SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gazzara* [2017] QCA 168
PARTIES:	**R** **v** **GAZZARA, Benjamin James** (applicant/appellant)
FILE NO/S:	CA No 311 of 2016 DC No 418 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction) Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 22 August 2016; Date of Sentence: 24 October 2016
DELIVERED ON:	11 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	19 April 2017
JUDGES:	Morrison and Philippides JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**1. The time in which to file the appeal is extended to 16 December 2016.** **2. The application for leave to adduce further evidence is refused.** **3. The appeal against conviction is dismissed.** **4. The application for leave to appeal against sentence is granted.** **5. The appeal against sentence is allowed.** **6. Vary the order that the applicant be disqualified from holding or obtaining a driver's licence for a period of three years and instead order the applicant be disqualified from holding or obtaining a driver's licence for a period of two years from 24 October 2016.** **7. Order that the portion of the disqualification that had not expired when the appeal against conviction was lodged on 16 November 2016 shall take effect from 17 November 2016.** 8. **Otherwise confirm the sentence imposed on 24**

October 2016.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – where the applicant/appellant pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm on 22 August 2016 – where the applicant/appellant was sentenced on 24 October 2016 – where the applicant/appellant filed a notice of application to extend the time within which to appeal his conviction – where the notice of application explained that the applicant/appellant mistakenly believed he had been convicted in October, rather than when he was arraigned in August – whether the applicant/appellant should be granted leave to appeal

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – GENERAL PRINCIPLES – where the applicant/appellant submitted the plea of guilty was not a true acknowledgement of guilt – where the appellant submitted that a miscarriage of justice would occur if the plea of guilty was not set aside – where the appellant received legal advice prior to entering his plea of guilty – where the appellant's counsel and solicitors had access to all evidence supporting the charge before advising the applicant to plead guilty – where the appellant gave written instructions of the plea of guilty – where the appellant submitted at the appeal hearing that a new expert report obtained in a civil proceeding should be accepted as fresh evidence which requires a re-trial – whether a substantive miscarriage of justice would occur if the new report was not accepted

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to three years' imprisonment, suspended after six months for an operational period of four years – where the applicant was also disqualified from holding or obtaining a drivers' licence for three years – where the applicant's counsel contended that the head sentence of three years, the operational period and the disqualification period were manifestly excessive – where the learned sentencing judge used a number of cases to characterise the applicant's conduct as "fraught with risk" and with "devastating", "profound implications for the victim" – where it is common for an operational period to be longer than the period of imprisonment – where the learned sentencing judge imposed the disqualification period to protect the community and support rehabilitation – where the applicant objects to the disqualification period because of the adverse effects it will have on rehabilitation – where the applicant shows remorse and has job prospects requiring a

driver's licence – whether the disqualification will hinder rehabilitation – whether the operational period of the suspended sentence was excessive – whether the head sentence was excessive – whether the sentence as a whole is manifestly excessive in all circumstances

Penalties and Sentences Act 1992 (Qld), s 187(1)(b)
Transport Operations (Road Use Management) Act 1995 (Qld), s 131

Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, followed
R v Armstrong [2014] QCA 274, cited
R v Boubaris [2014] QCA 199, considered
R v Danter [2016] QCA 94, considered
R v Hennessy; *Hennessy v Vojvodic* [2010] QCA 345, followed
R v Huxtable [2014] QCA 249, considered
R v MacDonald (2014) 244 A Crim R 148; [2014] QCA 9, considered
R v Osborne [2014] QCA 291, considered
R v Stevenson [2016] QCA 162, considered
R v Tout [2012] QCA 296, followed

COUNSEL: A J Kimmins for the applicant/appellant
J Robson for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** On 9 September 2013, Mr Gazzara was driving a prime mover and trailer, which was carrying a total load of about 16 tonnes. His friend was in the passenger seat. He was travelling in excess of the speed limit, causing his friend (another truck driver) enough concern that he suggested that Mr Gazzara "might want to back off a bit". Mr Gazzara replied "it'll be right", and did not slow down.

[2] The semi-trailer was negotiating a large sweeping right hand bend on the Gateway Motorway, near where the Gateway Motorway crossed the Gympie Arterial Road before joining the highway north. Mr Gazzara changed lanes from the right-hand lane to the left lane, because there was a slower truck travelling in the right lane. He attempted to overtake it on the left side, correcting the semi-trailer's line of travel once he reached the left lane.

[3] The trailer tipped entirely over, causing the prime mover to roll to the left as well. The prime mover and trailer combination crashed through a metal barrier on the left side of the road, and plunged off an embankment to a service road below. As a consequence, the passenger suffered severe injuries which included a traumatic amputation of his left leg below the knee.

[4] Mr Gazzara was charged with dangerous operation of a vehicle causing grievous bodily harm. He entered a plea of guilty on 22 August 2016. On 24 October 2016,

he was sentenced to a period of three years' imprisonment, suspended after serving six months for an operational period of four years. He was also disqualified from holding or obtaining a drivers' licence for three years.

[5] He seeks to withdraw his guilty plea, and also challenges the sentence as being manifestly excessive.

The notice of appeal

[6] On 16 November 2016, a notice of appeal and an application for leave to appeal against sentence was filed. It mistakenly recorded the date of conviction as the same date as the sentence, namely 24 October 2016. The two grounds advanced were that the verdict was unreasonable and could not be supported having regard to the evidence, and that the sentence was manifestly excessive.[1]

[7] On 16 December 2016, Mr Gazzara filed a notice of application to extend the time within which to appeal against his conviction. That document explained that Mr Gazzara misapprehended that he had actually been convicted on the date of his sentence, rather than 22 August 2016 when he was arraigned. The application for an extension of time was not opposed by the Crown and is granted. The time in which to file the appeal is extended to 16 December 2016.

[8] That notice said the appeal "relates to having my plea of guilty revoked". At the hearing before this Court, the Crown did not oppose any extension of time for the appeal against conviction.

[9] At the hearing before this Court leave was granted to amend the grounds of the appeal so that the only grounds raised were:

(a) the plea of guilty was not a true acknowledgment of guilt;

(b) it would be a miscarriage of justice if the plea of guilty was not set aside and a re-trial ordered; and

(c) the sentence was manifestly excessive.

Factual background of the offending

[10] It is appropriate to consider the factual basis of the offending in a little more detail.

[11] Mr Gazzara was 24 years old at the time of the offence, and employed as a truck driver. He was taking the prime mover and semi-trailer from the Port of Brisbane to Mackay. He had loaded the semi-trailer with the two crates of machinery which, together, weighed about 16 tonnes. The smaller crate, though heavier at 11 tonnes, was loaded over the back axles of the trailer. The truck was signed "Oversize" because the larger crate was wider than the trailer. The larger one, weighing five tonnes, was loaded immediately behind the cabin of the semi-trailer.

[12] Mr Corry, then about 25 years old, had been friends with Mr Gazzara for about eight years. He needed to travel to Mackay and Mr Gazzara offered him a lift. They met at Boronia Heights on the evening when they left Brisbane. Both Mr Corry and Mr Gazzara checked the load. Mr Corry, who had commercial truck driving

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1 AB 103.

experience, did not think the load was perfectly loaded, and would have loaded it differently himself. However, he was not so worried as to decline to get into the prime mover.

[13] At the point where the Gateway Motorway travels over the Gympie Arterial Road, at Bald Hills, the overpass is part of a large sweeping right hand bend. The speed limit was 100 kilometres per hour, and Mr Gazzara was travelling at a speed between 96 and 100 kilometres per hour. Because his truck was "over size", Queensland Government Guidelines limited him to 90 kilometres per hour, or any lower speed that was signed. The bend had an advisory speed of 80 kilometres per hour, signed on both sides of the road.

[14] Mr Corry was concerned at the speed involved in approaching the right hand bend. He told Mr Gazzara that he "might want to back off a bit", but Mr Gazzara did not do so, replying "it'll be right". Mr Gazzara did not brake at all going into the curve.

[15] As Mr Gazzara approached the bend he was in the right hand lane. He came up behind another truck which was travelling slower than himself, also in the right hand lane. Mr Gazzara changed lanes to the left to "undertake the truck".[2]

[16] After the truck entered the left hand lane, Mr Gazzara turned the steering wheel to straighten the truck's path into that lane. The tyre marks which revealed Mr Gazzara's path, showed it was travelling with a radius of about 220 metres, instead of the radius of the path if it had stayed in one lane (about 320 metres).

[17] The manoeuvre changing lanes, combined with the speed at which Mr Gazzara was driving, meant that the lateral acceleration acting on the truck exceeded that which the truck could take without rolling over. The lateral force caused the truck to move to the outside of the curve. The agreed schedule of facts at the sentencing hearing then described what happened:

> "That changing lanes manoeuvre, at the speed [Mr Gazzara] was driving, meant that the lateral acceleration acting on the truck exceeded that which the truck could take without rolling over. The lateral force caused the truck to move to the outside of the curve. Initially, that meant that there was significant pressure on the left side tyres of the truck and trailer, which left tyre marks on the road. The lateral force led to the truck tipping. The trailer, which would roll with less lateral acceleration, rolled first. The back right tyres of the trailer left the ground and the trailer started to tip to the left. As the trailer tipped entirely over, the heavy machinery in the back crate fell off the trailer, and smashed through the metal barrier on the side of the road.
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> The trailer tipping caused the prime mover to rollover as well. It hit the road on its side, leaving large gouge marks where the front tyre of the prime mover spun horizontally on the ground.
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> The whole prime mover and trailer combination smashed through the W-beam metal barrier on the side of the road and plunged off an embankment down to a service road area below. The prime mover and trailer landed on the ground with the prime mover upside down

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[2] The expression "undertake" was used in the agreed Schedule of Facts, apparently to signify overtaking a vehicle on the left, rather than the right.

> and severe rollover damage to the cab. The trailer was still attached to the prime mover and also upside down."[3]

[18] No mechanical defects were found to have contributed to the crash. At the sentence hearing it was agreed that:[4]

> " … expert analysis of the physical evidence at the scene and of the vehicles and loads determined that the rollover was caused by the force acting laterally on the truck and trailer caused by its speed and path. Further, the load did not shift on the trailer or tip over inside one of the crates".

[19] The schedule of facts contained the conclusion that Mr Gazzara's operation of the vehicle was dangerous by reason of the following factors:

(a) failing to drive at a speed suitable to the circumstances;

(b) changing lanes at a time at which it was unsafe to do so;

(c) changing lanes in a manner which was unsafe in the circumstances;

(d) failing to maintain proper control of the truck and trailer; and

(e) failing to drive with due care and attention.

[20] Mr Gazzara's dangerous driving caused the truck and trailer to roll over. That dangerous driving also posed a danger to other road users on the Gateway Motorway and the Gympie Arterial Road.

[21] The schedule of facts described the aftermath of the crash.[5] Mr Corrys' left leg had been amputated in the crash and he had also sustained multiple injuries including an open wound to the right knee, a crush injury to the right hand, fractures of four ribs on the left side, air and blood in the chest cavity outside the lung on the right side, lacerations to the right hand and forearm, fractures to both sides of his pelvis, and bruising and abrasions.

[22] Mr Corry was taken to intensive care where he underwent various surgical procedures on his wounds. He was in intensive care for about 16 days and subsequently underwent skin grafts and corrective surgery on the stump of his left leg, which involved shortening the existing bone. He was eventually discharged to a rehabilitation unit on 4 November 2013, nearly two months after the accident.

[23] The crash also caused significant damage to the mining equipment in the crates, valued at over US$550,000. Some of the equipment was rendered unrepairable or unusable.

Circumstances surrounding the plea of guilty

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3 AB 36.
4 AB 36.
5 AB 37-38.

[24] Prior to entering his plea of guilty on 22 August 2016, Mr Gazzara gave written instructions to his then legal representatives.[6] Those instructions contained the following paragraphs:

> "5. I have had the benefit of advice from my legal representatives and fully understand the charge, the prosecution evidence against me, and that the evidence supports the charge.
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> 6. By pleading guilty I understand and accept that I will be sentenced by the Court on the basis of the facts presented to the Court by the prosecution, and any mitigating factors accepted by the Court. I have had these matters explained to me."[7]

[25] At the sentencing hearing, Counsel for Mr Gazzara referred to a number of factors which make it plain that Mr Gazzara and his legal representatives had access to the Queensland Police Service forensic crash investigation report (**the QPS report**).

[26] At the hearing before this Court two reports were tendered, each from Loadsafe Australia Pty Ltd,[8] a firm engaged on behalf of Mr Gazzara. The first report is dated 9 April 2015, and the second 23 May 2016.[9]

[27] Loadsafe was engaged in the first report to provide expert advice on various aspects of the incident, including the load and whether the load restraint was appropriate. In the second report, Loadsafe was retained to provide expert advice in respect of the QPS report.

[28] In the first report, Loadsafe reached the conclusion, based on an analysis which was set out in the report, that:

(a) the loaded semi-trailer had very poor stability because of the high centre of mass of the load;

(b) as a result of the right hand curvature of its path, and speed, the semi-trailer was subjected to a relatively small lateral acceleration, but because of its poor stability, the trailer began to roll to the left;

(c) once the rear of the trailer began to roll and the deck achieved a relatively low angle, the unrestrained 11 tonne load was free to slide sideways to the left of the vehicle; and

(d) any sideways displacement of the 11 tonne load would have provided an additional destabilising force, which most probably prevented any recovery from the roll over.[10]

[29] In the second report, Loadsafe conducted an analysis of the QPS report, section by section. In the course of that exercise, Loadsafe dealt with various topics such as curve and truck speed, curve and travel radius, the rollover threshold and lateral forces.

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6 Leave was sought to adduce this evidence as part of the "fresh evidence" in support of the ground to set aside the guilty plea.

7 Affidavit of Mr Gazzara, 13 April 2017, Exhibit BJG-1.

8 Which I will refer to as "Loadsafe".

9 Exhibits TGZ-1 and TGZ-2 to the Affidavit of Mr Zwoerner, 12 April 2017. This material was sought to be advanced in response to the ground seeking to set aside the guilty plea.

10 Loadsafe Australia report, 9 April 2015, paragraphs 31-36.

[30] Mr Gazzara had the benefit of those reports at the time he pleaded guilty. In addition, he and his advisers were able to assess the quality of the QPS report against whatever critique was made of it by Loadsafe.

[31] In addition, the CCTV footage of the actual incident was available to Mr Gazzara and his advisers.

[32] With the benefit of all of that information and advice, Mr Gazzara gave instructions to plead guilty to dangerous operation of a vehicle causing grievous bodily harm. I have already referred to two of the paragraphs from Mr Gazzara's written instructions: paragraph [24] above. There is a third which contains the following:

> "7. I do not admit my guilt to the offences. However, I understand that by pleading guilty I am indicating that I do not wish to contest the crown case against me, and am thereby accepting my guilt to the offence. I understand that despite my honest belief in my innocence, I will be sentenced by the court on the basis that I am guilty. I have decided to plead guilty for, among others, the following reasons:
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> (a) My counsel has advised me that it is extremely likely I will be convicted of the charge;
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> (b) If convicted of all of the offence after trial it has been explained to me that I will receive a longer sentence of actual imprisonment than if I plead guilty;
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> (c) I want to minimise the amount of actual custody that I am potentially exposed to."

[33] Certain statements made at the sentencing hearing by Counsel for Mr Gazarra fall to be considered in the light of Mr Gazarra having obtained his own expert advice in relation to the incident, and analysis of the QPS report,:

(a) the police forensic investigation report concluded that the cause of the truck tipping was a combination of the slightly elevated speed with a decrease in the turn radius, caused by the lane change;[11]

(b) if Mr Gazzara had driven around the right hand bend in the right hand lane at the speed he was travelling at, the vehicle would not have tipped;[12]

(c) if Mr Gazzara had performed the lane change at a lower speed, he would not have tipped;[13]

(d) it was not the case that Mr Gazzara had to take emergency evasive action to avoid the truck in front of him; it was an unwise lane change and poor judgment;[14] and

(e) Mr Gazzara "shouldn't have changed lanes at the time that he did, because by doing so, he increased the lateral force on the vehicle to a point that caused the trailer to tip. If he had done the lane change at a different point in the

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11 AB 20 lines 26-29.
12 AB 21 lines 1-3.
13 AB 21 lines 4-5.
14 AB 21 line 44 to AB 22 line 3.

road, it wouldn't have tipped; if he had performed the lane change at a slower speed he wouldn't have tipped".[15]

Antecedents of Mr Gazzara

[34] Mr Gazzara was born on 14 September 1988, making him about 25 years old at the offence and 28 at sentence. He had no relevant criminal history, but his traffic history contained a number of offences including:

(a) speeding offences in 2006 (2), 2007 (2), and 2010 (2);

(b) suspension of his licence on the basis of accumulated demerit points, in 2007, 2008, 2010, 2011 and 2015;

(c) since the accident, several offences of failing to keep a work diary or possessing false information in relation to truck driving and one speeding offence (exceeding the limit by more than 20 kilometres per hour).

[35] Mr Gazzara had an excellent work history, having left school at Year 11, and taking up a plumbing apprenticeship. He then obtained his trucking licence and worked full-time in that industry until the offence. Counsel for Mr Gazzara explained that he had not been working to any significant extent since the incident, but had a future offer of employment in the trucking industry, which was where he intended to remain.[16]

[36] A psychological report from Professor Freeman was tendered as part of the material on the sentencing hearing.[17] Mr Gazzara said his employment history commenced with a plumbing apprenticeship which was terminated, a diesel mechanic apprenticeship that ended due to poor health, and his move to enter the earthmoving industry before obtaining a number of heavy vehicle licences, including a road train licence.[18]

[37] Professor Freeman did not identify any significant psychological disorder, except that Mr Gazzara had developed an Adjustment Disorder, evidenced by his level of remorse.

[38] A reference tendered at the sentencing hearing testified to Mr Gazzara's capabilities and good work history.[19]

[39] Mr Gazzara's mental health was also the subject of two reports by Ms Mohi, an authorised mental health practitioner.[20] In her opinion, Mr Gazzara was suffering from post-traumatic stress disorder and depression, as a result of the accident.

Approach of the sentencing judge

[40] The learned sentencing judge reviewed the nature of the offending conduct and identified that Mr Gazzara had lost control, attempting to navigate a sweeping bend too fast and too sharply. Her Honour held that approaching at about 100 kilometres

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15 AB 22 lines 3-7.
16 AB 22.
17 Report by Professor Freeman, 6 October 2016; AB 94.
18 Report by Professor Freeman, paragraph 8.3, AB 96.
19 AB 99.
20 AB 100-101.

per hour was 10 kilometres per hour above the speed limit for the semi-trailer, and 20 kilometres per hour faster than the general advisory speed for the bend. Mr Corry asked Mr Gazzara to slow down, but, thinking it would be alright, Mr Gazzara made no attempt to slow down.

[41] Next, the learned sentencing judge examined the circumstances of Mr Corry and his injuries, including the aftermath and the psychological and physical scars still carried by him. Her Honour also identified the serious financial repercussions on Mr Corry and his family as a consequence of the injuries sustained.

[42] Her Honour then took into account a number of factors including:

(a) the plea of guilty "entered on the morning of trial in August";

(b) the belated apology provided to the prosecution on the morning of sentencing;

(c) the reference showing that Mr Gazzara was a valued employee;

(d) Professor Freeman's report and his diagnosis; in this respect her Honour referred to the fact that the tangible demonstration of Mr Gazzara's remorse was less marked than that indicated by Professor Freeman;

(e) the lack of any criminal history;

(f) Mr Gazzara's relative youth;

(g) his driving history and the fact that he had committed offences since the incident; and

(h) comparable cases including *R v MacDonald*[21], *R v Danter*[22] and *R v Osborne*.[23]

[43] The learned sentencing judge took the view that the objective seriousness of the offending conduct involved "a very grave error of judgment with profound implications for the victim". She held that Mr Gazzara's case was more serious than that in either *MacDonald* or *Danter*.

[44] I pause to note that at one point the learned sentencing judge appears to have misstated the way in which the incident occurred and in particular the significance of the truck ahead of Mr Gazzara. Her Honour said he "sought to pass that truck by moving to the inside lane which, effectively, sharpened the curve".[24] The correct situation, as revealed by the schedule of facts, was that the truck ahead of Mr Gazzara was in the right hand lane and he changed lanes into the left hand lane to "undertake" to truck.[25] For reasons which will appear, I do not consider this error to be of moment.

Discussion

Withdrawal of the plea of guilty – miscarriage of justice

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21 [2014] QCA 9.
22 [2016] QCA 94.
23 [2014] QCA 291. Her Honour had also been referred to *R v Price* [2005] QCA 52.
24 AB 26 lines 16-18.
25 AB 36.

[45] Counsel for Mr Gazzara based his contentions in respect of withdrawing the plea of guilty on a new expert report which had been obtained from a Mr de Cristoforo. It was contended that the report, dated 3 November 2016, led to the conclusion that the advice to Mr Gazzara from his lawyers was based on "empirically incorrect expert evidence for both the prosecution and the defence".[26] The sequence of the points in this contention were as follows:

(a) Mr Gazzara's guilty plea was never a true acknowledgement of guilt, given paragraph 7 of his instructions: see paragraph [32] above;

(b) the QPS report concluded that a combination of travelling above the advisory speed and reducing the truck's travel radius to 200 metres significantly increased the lateral forces on the truck and caused the rollover;

(c) the Loadsafe reports concluded that the semi-trailer had poor stability because of a high centre of mass, and did not contradict the conclusions in the QPS report;

(d) Mr de Cristoforo's report[27] concluded that the sideways force on the vehicle when taking the bend was not sufficient to explain the tipping and that the maximum imposed lateral acceleration implied that the rollover was not caused by excessive speed through the bend; and

(e) as Mr de Cristoforo's report incorporated methodology which had not been utilised in the previous reports, which gave greater weight to the likelihood that his report and evidence, if adduced at a trial, would likely have the consequence that an acquittal would result, rather than conviction.

[46] It was submitted that Mr de Cristoforo's report was "fresh evidence" because all previous reports implicated speed as a necessary ingredient in the accident. Thus, it was said: (i) it would be unreasonable to expect the solicitor to investigate further in that area, which involves highly specialised knowledge and methodologies in the domain of physics,[28] and (ii) therefore it would not strictly be said that the evidence could have been adduced at the trial.

[47] In my view, this argument should not be accepted. Mr de Cristoforo's report did not exist until 3 November 2016, some months after the guilty plea was entered and a month after the sentence hearing. It cannot be the case that the opinion of Mr de Cristoforo could have been called at the "trial".

[48] It was contended that even if Mr de Cristoforo's evidence was considered as "new evidence", it nonetheless cast a doubt on a key plank of the prosecution case, namely that speed was a necessary (but not sufficient) ingredient of the element of dangerousness.[29] Thus it was urged that the evidence should be received in consideration of the substantive ground of appeal and to avoid a miscarriage of justice.

[49] There are difficulties with this approach. The agreed statement of facts listed five factors which, in combination, made the operation of the vehicle dangerous. Speed was only one of those factors, the others being the time at which and manner in

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26 Applicant's Outline, paragraph 35.

27 Commissioned by the owner of the semi-trailer and intended for use in civil proceedings: Applicant's Outline, paragraph 22.

28 Applicant's Outline, paragraph 27.

29 Applicant's Outline, paragraph 28.

which lanes were changed, the failure to maintain proper control of the truck and trailer, and failing to drive with due care and attention.[30]

[50] Reference to Mr de Cristoforo's report shows that he was engaged solely to "provide comments on the likelihood that excessive speed was the cause of rollover".[31] Two things follow from those instructions. First, he looked at only one of the five factors relied on for the prosecution of the offence, namely speed. Secondly, he investigated whether that one factor was **the** cause, not a cause in combination with others.

[51] The methodology involved taking the four scenarios which had been used in the QPS report,[32] correcting them by taking into account (as it was said the QPS report did not) the "superelevation present on the road curve".[33] Once that was taken into account, the worst case scenario[34] the lateral acceleration was reduced from 0.36g to 0.31g.

[52] Mr de Cristoforo then calculated a Static Rollover Threshold (SRT) to compare with that calculated by Loadsafe. He used a different computer simulation from that utilised by Loadsafe, which was said to be a "simplified package that is not able to properly consider a prime mover and semi-trailer combination".[35] He then made seven sets of assumptions dealing with payload masses, cross-axle group loads, payload centre of gravity heights, tyres, couplings and the like. In the course of that, Mr de Cristoforo observed that some of his assumptions differed from those of Loadsafe because information concerning the steer and drive tyres were not accounted for by them. Other assumptions as between Loadsafe and himself differed in various ways though there was no explanation which would shed light on which assumption was correct.[36]

[53] As a consequence of his own assumptions and calculations, Mr de Cristoforo calculated an SRT of 0.38g, whereas Loadsafe calculated an SRT of 0.27g.[37] By combining his SRT of 0.38g and a maximum imposed lateral acceleration of 0.31g, Mr de Cristoforo said that his calculation "implies that rollover was not caused by excessive speed through the bend".[38]

[54] In my view, there are difficulties with Mr di Cristoforo's report.

[55] First, it appears he was only given the first Loadsafe report, dated 9 April 2015, and not the second report.[39] It dealt with "Loading and Restraint of Mechanical Equipment Crates on a Semi-Trailer". The second Loadsafe report was the review of the QPS report.

[56] Secondly, nowhere in Mr de Cristoforo's report does he seem to include any analysis to reflect the fact that Mr Gazzara changed lanes at speed as he approached

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30 AB 36.
31 de Cristoforo report, paragraph 8.
32 These were various combinations of two speeds (80km/h or 96 km/h) and two turning radii (322m and 200m).
33 de Cristoforo report, paragraph 13. The "superelevation" is a measure of how much the road surface slopes downward towards the inside of the curve.
34 Scenario 4, based on a truck speed of 96 kilometres per hour and a turning radius of 200 metres.
35 de Cristoforo report, paragraph 23.
36 de Cristoforo report, paragraphs 26-32.
37 de Cristoforo report, paragraphs 8, 9, 11 and 33.
38 de Cristoforo report, paragraph 33.
39 de Cristoforo report, page12.

the rear of the vehicle in front of him, and then having moved to the outside lane of the curve, corrected the direction of the semi-trailer to bring it into the left lane. All of Mr de Cristoforo's calculations seem to assume a continuous arc at the varying radii of the four scenarios. In my view, that omission provides an obvious basis for a jury to discount Mr de Cristoforo's report based, as it was, on the instruction to investigate excessive speed only.

[57] Thirdly, if a jury had Mr di Cristoforo's report they would also have had the CCTV footage showing that the semi-trailer combination rolled over while travelling at speed on the outside lane of a right hand bend, having shortly beforehand changed from the inside lane to the outside lane. They may well have reasoned: if it was not speed alone, could it be speed in combination with the lane change manoeuvre; if it was not speed then what caused the entire unit to roll over and crash off the highway; did the late manoeuvre to change lanes have an impact on the rollover; if Mr de Cristoforo was right that each 0.1 metre closer to the inside of the curve would have been 50mm lower[40] (in other words the road was banked down towards the inside of the curve), what caused the rollover if speed did not; given that Mr Gazzara accepted that he lost control of the semi-trailer, was the manner of driving dangerous in any event. In my view, reasoning that way it is highly likely that the jury would have concluded that the operation of the semi-trailer was dangerous, and that speed was a factor, even if it was not the sole factor for the rollover.

[58] Demonstrating a dispute as to whether excessive speed alone caused the rollover would not necessarily be enough to displace the jury's acceptance that the manner of driving was dangerous, given: (i) Mr Corry, an experienced truck driver, was worried about the speed of the semi-trailer and suggested that Mr Gazzara slow down; and Mr Gazzara did not do so; (ii) the agreed statement of facts went beyond excessive speed and into other aspects of the manner of driving;[41] (iii) Mr Gazzara himself told Professor Freeman that he (Mr Gazzara) accepted that he lost control of the vehicle.[42]

[59] Insofar as paragraph 7 of Mr Gazzara's written instructions are concerned, the fact that his plea of guilty was a pragmatic exercise and that, by not contesting the Crown case, Mr Gazzara accepted his guilt of the offence, does not take mean that the plea did not reflect his intentions or was not a true acknowledgment of his guilt. Less does it mean that there would be a miscarriage of justice if the plea stood. As was said in *Meissner v The Queen*:[43]

> "A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is

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40 This is a reference to the superelevation present on the road curve.

41 Changing lanes at an unsafe time and in an unsafe manner, and failing to maintain proper control of the truck.

42 Professor Freeman's report, paragraph 11.2, AB 97.

43 (1995) 184 CLR 132 at 141, internal references omitted.

> entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence."

[60] There is no doubt that where a plea of guilty has been entered, withdrawal requires leave of the court. More importantly, the onus lies on the person seeking to withdraw their guilty plea to establish that a miscarriage of justice took place when the court accepted and acted on the plea.[44]

[61] In *R v Hennessy; Hennessy v Vojvodic*[45] this Court referred to a number of circumstances when a court will act notwithstanding a plea of guilty, in order to avoid a miscarriage of justice. White JA[46] said:[47]

> "[36] In *R v Hura*, Spigelman CJ discussed the "exceptional cases" in which the court would set aside a conviction following a plea of guilty. He noted that the authorities had been considered in *R v Toro-Martinez* and identified a number of circumstances when the court would act notwithstanding a plea of guilty to avoid a miscarriage of justice:
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> "• where the appellant "did not appreciate the nature of the charge to which the plea was entered": *Ferrer-Esis* (1991) 55 A Crim R 231 at 233.
>
> • where the plea was not "a free and voluntary confession": *Chiron* (at 220 D-E).
>
> • the "plea was not really attributable to a genuine consciousness of guilt": *Murphy* [1965] VR 187 at 191.
>
> • where there was "mistake or other circumstances affecting the integrity of the plea as an admission of guilt": *Sagiv* (1986) 22 A Crim R 73 at 80.
>
> • where the "plea was induced by threats or other impropriety when the applicant would not otherwise have pleaded guilty … some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt": *Cincotta* (Court of Criminal Appeal, NSW, No 60472 of 1995, 1 November 1995).
>
> • the "plea of guilty must either be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt": *Maxwell* at 511; 186-187.
>
> • if "the person who entered the plea was not in possession of all of the facts and did not entertain a genuine consciousness of guilt": *Davies* (1993) 19 MVR 481. See also *Ganderton* (unreported,

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44 *R v Gadaloff* [1999] QCA 286.
45 [2010] QCA 345.
46 With whom Fraser JA and Jones J concurred.
47 *Hennessy* at [36]-[38], internal citations omitted.

> Court of Criminal Appeal, NSW, No 60364 of 1998, 17 September 1998) and *Favero* [1999] NSWCCA 320."

His Honour quoted a passage from the judgment of Badgery-Parker J in *Davies*:

> "If the plea was not entered into with full knowledge of the facts and as a genuine recognition of guilt, and if the material before the court of Criminal Appeal shows that there is a real question about the guilt of the accused, then the proper course must be to set aside the plea of guilty, to quash the conviction and to order a new trial."

[37] These propositions were endorsed by Howie J in *Wong v Director of Public Prosecutions (NSW)*:

> "The authorities referred to in the above passage show that the issue is one of the integrity of the plea of guilty and the question to be determined is whether a miscarriage of justice would arise if the court acted upon the plea of guilty to convict and sentence the defendant."

[38] In *Price v Davies*, Roberts-Smith J, hearing an appeal from a magistrate, concluded:

> "Although the appellant's plea of guilty was unequivocal, it was not a properly informed plea and indeed was founded on a mistaken view that the facts as he wished to put them before the court, would afford him no defence as a matter of law. That went to the root of his plea and as a result the appellant was denied (albeit not by any error on the part of the magistrate) the right and opportunity to present his defence and have it considered by the court."

In *Soteriou v Police (SA)*, Duggan J, hearing an appeal from a magistrate, concluded that a plea of guilty to drink driving to protect a friend who would have lost her licence was entered without sufficient knowledge to make an informed decision."

[62] In the course of argument, Counsel for Mr Gazzara put his case on the basis that he came into the last category referred to in *Hennessy*, namely that the person who entered the plea was not in possession of all of the facts.[48] There are, however, a number of reasons why I think that approach should be rejected.

[63] First, Mr Gazzara entered his plea of guilty when he was in possession of all the facts about what happened, and with the benefit of expert advice as to the cause of the rollover. The only thing he did not have was the report of Mr de Cristoforo which, of course, did not then exist.

[64] Secondly, the discovery of Mr de Cristoforo's report does not reveal a new fact of which Mr Gazzara was unaware at the time of his plea. The report simply expresses

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48 Appeal transcript T1-3 line 12.

an opinion, based on a number of assumptions which may or may not be accurate, as to the significance of an already known fact, namely the speed at which the semi-trailer was travelling. That opinion would be inadmissible hearsay were it not for the status of the author as an expert. Whilst it might be true to say that an opinion reflects a state of mind of the person expressing it, and that is a fact, it is not the sort of fact that is referred to in the principles espoused in *Hennessy*. It is an opinion expressed on what might be referred to as causation of the rollover, rather than any of the key facts relating to the manner of driving.

[65] The authorities establish that where the plea of guilty is said to be made by a person in possession of all the facts, the facts referred to are those which establish the legal ingredients of the offence and upon which he could, in law, have been convicted of the offence charged.[49] That position is reflected in the decision of this Court in *R v Armstrong*[50] where Gotterson JA referred to the passage from *Meissner* in paragraph [59] above and said:[51]

> "[20] Consistently with this approach, a viable defence, had one been available here, would not of itself warrant the grant of an extension of time to appeal against conviction. As the paragraphs cited comprehend, the authorities indicate that there are three circumstances in which a plea of guilty will be set aside. They are:
>
> (a) that the applicant did not understand the nature of the charges and did not intend to admit guilt;
>
> (b) that upon the admitted facts, the applicant could not have been guilty of the offence; or
>
> (c) that the guilty plea was obtained improperly by inducement, fraud, intimidation or the like."

[66] Thirdly, there was no dispute that the semi-trailer was travelling at a speed between 96 and 100 kilometres per hour, at a point where the semi-trailer's legally limited speed was 90 kilometres per hour, and the advisory speed on the bend was 80 kilometres per hour. There is still no dispute about any of those facts.

[67] Fourthly, the prosecution's contention was that the operation of the vehicle was dangerous for a combination of reasons, only one of which was "failing to drive at a speed suitable to the circumstances".[52] There was no contest that the actual speed of the semi-trailer was at least 16 kilometres per hour faster than the advisory speed for the bend, and between six and 10 kilometres per hour faster than the legal limit for that semi-trailer. Mr de Cristoforo's opinion did not dispute those facts, but sought to analyse them in isolation from other factors such as the time and manner of the lane change, and the loss of control of the semi-trailer. That opinion does not negate the facts as alleged and admitted, but merely puts forward a theory about the significance of some of the facts.

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49 *R v Davies* (1993) 19 MVR 481, per Badgery-Parker J, with whom Wood and Matthews JJ agreed; *R v Sagiv* (1986) 22 A Crim R 73, at 80-81, per Lee J; *R v Murphy* [1965] VR 187 at 188 citing Avory J in *R v Forde* (1923) 2 KB 400, at 403.

50 [2014] QCA 274.

51 *Armstrong* at [20], Philippides and McMeekin JJ concurring.

52 AB 36.

[68] In my view, the report of Mr de Cristoforo does not establish a foundation for setting aside Mr Gazzara's plea of guilty. It does not establish that when Mr Gazzara entered the plea that he was not in possession of all the relevant facts, one of which was the speed at which he was driving, the speed limits both actual and advisory, and the fact that he did not slow down at the point when he embarked upon the manoeuvre to pass another truck on the outside of the bend. The fact that it might be later discovered that some expert has expressed a view, which may or may not be correct, as to the significance of the speed, does not affect the quality of the guilty plea. It remains a guilty plea which fits the description in *Meissner*.[53]

[69] For these reasons the application for leave to adduce further evidence should be refused. These grounds of the appeal fail.

Sentence

[70] Counsel for Mr Gazzara contended that there were three aspects of the sentence which were manifestly excessive:

(a) the head sentence of three years;

(b) the operational period of four years for the suspended sentence; and

(c) the three year period for the disqualification of the driver's licence.[54]

[71] Before reviewing the comparable cases which were advanced, it is worth noting the way in which the learned sentencing judge characterised the objective seriousness of the offending conduct. The following elements were noted by her Honour:

(a) the prime mover and semi-trailer contained an oversized load of 16 tonnes;

(b) Mr Gazzara lost control while attempting to navigate a sweeping bend, too fast and too sharply;

(c) the speed as the bend was approached was about 100 kilometres per hour which was 10 kilometres per hour above the speed limit for the semi-trailer and 20 kilometres per hour faster than the general advisory speed;

(d) he should have been driving at something under 80 kilometres per hour;

(e) he was a professional truck driver and therefore bore a heavy responsibility to exercise care;

(f) the passenger asked him to slow down, but Mr Gazzara did not make any attempt to do so;

(g) the manoeuvre was fraught with risk;

(h) the prime mover and trailer overturned, crashing through a metal barrier, down an embankment and landing on a service road below;

(i) the consequences of the accident were substantial and life-threatening injuries, requiring considerable hospitalisation and seven operations;

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53 *Meissner* at 141.

54 The period of disqualification was the subject of challenge only in oral argument, as paragraph 38 of the applicant's outline denied any challenge.

(j) the impact was devastating, not only on the passenger, but his family, involving impaired enjoyment of life and serious financial repercussions; and

(k) the driving involved a very grave error of judgment with profound implications for the victim.

[72] The learned sentencing judge took the view that Mr Gazzara's case was more serious than those described in *R v MacDonald*[55] and *R v Danter*,[56] but of some comparability (though with more serious outcomes) with *R v Osborne*.[57] Counsel for Mr Gazzara contended that her Honour was in error to do so, and a sentence closer to that in *MacDonald* was warranted.

[73] One must bear in mind what was said in *R v Tout*:[58]

> "[A] contention that the sentence is manifestly excessive is not established merely if the sentence is markedly different from sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle, or that the sentence is 'unreasonable or plainly unjust': *Hili v The Queen* (2010) 242 CLR 520 at [58], [59]."

[74] Further, there is no one single correct sentence. Judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the relevant statutory regime.[59]

[75] In *MacDonald*, the driver of a tanker intended to turn right at an intersection of the highway and another road, thus travelling across the path of the highway. As he approached the intersection the maximum view of approaching traffic (each way) was about 177 metres. How quickly that distance was closed depended upon the speed of traffic approaching the intersection in each direction and whether the oncoming traffic was going to travel straight ahead or go left onto the road where the tanker was heading. The tanker was heavy and not as manoeuvrable as a car. The driver had sufficient time to observe the approach of oncoming cars and determine what they were doing. None of them were indicating to go left or had moved to the left of their lane or had given any indication other than that they were travelling straight ahead. Even if the oncoming cars were taking the slip-lane into the road where the tanker was headed, the driver would still be manoeuvring a very large vehicle into the path of those oncoming vehicles. The speed of the oncoming vehicles was obviously greater than the speed of the tanker taking the corner.

[76] The driver made a serious mistake about the cars' direction of travel and failed to keep a proper lookout. He turned into the path of a car and they collided. Two people were injured. The oncoming driver (18 years old) suffered life threatening injuries, a severe traumatic brain injury and a fracture to her skull. She had other injuries to her spine, ribs and other parts of the body. The passenger sustained injuries which were quite confined when compared with the driver.

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55 [2014] QCA 9.
56 [2016] QCA 94.
57 [2014] QCA 291.
58 [2012] QCA 296 at [8].
59 *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27].

[77] The sentence in *MacDonald* was 18 months' imprisonment, suspended after serving three months, for an operational period of two years. He was also disqualified from holding a driver's licence for a period of 12 months. Before this Court there was no challenge to the head sentence, it being conceded that 18 months' imprisonment "was both within range and appropriate". The focus of the challenge was therefore on the imposition of a period of actual custody.

[78] The summary above shows that *MacDonald* was a less serious case than that of Mr Gazzara. There was no element of speed involved in *MacDonald*, but rather an error of judgment produced by not keeping a proper lookout. By contrast, in this case there was excessive speed, a failure to slow down despite the warnings of another experienced driver who was then the passenger, and a change of direction to the outside lane done in a manner which, combined with the speed, resulted in the entire semi-trailer rolling off the roadway, down an embankment and onto a service road below. Mr Gazzara lost control of a large heavy vehicle travelling at speed on a highway where there were, or likely to be, other drivers.

[79] *Danter* involved a sentence of three years' imprisonment with a parole release date after 12 months of that term. This Court varied that sentence only to the extent of wholly suspending it. That driver was travelling in a line of traffic on a suburban road where the speed limit was 60 kilometres per hour. The two cars in front of the driver stopped at a pedestrian crossing to allow two young girls to cross. The driver pulled out from behind the two stopped vehicles on their left side, swerved to avoid a traffic island and then drove across the crossing. She almost hit one of the two girls, swerving to the right which then meant she hit the other girl. The impact caused serious injuries including a closed head injury and fractures to the ribs, pelvis, and clavicle. The girl was left with complex areas of scarring which would never disappear, though they would improve. The injuries impacted on her ability to participate in sport. She also suffered from a psychological disorder.

[80] The driving was characterised as involving an element of recklessness, though the error was one of momentary inattention. At issue on the application before this Court was whether a period in custody ought to have been imposed, rather than any challenge to the head sentence of three years.

[81] On any view, the present case is much more serious than that in *Danter*, which did not involve excessive speed, nor persistent driving at excess speed in spite of a warning, nor loss of control of the vehicle.

[82] For these reasons I do not consider that either *MacDonald* or *Danter* compels the view that the present sentence of three years, or the operational period of four years, was manifestly excessive.

[83] Counsel for Mr Gazzara also urged that *R v Boubaris*[60] supported the conclusion that the sentence imposed in this case was manifestly excessive. *Boubaris* involved a sentence of 18 months' imprisonment, suspended after serving three months for an operational period of 30 months, together with a disqualification of the driver's licence for 18 months. The challenge to that sentence was refused by this Court.

[84] *Boubaris* was a count of dangerous operation of a motor vehicle causing death. The focus of the challenge to the sentence was not in relation to the head sentence. That

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60 [2014] QCA 199.

driver was travelling on the Bruce Highway in a concrete pumping truck. There was a passenger in the truck. He drove off the left hand side of the highway and the truck overturned. The truck travelled about 44 metres from where it left the carriageway to where it hit a guardrail, during which time the passenger tyres had to pass over a white line and safety devices which would cause a vibration in the tyres and thus warn the driver. Descriptions from eye witnesses revealed that the truck was not travelling at excessive speed (somewhere between 90 kilometres per hour and 100 kilometres per hour), and moved off the road gradually. The driver had ingested methylamphetamine, but there was no suggestion that it adversely impacted upon his ability to drive. The driver had a poor traffic record including speeding offences and driving under the influence of alcohol. Of some concern were five offences subsequent to the accident. He also had a criminal record over some five years, but for offences which were not directly relevant to the driving accident.

[85] The characterisation of the driving in *Boubaris* was that he was probably driving at about 100 kilometres per hour, maintaining a standard distance in a line of traffic, not weaving nor changing speed, and there was nothing exceptional with the driving until he veered off to the left of the road. Further, the manoeuvre required to correct the truck moving off the road was not one that needed any particular skill, and the driver's inattention was not the same as if the truck had been approaching an intersection or carrying out a particular manoeuvre. It was a case of brief inattention.[61]

[86] The foregoing is sufficient to demonstrate that *Boubaris* is a less serious example of driving than that of Mr Gazzara, albeit that it involved a death. Here there was excessive speed, persistence with that in spite of a warning, and a deliberate manoeuvre which resulted in loss of control. Those matters, together with the fact that the head sentence was not the subject of challenge in *Boubaris* make it inutile on the issue of manifest excess in this case.

[87] The learned sentencing judge referred to the decision in *R v Osborne*.[62] That involved a collision between a truck and cyclists in which one cyclist was killed and several others suffered grievous bodily harm. The sentence was three and a-half years' imprisonment, suspended after 14 months for an operational period of four years, and a disqualification of the licence for five years.

[88] The driver in *Osborne* worked as a truck driver for a construction business. The load on his truck protruded about 40 centimetres beyond the ordinary width of the tray on each side. The driver thought his load was 30 centimetres narrower than it was. The laneway on which he was driving was less than either of those estimates. The driver was conscious that he was carrying a wide load and had warning flags attached to the front and rear of the truck.

[89] The truck and the cyclists encountered one another on a bridge, with the truck converging on the bridge from behind them. At the same time a line of cars was traversing the bridge in the opposite direction. The cyclists were riding between the fog line on the road and the guardrail on the bridge and, presented with that scenario, the driver drove on though he had little space outside the margins of his lane. He thought it was going to be a "tight squeeze", but thought he had enough

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61 *Boubaris* at [37].

62 [2014] QCA 291.

room to get through. The load struck the cyclists killing one and causing serious injuries to several others. The injuries included fractures, lacerations, bruises and abrasions.

[90] The driver in *Osborne* was 65 years old and had no previous convictions. He had a minor traffic history and had led a blameless and productive life. He was a highly regarded member of the community.

[91] The primary judge noted that the driver plainly recognised the danger confronting him at the bridge and took a grave risk, which represented a very serious error of judgment going beyond mere momentary inattention. As well, the judge noted the devastating consequences of the collision.

[92] There was no challenge to the head sentence, but it was argued that the 14 month suspension did not make adequate allowance for the mitigating circumstances. Challenge was also made to the period of disqualification having regard to the circumstances of the offence, the traffic history and the driver's occupation. In the course of dealing with the contentions, Henry J[63] noted that the head sentence was not challenged, but said:

> "The dangerousness for which the applicant was sentenced may be described as involving momentary misjudgement but the crucial issue, as Fraser and Morrison JJA observed in *R v MacDonald*, is the level of seriousness of the actual driving, not the short hand description given to it. The particularly serious feature of the applicant's misjudgment here obviously derived from its context. It occurred whilst he was driving a wider than ordinary load. Because his vehicle's wide load represented a higher potential for danger and injury than a vehicle of ordinary width, he owed a higher than ordinary standard of care to those on or near the road on which he travelled in making safe allowance for their actual or potential presence in or near his vehicle's path. His was a significant breach of that high standard and it was met with an undoubtedly significant head sentence."[64]

[93] Henry J then referred to the respondent's submission in *Osborne*, which was that the head sentence imposed might legitimately have been higher. As to that, reference was made to the decision of this Court in *R v Huxtable*,[65] a case where the driver of a tip truck towing a trailer failed to notice the vehicle in front of him slowing and stopping, as a result of which he collided with the vehicle forcing it into an intersection and causing a collision with yet another vehicle. As a result, the driver of the vehicle in front was killed and the driver of the other vehicle suffered grave injuries, being hospitalised for five months. This Court reduced the sentence of five years' imprisonment to one of three and a-half years. Referring to *Huxtable*, Henry J said this:

> "The applicant's counsel conceded the head sentence was within range in light of the recent decision of this Court in *R v Huxtable*. It ought to be noted in fairness to the learned sentencing judge that *R v Huxtable* had not been handed down by this court as at the time of

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63 With whom Holmes JA and McMeekin J concurred.

64 *Osborne* at [37]; internal references omitted.

65 [2014] QCA 249.

> the applicant's sentence. It is a decision which fortifies the respondent's position regarding the high head sentence but not the periods of suspension of imprisonment or driver's licence disqualification."[66]

[94] In some respects *Osborne* is comparable to the present case, yet there are differences. Each involved a deliberate but reckless course of driving of a large vehicle and in circumstances where more could have been done to avoid the consequences. However *Osborne* involved a more serious charge of dangerous driving causing death, which is not the case here. In that sense the consequences of the conduct are far more serious in *Osborne* than they are in the current case. However the current case involves a warning against the excessive speed, a persistence in it despite the warning, and a deliberate manoeuvre in which control was lost. Looking at the two cases together one can understand why the learned sentencing judge said that there was "some comparability to *Osborne*".

[95] In my view, *Osborne* does provide some support for the sentence imposed in Mr Gazzara's case. Allowing for the fact that a death was caused, there is a degree of comparability in terms of the objective seriousness of the driving. Further, the passages from the judgment of Henry J, referred to above, lend support for the fact that the sentence could have been higher in *Osborne*, by reference to the decision in *Huxtable*. It must be said that the driving in *Huxtable*, though it had a far more serious outcome, was not as objectively serious as that in the present case.

[96] I am unable to conclude that the sentence in Mr Gazzara's case is beyond the range available in the exercise of the sentencing discretion. I am unpersuaded it is manifestly excessive.

The operational period

[97] The conclusion I have reached above, together with another matter which I will now mention, renders the contention as to the length of actual custody to be served before the sentence is suspended, redundant. First, the period of actual custody was one-sixth of the total period of imprisonment. That is hardly disproportionate given that the plea of guilty, especially when one recalls that the plea of guilty was only entered on the first day of trial and the finding by the learned sentencing judge that the tangible demonstration of remorse was less marked than Professor Freeman's report would suggest. Secondly, as Counsel for Mr Gazzara pointed out during the hearing before this Court, the period of six months had almost entirely been served by the time of the hearing; Mr Gazzara was due for release two days after the hearing.

[98] Thirdly, Counsel conceded that the appropriate sentence for Mr Gazzara required some actual period of custody.[67]

[99] I am unpersuaded that there is substance to the challenge to the operational period of the suspended sentence. The operational periods for suspended sentences are often longer than the head sentence itself, and that is the case here. Further, Mr Gazzara's unfortunate traffic history, and the fact that he committed a number of

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66 *Osborne* at [38]; internal references omitted.

67 Appeal transcript T1-11 lines 23-26.

offences after being charged with the current one, suggest a need for personal deterrence that would signify an operational period of the kind imposed.

The period of disqualification

[100] Mr Gazzara was disqualified from holding or obtaining a driver's licence for three years.

[101] At the sentencing hearing the prosecutor referred the learned sentencing judge to *Osborne* and those paragraphs that deal with the issue of disqualification. The submission made was that it "needs to be in proportion to the offence and consider whether it adversely affects rehabilitation".[68] Counsel for Mr Gazzara referred to the fact that Mr Gazzara had a future offer of employment in the trucking industry which is the industry in which he intended to remain, and then said that Mr Gazzara "understands that he will be disqualified for a period of time by your Honour".[69] Ultimately Mr Gazzara's Counsel submitted that a disqualification period of the order of two years would be appropriate.[70]

[102] Implicit in that submission is an acceptance that the learned sentencing judge must or ought to have been satisfied in terms of s 187(1)(b) of the *Penalties and Sentences Act* 1992 (Qld) that "having regard to the nature of the offence, or to the circumstances in which it was committed, that the offender should, in the interests of justice, be disqualified from holding or obtaining a Queensland driver's licence". That provision highlights the two principle features affecting the question of disqualification, namely:

(a) the nature of the offence; and

(b) the circumstances in which it was committed.

[103] As was pointed out in *Osborne*:[71]

> "However, the discretion arising under s 187(1) as to the period of disqualification is broad and not expressed as being confined solely to 'the nature of the offence, or to the circumstance in which it was committed'. Other considerations which have been regarded as relevant to that discretion include:
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> - the need for protection of the public from persons who create danger on the road, particularly those with a pattern of doing so;
> - the consequences of the disqualification upon the offender's future employment prospects;
> - the risk that the disqualification period may create a disincentive to rehabilitation on release from custody;
> - the extent to which the disqualification period will operate as an additional penalty to other penalties imposed."[72]

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68 AB 17 lines 1-3.
69 AB 22 line 16.
70 AB 22 line 41.
71 *Osborne* at [57].
72 *Osborne* at [57]; internal citations omitted.

[104] This Court has accepted that a disqualification, whilst acting as an additional penalty, is not meant to be simply a gratuitous addition to other available punishments. There should be an apparent purpose in the disqualification.[73]

[105] *Osborne* also cautioned that where the duration of a disqualification order exceeds what is necessary for the other purposes of sentencing, care must be taken to ensure its duration does not give rise to a punishment which is unjust overall.[74]

[106] Addressing the points recognised in *Osborne* the following factors seem to be relevant in relation to Mr Gazzara and the period of disqualification of his licence:

(a) unlike the driver in Osborne Mr Gazzara's traffic history is of some concern; because it involves a number of speeding offences and suspensions due to accumulated demerit points, although of themselves none of them could necessarily be said to show a pattern of dangerousness towards other road users except by the mere fact of speed; however there is a pattern of speed which continued after this particular accident; in that sense the need for protection of the public must have a role;

(b) there can be little doubt that Mr Gazzara feels remorse, even if that has not been matched by tangible demonstrations of it, as pointed out by the learned sentencing judge; Professor Freeman's report expressed the view that Mr Gazzara's level of remorse was evidenced by the development of the Adjustment Disorder, and there is no reason to doubt that; that level of remorse does not reach that which was the case in *Osborne*;[75] nonetheless the combination of remorse at a level that it leads to an Adjustment Disorder or PTSD[76] puts Mr Gazzara's case somewhat closer to *Osborne*, albeit that there is a disparity in the driving history of each offender;

(c) in terms of the consequences of the disqualification upon Mr Gazzara's future employment prospects, there is an obvious impact; just as there was in *Osborne*; each was a professional truck driver and for so long as the licence was unavailable, that avenue of employment could not be followed; however, balanced against that is the fact that Mr Gazzara is still very young compared to Osborne, whose age presented a practical difficulty of getting back into the driving industry; nonetheless prolonged absence of a licence must inevitably harm Mr Gazzara's chances of future employment prospects, given that he has no formal skills otherwise[77] and intends to re-join that industry;

(d) I do not see that the disqualification period will necessarily create a disincentive to rehabilitation; Professor Freeman's report details the personal and employment reasons why one would be confident that Mr Gazzara will persist with rehabilitation regardless of the position with his licence; that said, an obvious part of rehabilitation is return to the workforce so that personal wellbeing and financial support are enhanced; the longer that is delayed or hampered, the greater the necessity to find the justification for it as being a necessary part of the punishment rather than it becoming a gratuitous addition to the other punishments;

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73 *Osborne* at [58]; *R v Stevenson* [2016] QCA 162.
74 *Osborne* at [59].
75 See for example *Osborne* at [20] and [60].
76 As Ms Mohi reported AB 100-101.
77 Having not finished his previous apprenticeships.

(e) in circumstances where the head sentence might be said to be on the higher side of the appropriate range even though within appropriate bounds of the exercise of sentencing discretion, and where it will therefore hang over Mr Gazzara's head for the length of the operational period of the suspension, there is an argument that factor needs to be weighed against an unduly prolonged disqualification period; in this respect one needs to bear in mind the observation in *Osborne*, of the need to ensure that the duration of the disqualification does not give rise to a punishment which is unjust overall.

[107] When one has regard to the sentencing remarks[78] it is not immediately apparent that the learned sentencing judge gave consideration to the factors apparent from *Osborne* and *R v Stevenson*.[79] That being the case, the two alternatives are that her Honour either did not carry out that consideration, or she did but gave no reasons for it. Either way that constitutes an error justifying this Court's intervention in that respect.

[108] In my view, a three year disqualification period is difficult to justify in terms of protection of the community or necessary for the purposes of rehabilitation, and has the potential to be unhelpful to rehabilitation particularly in the sense that it will keep Mr Gazzara out of his proven form of employment for longer than would otherwise be necessary. Whilst Mr Gazzara is still young enough to turn his hand at other things, the fact is that he has been employed in the truck driving industry and Professor Freeman's report recorded the prospect of that occurring again soon after sentencing.[80] Given the view reached above, that whilst the head sentence was not manifestly excessive it was nonetheless on the higher side of the available range, that sets the context for the overall sentence imposed. For the purposes of punishment, deterrence and denunciation are served by that sentence, together with the operation period of the suspended sentence, such that a disqualification period longer than about two years can be seen to lack proper purpose. In the circumstances a disqualification period of three years was manifestly excessive.

[109] I would vary the order that Mr Gazzara be disqualified from holding or obtaining a driver's licence for a period of three years, by vacating that order and substituting it with an order that he be disqualified or holding a driver's licence for a period of two years.

Suspended period of disqualification

[110] This court recognised in *Stevenson* that the lodgement of an appeal against conviction has the effect that a period of disqualification is suspended: s 131(3A) of the *Transport Operations (Road Use Management) Act* 1995 (Qld).[81] Section 131(3B) of that act provides that once the appeal is determined, "subject to any decision of a court upon that appeal, that portion of the period of disqualification which had not expired when such a suspension began to operate should take effect from the date of determination of that appeal".

[111] As in *Stevenson*, the application of s 131(3B) would mean that Mr Gazarra's disqualification would be extended by the period between when he lodged his notice

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78 AB 26–27.
79 [2016] QCA 162, at [24]-[29].
80 Professor Freeman's reports, paragraph 10.2, AB 97.
81 *Stevenson* at [43].

of appeal against conviction (16 November 2016) and now, unless another order is made. Between 16 November 2016 and 21 April 2017 (the date of Mr Gazarra's release, two days after the hearing of his appeal), Mr Gazarra remained in jail with no chance of driving, even though the suspension of his licence had been affected. Had the appeal against conviction not been lodged, then the time of disqualification would have continued running in the meantime. As in *Stevenson*, I can see no good reason why the time when Mr Gazarra can resume employment can should be extended further than necessary. Consequently, whilst it is appropriate that the period of two years' disqualification apply from the date of the original sentence, the unexpired portion of the disqualification should take effect from the day following 17 November 2016 (the day following the lodgement of the notice of appeal).

Disposition

[112] For the reasons given above I would make the following orders:

1. The time in which to file the appeal is extended to 16 December 2016.
2. The application for leave to adduce further evidence is refused.
3. The appeal against conviction is dismissed.
4. The application for leave to appeal against sentence is granted.
5. The appeal against sentence is allowed.
6. Vary the order that the applicant be disqualified from holding or obtaining a driver's licence for a period of three years and instead order the applicant be disqualified from holding or obtaining a driver's licence for a period of two years from 24 October 2016.
7. Order that the portion of the disqualification that had not expired when the appeal against conviction was lodged on 16 November 2016 shall take effect from 17 November 2016.
8. Otherwise confirm the sentence imposed on 24 October 2016.

[113] **PHILIPPIDES JA:** I agree with the reasons of Morrison JA and with the orders his Honour proposes.

[114] **ATKINSON J:** I agree with the orders proposed by Morrison JA and with his Honour's reasons.