg 93 of the *Traffic Regulations*. The

---

15 *The Queen v Little* (1976) 14 SASR 556 at 569.

16 *Crispin v Rhodes* (1986) 40 SASR 202; *Dayman v Gill* [1941] SASR 408.

17 See Discussion in Douglas Brown, *Traffic Offences and Accidents* (LexisNexis Butterworths Australia, 4th ed, 2006) at 88-89.

18 [1981] HCA 31; 147 CLR 383 at 389 (Gibbs CJ).

maximum penalty is far lower than the penalty for more serious driving offences in the *Criminal Code* or other more serious offences, such as dangerous driving in the *Traffic Act 1987* (NT). On one view, the limited penalty for drive without due care may point against an interpretation that encompasses a range of conduct including the serious consequences of the driving, rather than the level of the breach itself. However, in my view the relatively recent authorities are clear that the consequences of driving without the requisite care form part of the assessment of the gravity of the offending, but those consequences are not necessarily the dominant factor. The focus must still be on the objective quality of the driving itself, having regard to all of the circumstances. It is to be remembered that the offence of drive without due care is a regulatory offence, therefore criminal responsibility is determined largely without reference to subjective factors, nor are the usual range of excuses, justifications or authorisations relevant.[19] Further, harm or serious harm is not an element of the charge of drive without care. Neither are they statutory circumstances of aggravation. While any sentence for drive without due care cannot be based on the premise that an offender is criminally responsible in the sense of being found guilty for consequential damage or injury, it does not follow that those same

19 See *Criminal Code Act 1983* (NT) s 22. It is a defence to a regulatory offence that the act, omission or event is done in obedience to the order of a competent authority or pursuant to authority lawfully granted: see *Criminal Code Act 1983* (NT) s 26(1)(c)-(d). See also the limited excuses under ss 30(3) 38 of the *Criminal Code Act 1983* (NT). Although lack of intention is no excuse, the act may be required to be voluntary: see *Kruger v Kidson* [2004] NTSC 24; 14 NTLR 91.

consequences should be ignored or carry no weight in sentencing considerations or assessing the objective gravity of the offending.

[15] Section 5(2) of the *Sentencing Act* requires the Court to have regard to the nature of the offence and how serious the offence was, including any physical, psychological or emotional harm done to a victim;[20] the damage, injury or loss caused by the offender;[21] and any harm done to a community as a result of the offence (whether directly or indirectly).[22] In *Staats v The Queen* ('*Staats*')[23] Angel J held s 5(2)(b) of the *Sentencing Act* applies irrespective of whether the harm done is an element of the offence.[24] Martin (BF) CJ observed of s 5(2)(b):[25]

> What it requires is that the harm done to a victim be included in the factors going to make up the seriousness of the offence. The degree of seriousness of an offence is a matter which may have an effect on sentence; it is a factor which may lead to a greater penalty being imposed; there is a potential for an adverse effect upon the offender. Accordingly, before imposing a greater penalty on that account, the court must be satisfied that the harm was an outcome of the offence and that the offender is to be held criminally accountable for it.

[16] A variety of views were expressed in *Staats* about the circumstances in which the consequences to a victim may be attributed to the offending and therefore form part of the assessment of the gravity of the offending. The context in which the issue arose in *Staats* concerned how a court may inform

---

20 *Sentencing Act 1995* (NT) s 5(2)(b).

21 *Sentencing Act 1995* (NT) s 5(2)(d).

22 *Sentencing Act 1995* (NT) s 5(2)(da).

23 (1998) 123 NTR 16.

24 (1998) 123 NTR 16 at 27.

25 (1998) 123 NTR 16 at 21.

itself in relation to the harm to a victim as envisaged in s 5(2)(b), dealing with psychological and emotional harm expressed in various ways in a victim impact statement. In that context, Martin (BF) CJ held an offender was responsible for harm that was foreseen or ought reasonably to have been foreseen by them.[26] Thomas J approved of the approach taken by the Judge at first instance in *Staats* which was expressed as follows:[27]

> It is not necessary for harm to be caused that it is solely caused by the offences. It is sufficient if it is a cause. As to whether the matters complained of are caused by the crimes or not or whether they are the result of some intervening act which breaks the chain of causation, the test to be applied is whether they were the very kind of thing likely to happen as a result of the prisoner's crimes.

[17] Angel J followed the reasoning of Underwood J in *Inkson v The Queen*[28] where his Honour expressed the view that deterrence and retribution required consideration to be given to unforeseen and unforeseeable consequences. Angel J observed other members of the Tasmanian Court of Criminal Appeal looked at justice rather from the point of view of the offender and although he considered it was unnecessary to decide the point, his Honour indicated he was inclined towards the view of Underwood J. Ultimately, Angel J resolved the issue by reference to s 5(2)(b) of the *Sentencing Act*, which his Honour observed expressly provides for the seriousness of the offence to be measured, *inter alia*, by the harm done to the victim. This was irrespective of whether harm is an element of the

---

26 *Staats v The Queen* (1998) 123 NTR 16 at 21.

27 *Staats v The Queen* (1998) 123 NTR 16 at 37.

28 (1996) 6 Tas R 1.

offence, noting that the issue of foreseeability is relevant, if at all, to causation. His Honour concluded sentencing principles are served by holding an offender to account for 'unforeseen and unforeseeable consequences of the offence'.[29] As indicated above, *Staats* is to be seen in its context, which was to determine whether certain emotional and psychological harms detailed in a victim impact statement elevated the gravity of, in that instance, sexual offending.

[18] In *Gumbinyarra v Teague* ('*Gumbinyarra*')[30] Mildren J noted the differences of opinion in *Staats*. *Gumbinyarra* concerned the question of whether staff cleaning up an offender's blood after he was injured when he smashed glass at a health clinic could be considered victims. After discussing the approach taken to causation in *Royall v The Queen* ('*Royall*'),[31] Mildren J adopted what was said by the majority in *Staats* as to when certain consequences of offending may be taken into account and concluded the consequences had to have been 'either foreseen by the accused or if not, have been reasonably foreseeable by the accused'.[32] In terms of whether the consequences are reasonably foreseeable, or what must be foreseen, 'is damage of the same kind as in fact occurred'.[33] Although it is accepted here that *Royall* deals with the question of causation in criminal matters, in that instance homicide, and whether foresight should form part of a causation direction, there are

29 *Staats v The Queen* (1998) 123 NTR 16 at 26-27.

30 [2003] NTSC 25; 12 NTLR 226.

31 [1991] HCA 27; 172 CLR 378 at 398-399, 450.

32 *Gumbinyarra v Teague* [2003] NTSC 25; 12 NTLR 226 at [8].

33 *Gumbinyarra v Teague* [2003] NTSC 25; 12 NTLR 226 at [8].

reasonable synergies with the law to be applied in this instance and the approach has been accepted by a majority of the Court of Criminal Appeal in *Staats*.

[19] Since the oral hearing of this appeal, the matter of *Holden v Nicholas*[34] has been drawn to my attention. In that matter, which involved the commission of a regulatory traffic offence resulting in a tragic death, Riley AJ came to the conclusion that such consequences are to be taken into account to elevate the seriousness of the offending.[35] Even though the words in s 5(2) of the *Sentencing Act* are broad and without apparent limitation, after reviewing the legislative regime his Honour concluded that it could not have been the intention of the legislature to attribute responsibility to an offender for harm which was not actually foreseen and which no reasonable person would foresee.[36] Although his Honour's reasoning, like that of Mildren J's in *Gumbinyarra* and the majority in *Staats*, was to some degree influenced by reasoning based on causation, his Honour also observed that if the legislature intended to extend the concept of responsibility for harm which no reasonable person would have foreseen, it would be necessary that a clear legislative statement be made to that effect.[37]

[20] It seems to me that applying the test of reasonably foreseeable consequences is most apt when dealing with the consequences of an offence such as drive

---

34 [2018] NTSC 76.

35 *Holden v Nicholas* [2018] NTSC 76 at [26].

36 *Holden v Nicholas* [2018] NTSC 76 at [17].

37 *Holden v Nicholas* [2018] NTSC 76 at [19].

without due care. To find the elements of the offence proven requires an objective assessment of the want of care. Damage or harm that is reasonably foreseeable is not an unorthodox approach to assessing the gravity of the offending in this context. Unfortunately, as is well accepted, even minor lapses when driving can in some cases lead to tragic events. Those events or consequences are rarely intended or foreseen, but by their nature may be reasonably foreseen. This in turn no doubt informs the rationale for the various traffic laws and regulations that inculpate even apparently minor lapses. If the harms were actually intended or foreseen by a driver they would likely be subject to a more serious charge than drive without due care. In my view a useful expression of the appropriate test was that adopted by her Honour Thomas J in *Staats*, namely whether the injuries were the very kind of thing likely to happen as a result of the offending.[38]

[21] As above, and as was acknowledged by the plea of guilty, the respondent turned across an 80 km/h stretch of road before ensuring it was clear of other traffic. The serious physical injuries were not subjectively foreseeable by him, however in all of the circumstances described, the injuries are properly regarded as a reasonably foreseeable consequence of the failure to take appropriate care.

[22] Both counsel have drawn attention to how courts in other jurisdictions have dealt with the issue of the consequences of charge of driving without due

---

38 *Staats v The Queen* (1998) 123 NTR 16 at 37.

care or equivalent charges. Although there are examples of cases which tend to confine the assessment of penalty to the probable and not the actual consequences of the want of due care and attention,[39] that position has changed, possibly as a result of changes in broader sentencing principles such as those in modern sentencing legislation which emphasise the position of victims.

[23] In 2005, the South Australian Parliament introduced an aggravated form of the offence of driving without due care to the *Road Traffic Act 1961* (SA). The aggravated form of the offence includes causing serious harm or death as a result of the driving. No such amendment has been introduced in the Northern Territory. Nevertheless, prior to the introduction of the aggravated form of drive without due care in South Australia, the South Australian Court of Criminal Appeal has held that a judge sentencing for an offence of drive without due care could have regard to the fact that the driving had caused death, bodily injury or other damage.

[24] In *McCormack v The Queen* ('*McCormack*'),[40] King CJ referred to s 10(e) of the *Criminal Law (Sentencing Act) 1998* (SA), which provided that the Court should have regard as far as relevant to 'any injury, loss or damage resulting from the offence'. His Honour concluded a judge sentencing for an offence

---

39 *Pavli v Prestwood* (1979) 21 SASR 478: See also *Thompson v Leech* (1985) 3 MVR 201, holding the consequences not relevant, although it was not clear what the consequences were. In *Ihor Krawec* [1985] RTR 1 at 3 Lord Lane CJ held 'unforeseen and unexpected results' were not in themselves relevant to penalty.

40 *McCormack v The Queen* (Unreported, Supreme Court of South Australia Court of Criminal Appeal, King CJ, Cox and Matheson JJ, 6 June 1991).

of driving without due care was justified having regard to the fact of death, injury or damage. Consistent with the *De Simoni* principle, King CJ observed the limitation that 'it would not be relevant to do so, as a general rule, if the consequence sought to be taken into account would make the conduct a different and more serious crime'.[41] Similar observations were made by Doyle CJ in *The Queen v Gathercole*[42] where it was held that a judge was entitled to have regard to the consequence of driving which in that instance was the death of the passenger. *McCormack* was also relied on by Lander J in *The Queen v Austin*.[43] In that case his Honour made a finding that the death was a foreseeable consequence of the breach of the road rules.[44] The relevant South Australian authorities were discussed by Riley AJ in *Holden v Nicholas*. His Honour concluded tragic consequences of driving are to be taken into account to elevate the seriousness of the offending in the Northern Territory. After consideration of the authorities, I have come to the same conclusion.

[25] In my view the harms to be taken into account must be shown to be reasonably foreseeable, however this is to be done in a manner that is consistent with the principle in *De Simoni*. A person charged with driving without due care cannot be sentenced on the basis of the more serious charge

---

41 *McCormack v The Queen* (Unreported, Supreme Court of South Australia Court of Criminal Appeal, King CJ, Cox and Matheson JJ, 6 June 1991).

42 [2001] SASC 248; 34 MVR 156.

43 [2001] SASC 425; 35 MVR 302.

44 [2001] SASC 425; 35 MVR 302 at 303.

of dangerous driving,[45] which requires proof of objectively dangerous driving beyond what is required for proof of driving without due care. Neither can a person in the circumstances of the respondent be sentenced on the basis that they have committed the more serious offences under the *Criminal Code*. Those offences require proof of dangerous driving in accordance with the definition under s 174F(3) of the *Criminal Code*. Although there may be some overlap in a given case, generally speaking dangerous driving requires a higher level of culpable driving be proven than for the offence of driving without due care. Overall, the circumstances of this offending were not such as to warrant a conviction for a more serious offence.

[26] Consideration should, however, have been given to the injuries to the victims.[46] There was detailed material before the Local Court in both the Crown facts and the victim impact statement and those matters should have been taken into account when assessing the gravity of the offending.

[27] I will uphold ground 1.

Ground 2: The learned sentencing judge erred in assessing that the offending was at the lower end of the scale.

[28] This ground will succeed in part for the reasons given with respect to ground one. This was a case where it was reasonably foreseeable that proceeding to cross a busy main road without an unobstructed view of the second lane

45 *Traffic Act 1987* (NT) s 30.

46 The *Sentencing Act 1995* (NT) s 5(2) and 6A(g) refers to aggravation if there is more than one victim.

would lead to collision and injuries of the kind suffered. The collision could have been avoided if the respondent had paused until his view was clear. Although the serious injuries to the victims elevate the gravity of the offending for sentencing purposes, the primary considerations are the quality of the driving and the extent to which the respondent fell below the standard expected of a reasonable driver in all of the circumstances.

[29] In exchanges with counsel the sentencing Judge appeared to compare the driving at hand with the higher level of culpable driving that might be expected in cases that involve the charges that had been withdrawn[47] or with driving through a red light.[48]

[30] It is not clear whether that was his Honour's concluded view, however the sentencing spectrum in this matter is confined to cases of drive without due care or equivalent charges and the reasonably limited penalties available which reflect the limited criminality in cases of drive without due care. In my view the offending is above the mid-range of cases of this kind when both the driving and the consequences are considered. I would allow this ground.

Ground 3: That the sentence was manifestly inadequate.

[31] It follows from what has been said in relation to grounds 1 and 2 above that the sentence passed was manifestly inadequate as the very moderate fine did

---

47 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 9.

48 Transcript of Proceedings, *Police v Brendan James Harker* (Northern Territory Local Court, 21741739, Judge Carey, 18 April 2018) at 10.

not reflect the gravity of the offending and its consequences, properly considered. Although I bear in mind the restraints inherent with Crown appeals,[49] in my view the sentencing discretion miscarried in the sense identified in *Cranssen v The King*.[50] Aside from the errors identified, the penalty is so inadequate when the facts and consequences are considered as to demonstrate error.

Re-sentence

[32] In my view the combination of the driving and the tragic consequences place this offending above the mid-range of offences of this kind. As the facts have already been set out I will not repeat them here. Although there is a discretion to refuse to correct the sentence notwithstanding error, in my view the respondent should be re-sentenced. There has been no particular matter of unfairness raised that would enliven the discretion.[51] For example, the Crown filed the Notice of Appeal in a timely fashion, although through no fault of the parties it has taken some time to resolve the appeal.

[33] Although a relatively serious example of offending of this kind, the sentence must be seen in the context of the maximum penalty of 6 months imprisonment or 20 penalty units. The offence of drive without due care is not in a generically serious category of offences, be that traffic offences or

---

49 Recently examined in *The Queen v Mossman* [2017] NTCCA 6 at [8] (Grant CJ, Southwood and Hiley JJ).

50 (1936) 55 CLR 509 at 519, 520.

51 See *The Queen v Wilson* [2011] NTCCA 9; 30 NTLR 51 at [27].

otherwise. It is within this penalty framework that the sentence must be assessed.

[34] The respondent has excellent subjective factors and prospects. During the appeal hearing the Court was told the respondent is 33 years old. He has no previous convictions of any kind. He has worked all of his life. He owns a trucking company and employs people. He has a good family life and is married with two young children. He was very cooperative with police at the scene and was clearly upset. He has sought counselling. The imposition of the conviction itself is keenly felt as a stain on him. As part of his business he owns two trucks and a grader and is effectively on the road for much of the time as a self-employed operator. A disqualification from driving would be devastating. He has considerable operating debts in his business, although given time to do so, he has the capacity to pay a fine. There was a plea of guilty.

[35] Given the respondent's circumstances, particularly his need to drive to run his business and that he has no previous convictions, there will be no order for disqualification. Given his positive antecedents, there will be no order for imprisonment, suspended or otherwise. The fine will however be substantially increased to satisfy general deterrence and the punitive objectives of sentencing law. The penalty should signify that the offending was more than a routine example of the offence of the drive without due care.

Orders

1. The appeal is allowed.

2. Pursuant to s 177(2)(b) of the *Local Court (Criminal Procedure) Act 1928* (NT) the fine imposed on 18 April 2018 is increased to $2,000.

3. Pursuant to s 177(2)(c) of the *Local Court (Criminal Procedure) Act 1928* (NT) the conviction and victim's levy of $150 imposed on 18 April 2018 are affirmed.
