SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lightbody* [2019] QCA 61
PARTIES:	**R** **v** **LIGHTBODY, Darren Anthony** (applicant)
FILE NO/S:	CA No 270 of 2018 DC No 13 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore – Date of Sentence: 24 September 2018 (Cash QC DCJ)
DELIVERED ON:	12 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 March 2019
JUDGES:	Fraser and Gotterson JJA and Bradley J
ORDER:	**The application is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his own plea of guilty of dangerous operation of a motor vehicle causing death and grievous bodily harm before leaving the scene – where the applicant was sentenced to imprisonment for three years, suspended after 12 months for an operational period of four years – where the applicant was also disqualified from holding or obtaining a driver's licence for a period of two years from the date of sentence – whether the sentence was manifestly excessive *Criminal Code* (Qld), s 328A(4) *R v Gruenert; ex parte Attorney-General (Qld)* [2005] QCA 154, distinguished *R v Harris; ex parte Attorney-General (Qld)* (1999) 30 MVR 334; [1999] QCA 392, distinguished *R v Huxtable* (2014) 68 MVR 367; [2014] QCA 249, considered *R v Liu* (2016) 77 MVR 104; [2016] QCA 186, considered *R v MacDonald* (2014) 244 A Crim R 148; [2014] QCA 9, considered *R v Maher* [2012] QCA 7, considered *R v Osborne* (2014) 69 MVR 45; [2014] QCA 291, considered

R v Proesser [2007] QCA 61, distinguished
R v Schoner (2015) 255 A Crim R 470; (2015) 73 MVR 107; [2015] QCA 190, considered
R v Stevenson (2016) 259 A Crim R 396; (2016) 76 MVR 39; [2016] QCA 162, considered
R v Vance; ex parte Attorney-General (Qld) (2007) 48 MVR 375; [2007] QCA 269, distinguished

COUNSEL: C F C Wilson for the applicant
C N Marco for the respondent

SOLICITORS: Martin Law for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Bradley J and the order proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the order proposed by Bradley J and with the reasons given by his Honour.

[3] **BRADLEY J:** On 24 September 2018, the applicant was sentenced for the dangerous operation of a motor vehicle causing the death of one person and grievous bodily harm to another.[1] The crime was committed in the aggravating circumstance that, while the applicant ought reasonably to have known that one or other of the persons had been killed or injured, he left the scene of the incident before a police officer arrived.[2]

[4] The learned primary judge sentenced the applicant to three years imprisonment, suspended after 12 months for an operational period of four years, and disqualified him from holding or obtaining a driver's licence for a period of two years from the date of sentence.

Manifestly excessive

[5] The applicant seeks leave to appeal on the basis that the sentence is manifestly excessive in all the circumstances.

> "Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle."[3]

[6] The applicant relied on eight decisions of this Court between 1999 and 2016. The respondent has made submissions about those cases and about three other decisions of this Court delivered in 2014 and 2015.

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1 *Criminal Code Act* 1899 (Qld) (**Code**), s 328A(4).
2 Code, s 328A(4)(c).
3 *R v Pham* (2015) 256 CLR 550 at 559 [28] (French CJ, Keane and Nettle JJ), citing *Wong v The Queen* (2001) 207 CLR 584 at 605 [58]; *Barbaro v The Queen* (2014) 253 CLR 58 at 79 [61].

[7] The spread of sentences imposed in the past does not fix "the boundaries within which future judges must, or even ought, to sentence".[4] A result markedly different from other sentences imposed in other cases does not justify appellate intervention.[5] However, in forming a conclusion about whether there must have been some misapplication of principle by the learned primary judge, this Court may have regard to the degree to which the applicant's sentence differs from sentences that have been imposed in comparable cases.[6]

Matters to consider on leave to appeal

[8] The maximum sentence for the offence, the gravity of the offending conduct on the scale of seriousness, and the personal circumstances of the offender are aspects to be considered.[7] They direct attention to consistency in the application of relevant legal principles, and not to mere numerical equivalence.[8] Consideration of these aspects demonstrates the extent, if any, to which sentences imposed on other offenders may be said to be more or less comparable to the applicant's sentence.

The maximum sentence

[9] A sentencing court is obliged to have regard to the maximum penalty prescribed for the offence.[9] The majority in *Markarian v The Queen*[10] observed that:

> "careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick."[11]

[10] Within s 328A of the Code, Parliament has provided increasing maximum penalties for different dangerous driving offences, including for various aggravating elements.

(a) For dangerous driving where no death or grievous bodily harm is caused and no other aggravating circumstance arises, the maximum penalty is imprisonment for three years.[12] Such conduct is a misdemeanour rather than a crime.[13]

(b) If an offender is adversely affected by an intoxicating substance or excessively speeding (or taking part in an unlawful race) at the time of the offending or if the person has been previously convicted of an offence of

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4 *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1 at 70-71 [303]-[305], expressly approved in *Hili v The Queen* (2010) 242 CLR 520 at 537 [54].

5 *Wong* (2001) 207 CLR 584 at 605 [58] (Gaudron, Gummow and Hayne JJ), cited with approval in *Pham* (2015) 256 CLR 550 at 559 [28] (French CJ, Keane and Nettle JJ).

6 *Pham* (2015) 256 CLR 550 at 559 [28]; *Barbaro* (2014) 253 CLR 58 at 70 [27], citing *House v The King* (1936) 55 CLR 499 at 505.

7 *Munda v Western Australia* (2013) 249 CLR 600 at 613 [33].

8 *Barbaro* (2014) 253 CLR 58 at 74 [40]-[41], citing the plurality in *Hili* (2010) 242 CLR 520.

9 *Penalties and Sentences Act* 1992 (Qld) (**PSA**), s 9(2)(b).

10 (2005) 228 CLR 357.

11 at 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

12 Applicant's Outline at [12].

13 Code, s 328A(1).

dangerous driving, then the person commits a crime with a maximum penalty of five years imprisonment.[14]

(c) If the offender causes death or grievous bodily harm, then they commit a crime with a maximum penalty of 10 years imprisonment.[15]

(d) Where the dangerous driver causing death or such harm is adversely affected by alcohol, excessively speeding or taking part in an unlawful race, then the maximum penalty increases to 14 years imprisonment.[16]

(e) The same 14 year maximum applies in the presently relevant circumstances where the dangerous driver, causing death or grievous bodily harm, leaves the scene before a police officer arrives.[17]

[11] This progression of maximum penalties indicates the legislature's intention that offending conduct may be regarded as more serious, and greater punishment may be required, as the conduct moves from the misdemeanour through other levels of offending to the most serious offences in the provision, including that committed by the applicant.

[12] The applicant's circumstance of aggravation and its related maximum penalty were enacted by the Parliament with effect from 20 March 2007.[18] Prior to those changes, the maximum penalty for the applicant's conduct would have been seven years imprisonment and the then available circumstances of aggravation would not have applied.[19]

[13] The applicant's offending falls to be compared with the "worst possible case" of his particular offence and his sentence is to be assessed on the basis that the worst case attracts a sentence of 14 years imprisonment.

The gravity of the offending

[14] On the scale of seriousness, the applicant's offending conduct may be gauged by reference to: his actual dangerous driving; the extent of the harm caused by his dangerous driving; and the circumstances of his aggravating conduct in leaving the scene before the police arrived.

The actual dangerous driving

[15] In sentencing, the crucial issue is the level of seriousness of the actual driving of the offender.[20] The essence of this offence is the operation of the vehicle in a way the

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14 s 328A(2).

15 s 328A(4)(a).

16 s 328A(4)(b).

17 s 328A(4)(c). In *R v Harris; ex parte Attorney-General (Qld)* [1999] QCA 392 at [22]-[25], after reviewing the history of the statutory provision, Pincus JA concluded that s 328A(4) of the Code was a new offence, created as a result of the amendment made by s 55 of the *Criminal Law Amendment Act* 1997 (Act No 3 of 1997), and being a crime separate from the misdemeanour in s 328A(1).

18 *Criminal Code and Civil Liability Act* 2007 (No 14 of 2007), s 4.

19 The aggravating circumstances were: the former s 328A(4)(a) being adversely affected by an intoxicating substance (maximum penalty 10 years); and the former s 328A(4)(b) being adversely affected by alcohol and being over the high alcohol limit (14 years).

20 *R v Hart* [2008] QCA 199 at [17] (Keane JA), citing Thomas JA in *Harris* [1999] QCA 392 at [42]. The court is required to have regard primarily to any disregard by the offender for the interests of public safety: PSA, s 9(3)(f).

statute makes unlawful.[21] By its nature, the offence involves conduct that subjects the public to a risk over and above that ordinarily associated with driving. In a real sense, the offender's driving must be potentially dangerous to members of the public who may be on or in the vicinity of the road where the offender is driving.[22]

[16] On 26 November 2016, the applicant was driving a Toyota Hilux utility in the southbound lane of Steve Irwin Way at Landsborough. This is a major connecting road joining the Beerwah, Glasshouse Mountains and Landsborough areas to the Bruce Highway. It was not an isolated or little used roadway. There were eight independent witnesses to the collision.

[17] The applicant committed the offence on a straight alignment with a good road surface, and in fine weather conditions. He had a clear view along the road for a distance of 400 to 550 metres in each direction. The collision occurred in the vicinity of a gap in the solid white line marking dividing the single northbound lane and the single southbound lane. The gap permitted turning or overtaking at that point. The speed limit varied from 80 km/h to 100 km/h, with the lower limit applying to the stretch of road that approaches and includes the site of the collision.

[18] A Subaru sedan was also travelling in the southbound lane ahead of the applicant's Hilux. The Subaru driver assessed that it was safe for her to turn right at the line marking gap into a property on the western side of the road. She made this assessment because the applicant's Hilux was far enough behind that there was an abundance of time for her to slow down, indicate right, safely come to a stop, and wait for an opportunity to make a turn. When she noticed the applicant's Hilux was not slowing down, the Subaru driver used the foot brake pedal to flash the rear brake lights and so signal to the applicant that she was stopped. This was in addition to the blinking right indicator.

[19] The applicant did not apply the brake or take any evasive action before he drove the Hilux into the rear of the stationary Subaru. By striking the Subaru, the applicant forced it into the path of an oncoming Toyota Corolla sedan, travelling in the northbound lane. The collision between the Subaru and the Corolla forced both vehicles off the road onto the western verge.

[20] The applicant offered no excuse that might qualify his responsibility for failing to stop or avoid colliding with the Subaru. He was entirely to blame for the offence.

[21] The applicant told police he had consumed three stubbies over lunch before the collision, and he had a rum at the nearby hotel after leaving the scene. A test conducted more than 90 minutes after the collision showed the applicant then had a breath alcohol concentration (**BAC**) reading of 0.040 per cent, which is below the 0.05 per cent general alcohol limit. He showed no indicia of being adversely affected by drink. He tested negative for drugs.

[22] The matters in [16] to [21] above led the learned primary judge to conclude:

(a) The applicant was not driving in circumstances where he had no time to react to a manoeuvre occurring in front of him. He failed to see an indicator and brake lights for some considerable time, when he should have seen them, as

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21 *Harris* [1999] QCA 392 at [25] (Pincus JA; de Jersey CJ agreeing at [1]).

22 *R v Jiminez* (1992) 173 CLR 572 at 579 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ), citing Barwick CJ in *McBride v The Queen* (1966) 115 CLR 44 at 49-50.

in the circumstances of the clear, straight road, it should have been obvious to the applicant that the Subaru was waiting to turn.

(b) The applicant's offending conduct would properly be described as a category of inattention. His inattention was certainly not momentary. There might be argument as to whether there was "prolonged inattention", but it was "serious inattention". He was driving with grossly culpable inattention.

(c) The applicant's dangerous driving was more serious than a case of momentary inattention and less serious than one involving, for example, deliberate dangerousness or recklessness, such as deliberate speeding.

[23] These conclusions are not challenged by the applicant.

The extent of harm caused

[24] The death of a member of the public and the injury to others, and anything else relevant about the safety of members of the community, are matters to which the court was required to have regard primarily in sentencing the applicant.[23] The physical, mental and emotional harm done to victims of the offence is relevant to assessing the gravity of the offending conduct for the purpose of sentencing.[24]

[25] The harm resulting from the applicant's offending was set out in the agreed schedule of facts and in the victim impact statements. It is not challenged by the applicant.

[26] The 86 year old passenger in the Corolla was killed by the impact. She was on her way to a regular social bingo game. She is survived by four children, 15 grandchildren, 18 great-grandchildren and four great-great-grandchildren. Her death had a huge impact on the lives of her extended family. It affected the functional capacity of one of her children, who is on daily medication, affected by crying, migraine headaches, sadness, sleeplessness, irritability, anger, confusion, inability to concentrate and a general feeling of helplessness; affecting her employment, her home life with her husband and her relationship with her three siblings.

[27] The 67 year old driver of the Corolla suffered a ruptured subclavian artery in her left shoulder. Her life was saved by emergency blood transfusions at the scene, and subsequent care in the Brisbane tertiary hospital to which she was airlifted. She also suffered a laceration over her right kneecap deep enough to go to her prosthesis, a sternum fracture and multiple abdominal wall contusions. She was in hospital for 13 days. She has a permanent scar from a full thickness friction burn to her abdomen, which took eight weeks to heal, and scars left by the other multiple lacerations. Her ruptured artery has left visible marks on her upper body. She suffered pain associated with fractures to her spine, coccyx, ribs and sternum. She was driving her passenger to a regular bingo game. She regarded the deceased passenger as her friend, mentor and adopted mother. Diagnosed with post-traumatic stress disorder, she is under treatment by a psychologist. She has lost confidence and is afraid of getting into a car.

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23 PSA, s 9(3)(d), (k).

24 PSA, s 9(2)(c)(i), (e).

[28] The driver of the Subaru suffered two fractured discs in her spine, a massive haematoma on her lower left knee and bruising on her upper body and hips. She was in hospital for four days.

[29] The 14 year old passenger in the Subaru was rendered unconscious by the collision. She regained consciousness about five minutes after she was extracted from the car. She suffered a sore head and bruises on the side of her abdomen and her leg. She was discharged from hospital on the night of the collision.

The aggravating circumstance

[30] The collision occurred at about 5.15 pm. Other motorists stopped and there were many people assisting at the scene of the crash. Two of them helped release the driver of the Corolla, who was trapped in her car. The Corolla driver described seeing her passenger's life "slip slowly away." Once out of her car, she saw the applicant "squat down and look at what was happening" before "running off up the hill." All this occurred before the emergency services arrived.

[31] The applicant did not stay to assist anyone at the scene, or offer to do so. He left on foot, while using his mobile telephone. He did not call the authorities or medical or emergency services to come and assist at the scene of the collision.

[32] He walked about 1.8 km to the Landsborough Hotel. There, he changed his clothes (which he said were covered in fine dust from the Hilux car airbag that inflated on impact), putting on clothes he had carried with him in a backpack from the scene. He then entered the hotel and ordered a drink. His mobile telephone records showed he had attempted to make calls after the incident to family and friends. One of the calls was to his son, who drove to the hotel in another car, parked and collected him.

[33] The learned primary judge accepted that the applicant knew enough of the consequences of the collision to make out the aggravating circumstance. He knew the impact of the collision had been severe. The doors of his Hilux were so crushed that initially he could not get out. He knew the young passenger in the Subaru was unconscious. He likely knew that some other people had been injured to the extent of requiring assistance to be released from a vehicle.

[34] The higher maximum penalty for an offender who leaves the scene signals the seriousness of the offending. For the applicant, it was conceded that leaving the scene is "an aggravating feature and clearly one to be punished merely for having occurred".

[35] The applicant would diminish the seriousness of his aggravated contravention on the basis that many of the reasons for imposing additional punishment are non-existent here. Those reasons are said to be: callous disregard of the welfare of others hurt in the crash; raising issues of identification of the offender; and the inability to test the offender for drugs and alcohol.[25] Community concern about "hit-and-run" traffic offences, which give rise to the three considerations raised by the applicant, is a likely reason for the higher maximum penalty for committing the offence with this particular aggravating circumstance.[26]

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25 Applicant's Outline at [14]-[16].

26 Criminal Code and Civil Liability Amendment Bill 2007 - Explanatory Notes, p 1– *Section 328A*.

Callous disregard of the welfare of others

[36] Dangerous driving entails a disregard for the safety of those using the roads and an abrogation of personal responsibility to avoid endangering others. The aggravating circumstance increases the seriousness of the offending when the disregard and lack of personal responsibility continues after death or serious injury has been caused. This is clear from the statutory exception permitting an offender to leave the scene "to obtain medical or other help for the other person".[27]

[37] By leaving the scene the applicant exhibited a disregard and indifference to the lives of others. He made no enquiries about the extent of the injuries or as to whether anyone had been killed in the crash. Notwithstanding his assertion that he was "deeply troubled" by the young passenger in the Subaru being unconscious, he did nothing to assist her. He left it to other motorists and passengers to attend and assist those he had injured. He failed to call for emergency medical assistance on his mobile telephone. If, as transpired, one of the injured required assistance at the scene to save her life, the applicant was in no materially different a position to a driver who simply drove away from the scene leaving his victim to die.[28] A distinction is that the applicant walked away, his Hilux having been damaged in the crash.

[38] The applicant showed concern only for himself: removing himself from the scene; changing his dusty clothes for fresh ones; buying himself a drink; and calling his son to pick him up. Although an explanation was offered for the applicant initially walking away from the scene, the learned primary judge concluded the only inference one could sensibly draw is that, at the point in time when the applicant changed his clothes, he was attempting to some extent to avoid detection for his involvement in the dangerous driving offence.

[39] After having a rum, the applicant changed his mind, as his Honour acknowledged, and returned to the crash scene, arriving about 6.50 pm, more than 90 minutes after the collision. On his return, the applicant admitted to the police that he was the driver of the Hilux. He produced his car keys and mobile telephone.

[40] The applicant's leaving indicates a serious disregard for and lack of responsibility towards those injured or killed by his offending. His return after a period of time did not evidence and was not accompanied by any expression of concern for their welfare.

Identification of the offender

[41] Leaving a scene to avoid identification is seriously bad conduct. It may cause expenditure of additional public resources investigating and tracing an absconding offender.

[42] The applicant's return to the scene after about 90 minutes, and his admission that he was the Hilux driver, demonstrate assistance to the police in the investigation of the offence, and so relevantly diminish the overall seriousness of his offending conduct, compared to an offender who, having left, failed to return.

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27 Code, s 328A(4)(c).

28 *R v Vance; ex parte Attorney-General (Qld)* [2007] QCA 269.

[43] This assistance was limited by the version of events he gave to the police on his return. He told them the vehicle in front of him had stopped without warning to turn right, that he did not see any indicator, and so collided with it. This was not consistent with the agreed schedule of facts put before the sentencing court or the forensic examination of the tail light assembly of the Subaru, which concluded that the right indicator lights and the rear brake lights were illuminated at the time of impact.

Drug and alcohol testing

[44] The applicant submitted his return to the scene was "timely" because it allowed the police to conduct drug and alcohol tests. The applicant distinguished his conduct from that of an offender who surrendered to police after two and a half days.[29]

[45] It is unlikely the applicant's absence could have affected the drug test administered by the police, which produced a negative result. It is less certain that the applicant thought his absence would have no effect on a breath test for the consumption of alcohol.

[46] The applicant told police he had consumed three stubbies of full strength beer (about 1.4 standard drinks each) between 12.00 pm and about 3.00 or 3.30 pm and a rum (about one standard drink) at the Hotel between the crash and returning to the scene. He had a BAC close to the legal limit after more than 90 minutes absence from the scene. The learned primary judge observed that what the "reading would have been at the time of the crash is conjecture". His Honour did not speculate. Nor could this Court conclude, as the applicant urged it should, that by leaving the scene the applicant did not seek to affect the ability of the police to test whether he was adversely affected by an intoxicating substance at the time of committing the offence. To the extent that leaving the scene is more serious because it hampers the testing of an offender for the presence of drugs or alcohol, the applicant's conduct in returning, after 90 minutes and another alcoholic drink, did not fully remedy this aggravating aspect of his offending.

The applicant's personal circumstances

[47] In sentencing, the court must have regard to the personal circumstances of the applicant, including primary regard to his past record, any attempted rehabilitation and the number of previous offences of any type, to his antecedents, age and character and to any remorse or lack of remorse.[30]

Record and antecedents

[48] The applicant had no relevant criminal history.

[49] His traffic history records 17 speeding offences, including seven between 22 October 2010 and 11 July 2016. On 9 August 2016, three and a half months before this offence, the applicant had been sent a demerit points warning letter, triggered by a loss of four points for exceeding the speed limit in a speed zone by more than 20 km/h on 11 July 2016, having lost six points for exceeding the speed limit by more than 30 km/h on 6 April 2015. This pattern of losing points for speeding offences, followed by warning letters, had occurred in 2011 and 2014. His accrual

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29 Applicant's Outline at [17], citing *Vance* [2007] QCA 269.

30 PSA, s 9(3)(g), (h), (i).

of demerit points had resulted in the cancellation of his driver's licence in 1995 and again in 2006. Shortly after the latter event, the applicant was convicted of unlicensed driving and disqualified for six months.

[50] The learned primary judge rightly described this as "a serious and a bad traffic record" that indicated the applicant, at least before the present offence, was a person who "drove in a manner that did not display sufficient concern for other users of the road."

[51] There was no evidence of attempted rehabilitation on the part of the applicant in the 22 months between his offending conduct and his sentencing hearing.

Age

[52] The applicant was 45 years of age at the time of the offence and 46 at the time of sentence. He had been driving for many years. His first recorded traffic offence was at age 19.

Character

[53] The applicant was a person of good character. Referees who have known him for many years described the applicant's involvement in the incident as out of character.

[54] The applicant grew up in a secure, loving and happy environment with strong morals, and with encouragement and support from his parents. He has always had a steady job and supported his family. He is devoted to his family.

[55] The applicant's offending is not explained by a disadvantaged background or personal, domestic or financial stress.

Remorse or lack of remorse

[56] Referees for the applicant wrote of him "feeling great remorse for the others involved in this accident", the "intense and overwhelming remorse he has experienced every day" since the incident, "the intense remorse he has expressed since that day" as well as more general expressions of remorse. Each of these remarks was made months after his conviction and shortly before his sentencing hearing. By that time, the applicant's remorse was manifest.

[57] Immediately after the crash, the applicant's conduct in leaving the scene was not consistent with such remorse. No early indication is found in his limited assistance to the police and prosecuting authorities.

Assistance to law enforcement

[58] The applicant gave little assistance to the police in the investigation of this offence, a matter to which the court must have regard in sentencing.[31]

[59] On returning to the scene, the applicant gave police a version of the collision that was not consistent with the agreed schedule of facts put before the sentencing court,

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31 PSA, s 9(2)(i).

or with the subsequently obtained forensic evidence. The learned primary judge accepted that the applicant was not deliberately lying to avoid responsibility. However, his incorrect version of events did wrongly apportion blame to the driver of the Subaru.

[60] On 28 November 2016, two days after the collision, police executed a search warrant at the applicant's address. They seized clothing seen in the hotel video footage and conducted a forensic procedure, which confirmed he had minor injuries to his chest and shoulder consistent with seat belt abrasions from a driver's side seat belt. After seeking legal advice, the applicant declined to take part in a formal record of interview.

[61] On 30 June 2017, the applicant was issued with a notice to appear. He again declined to answer any questions about the collision.

Circumstances of the guilty plea

[62] On 17 January 2018, the indictment was presented and adjourned to the next criminal sittings. On 11 April 2018, the matter was listed for trial to commence 29 May 2018.

[63] On 29 May 2018, the day of the trial, the applicant was arraigned and pleaded guilty. The sentence was adjourned to enable his defence to obtain a psychological report, and was listed for a sentence hearing on 24 September 2018. His bail was enlarged.

[64] As the learned primary judge noted, by taking as long as he did to offer a plea, the applicant caused public resources to be expended on the prosecution and also had an impact on the victims and their relatives.

Other personal circumstances

[65] At the sentence hearing, the applicant's Counsel informed the court that the loss of his driver's licence – for the automatic statutory 12 months from his conviction[32] – would affect his livelihood as a carpenter living on the Sunshine Coast, and that this would necessarily affect his family.

Comparable cases

The applicant's earlier comparable cases

[66] Among the decisions the applicant relies on as comparable are *R v Harris; ex parte Attorney-General (Qld)*,[33] *R v Gruenert; ex parte Attorney-General (Qld)*,[34] *R v Proesser*,[35] and *R v Vance; ex parte Attorney-General (Qld)*.[36] Each concerned a sentence imposed before the increase in the maximum penalties for the then existing offences and before the introduction of this specific aggravating circumstance.

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32 As noted above, conviction for this offence resulted in an automatic disqualification from holding or obtaining a drivers licence for a period of 12 months: *Transport Operations (Road Use Management) Act* 1995 (Qld) (**TORUM Act**), s 86(3AA)(b).

33 [1999] QCA 392.

34 [2005] QCA 154.

35 [2007] QCA 61.

36 [2007] QCA 269.

[67] None of the four pre-amendment decisions raised by the applicant involved an intoxicating substance. In those cases, the relevant yardstick for the "worst possible case" was seven years imprisonment, not 14 years.[37]

[68] Like the increase in the maximum penalty considered in *R v Maher*,[38] the increase from seven years to 14 years imprisonment is a clear indication of the legislative intent that dangerous driving causing death or grievous bodily harm is to attract a greater level of punishment than might have been the case until then.[39] It is to be expected that such legislative changes:

> "would produce a general increase in the severity of sentences, rendering the earlier cases of little utility as comparable sentencing decisions. That is so even though … the increase in the maximum penalty should not necessarily be reflected in proportionate increases in sentences."[40]

[69] A brief recital of the different circumstances of the dangerous driving in those four cases confirms the very limited relevance of these pre-amendment sentences to the applicant's offence.

[70] In *Harris*, the 20 year old offender, on a learner's permit, was driving a borrowed car in the dark on a major suburban road. He was exceeding the 60 km/h speed limit by more than 15 km/h. He came over a crest and hit another vehicle, which was slowly crossing at an intersection. The learned sentencing judge concluded the offender's "excessive speed which was completely inappropriate from any driver let alone one as inexperienced as you" was the sole cause of the death and serious injury to the occupants of the other car.[41] The sentence imposed was 12 months imprisonment, to be served by way of an intensive correction order, and licence disqualification for two years.

[71] The majority of this Court dismissed the Attorney's appeal.[42]

[72] In *Gruenert*, the offending truck driver had been driving professionally for over 30 years. He had a clear view for the length of the highway, which allowed him to safely overtake a slower car towing a caravan. He veered back into the lane with the car before fully passing it, forcing the car and caravan off the road. The jury was taken to have accepted that the offender failed to keep a proper lookout when he was returning to the correct side of the road. In this Court, the sentence was considered on the basis that the learned sentencing judge did not err in characterising the offender's conduct as "momentary inattention". He had "an

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37 It is possible that the decisions in *Harris* and *Gruenert* played a part in the Parliament's decision to enact the 2007 amendments, but it is not necessary to reach any conclusion to that effect.

38 [2012] QCA 7. The marked upward trend in penalties for dangerous driving was noted in *R v MacDonald* [2014] QCA 9 at [32].

39 [2012] QCA 7 at [43].

40 *R v CBI* [2013] QCA 186 at [19] (Fraser JA), citing *R v L; ex parte Attorney-General (Qld)* [1996] 2 Qd R 63 at 65, *R v G; ex parte Attorney-General (Qld)* [1999] QCA 477 at [23], *R v T; ex parte Attorney-General (Qld)* [2002] QCA 132 at [21], *R v KT; ex parte Attorney-General (Qld)* [2007] QCA 340 at p 6.

41 at [19].

42 at [36] (Pincus JA), [48] (Thomas JA). At [12], in dissent, de Jersey CJ would have allowed the appeal and increased the sentence to 18 months, suspended after six months with an operational period of 18 months.

exemplary character" and no previous criminal or traffic record.[43] He was sentenced to 18 months imprisonment, wholly suspended with an operational period of two years; and the automatic licence disqualification for six months.

[73] Although the sentence was found to be at the lower end of the proper range, this Court dismissed the Attorney's appeal.[44]

[74] In *Proesser*, the 28 year old offender was driving a borrowed car along Smith Street, Southport at the 70 km/h speed limit. He looked down to adjust the car radio. When his eyes returned to the road he saw the car in front had stopped at an amber light. To avoid a collision, he applied the brakes and swerved into a left turning lane. In doing so he struck a pedestrian on a signed crossing, who suffered grievous bodily harm. He remained at the scene, offered to assist the injured man, was remorseful and entered an early plea of guilty. At first instance the sentence was 18 months imprisonment, suspended after three months with an operational period of 18 months. On appeal it was varied to suspend it immediately.[45]

[75] In *Vance*, the 20 year old offender was driving in the early morning along a street with overhead lighting and little traffic in fine weather. At a curve in the road, he crossed into the emergency stopping lane, hit the guard rail and then collided with a cyclist riding ahead of him in the same direction. The impact threw the rider 37 metres forward. The offender's front windscreen was substantially damaged, with the rear vision mirror detached and lying on the backseat. The offender did not stop at the scene, but drove five kilometres or so to his home. Other motorists found the rider lying face down in a pool of blood and called an ambulance. The rider died shortly after the ambulance arrived. The offender surrendered to the police two days after the collision.[46] He was sentenced on the basis that he was grossly fatigued and fell asleep at the wheel.

[76] The sentence of two years imprisonment, suspended after six months for an operational period of two years, was set aside, on the Attorney's appeal, as unduly indulgent to the offender. Instead, he was sentenced to three years imprisonment, suspended after 12 months for an operational period of three years. The licence disqualification for five years was not changed on appeal.[47]

The applicant's later comparable cases

[77] The applicant identified four decisions for offences after the relevant amendments to the Code: *R v Maher*,[48] *R v MacDonald*,[49] *R v Stevenson*,[50] and *R v Liu*.[51]

[78] In *Maher*, the 44 year old offender, driving his utility at night, turned right at an intersection across the path of an oncoming motorcycle, causing the rider's death. The offender drove over the top of the motorcycle and rider and did not stop until parking about 24 metres down the cross street. The site of the collision was a well-

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43 [2005] QCA 154 at [3]-[7], [9], [12], [13], [17].
44 at [9], [19], [20].
45 [2007] QCA 61 at pp 2, 4, 7. The 3 year licence disqualification was not altered on appeal.
46 [2007] QCA 269 at pp 3-5.
47 at p 15.
48 [2012] QCA 7.
49 [2014] QCA 9.
50 (2016) 76 MVR 39; [2016] QCA 162.
51 [2016] QCA 186.

lit, busy stretch of road, straight and flat without any dips or blind spots. The speed limit was 60 km/h. The motorcycle headlights were on low beam. The offending was characterised as a prolonged period of inattention, likely brought on by fatigue. Neither alcohol nor speed was involved in the collision.[52] So the maximum penalty was 10 years imprisonment. The offender had limited criminal and traffic histories.

[79] This Court refused the offender leave to appeal from the sentence of three years imprisonment, suspended after nine months with an operational period of three years, as well as licence disqualification for four years, rejecting the contention that it was manifestly excessive.[53]

[80] In *MacDonald*, a 49 year old professional truck driver was driving a prime mover (towing a tanker) north on a major regional road. He turned the vehicle right at an intersection into the course of two cars travelling south. The driver of the first of the oncoming cars had little opportunity to brake or steer away, and collided with the front of the prime mover. She suffered severe injuries and her passenger suffered a broken arm. The offender saw the two approaching cars and mistakenly thought they were going to enter the slip lane and exit left onto the cross road. The offender made a serious mistake about the oncoming cars' direction of travel, as he ought to have assumed they might be travelling straight ahead, and he failed to keep a proper lookout. He pleaded guilty to dangerous driving causing grievous bodily harm and was remorseful.[54] He was sentenced to 18 months imprisonment, suspended after three months with an operational period of two years, and disqualified from holding a driver's licence for 12 months. The maximum penalty for the offence was 10 years imprisonment.

[81] This Court dismissed the offender's application for leave to appeal, rejecting the contention that the sentence was manifestly excessive.[55]

[82] The learned primary judge in the applicant's case noted the observations of Applegarth J in *MacDonald* about an offender's culpability for the consequences of dangerous driving.[56] The applicant's offending may be more serious than that in *MacDonald*, where no one was killed (or almost killed) and the grievously injured person recovered.

[83] In *Stevenson*, a professional truck driver in his mid-50's, with only an "aged" traffic history, failed to stop at a red traffic light, colliding with a car and pushing it to strike a second car. The occupant of the second car suffered grievous bodily harm. The offender was sentenced to 18 months imprisonment, suspended after nine months for an operational period of three years.[57] As in *Maher* and *MacDonald*, the maximum penalty was 10 years imprisonment, as there was no aggravating circumstance.

[84] At the hearing of the application for leave to appeal, the only matter in issue was the period of his licence disqualification. Leave to appeal was granted and the sentence

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52 [2012] QCA 7 at [7]-[12], [26]-[27], [31].
53 at [43].
54 [2014] QCA 9 at [38]-[39], [55].
55 at [20], [22].
56 at [100].
57 (2016) 76 MVR 39; [2016] QCA 162 at [1].

set aside, but only to the effect that the licence disqualification period was reduced from four years to two years.[58]

[85] In *Liu*, a 23 year old visitor on a working holiday, failed to give way at an intersection and collided with another vehicle, causing the death of a passenger in his car. The maximum penalty was 10 years imprisonment. He was sentenced to two years imprisonment, suspended after three months with an operational period of three years, and disqualified from holding or obtaining a licence for three years.

[86] This Court refused leave to appeal, rejecting the contention the sentence was manifestly excessive.[59]

The respondent's comparable cases

[87] The respondent drew the Court's attention to three other decisions: *R v Huxtable*,[60] *R v Osborne*[61] and *R v Schoner*.[62] Each was decided after the amendments to the Code.

[88] In *Huxtable*, a 56 year old professional truck driver was driving a tip truck towing a trailer south along a major regional road. He was travelling behind a car, also driving south. The car slowed and stopped at an intersection, waiting to turn right with its indicator flashing. The offender's truck was recorded at 84 km/h before it braked hard, and collided with the rear of the car, about three seconds later. The impact forced the car across the centre-line into the path of an oncoming car, which was travelling north along the road. The collision occurred on a four-lane roadway, with two lanes in each direction, allowing vehicles to safely pass a turning vehicle, with a speed limit of 100 km/h. The weather was fine and there was good visibility. The driver of the stationary car was killed instantly by head injuries. The driver and a child passenger in the oncoming car were also injured, the driver grievously.[63]

[89] In the week he was listed for trial, the offender pleaded guilty to dangerous driving causing death and grievous bodily harm. He was sentenced to five years imprisonment, suspended after 15 months, with an operational period of five years. He was disqualified from holding or obtaining a driver's licence for a period of two years.[64]

[90] On appeal, this Court assessed the dangerous driving in *Maher* as more serious than that of Mr Huxtable, because in *Maher* the offender drove knowing he was fatigued. Mr Maher's dangerous driving caused one death and Mr Huxtable's caused one death and grievous bodily harm to another. Mr Maher had a directly relevant prior conviction for dangerous driving and fewer mitigating features than Mr Huxtable. Considering that the maximum penalty in both cases was 10 years imprisonment, the Court concluded that the three year sentence not disturbed in *Maher* did not support the five year sentence imposed at first instance in *Huxtable*.[65]

[91] Finding the sentence was manifestly excessive, the Court re-exercised the discretion and sentenced Mr Huxtable to three and a half years imprisonment, suspended after

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58 at [3]-[4], [45].
59 [2016] QCA 186 at [14]-[15].
60 (2014) 68 MVR 367; [2014] QCA 249.
61 (2014) 69 MVR 45; [2014] QCA 291.
62 (2015) 73 MVR 107; [2015] QCA 190.
63 (2014) 68 MVR 367; [2014] QCA 249 at [3], [5], [6].
64 at [1].
65 at [25]-[26].

14 months with an operational period of three and a half years. The Court did not interfere with the two year licence suspension.[66]

[92] In *Osborne*, a 65 year old truck driver was transporting an oversized load of formwork, which protruded about 40 cm on each side of the truck tray, so that the load was 3.8 m wide. The load was marked with warning flags "OVERSIZED" on the front and rear of the truck. As it exceeded 3.4 m, the truck ought to have been preceded by a pilot vehicle to warn road users. It was not. The offender drove along a curved bridge over a culvert near Townsville, in an 80 km/h speed zone. It was a sealed road with single opposing lanes marked by an unbroken dividing white line down the centre of the road and fog lines on each road edge. Beyond the fog line there was 90 cm of sealed road surface and a further 75 cm of gravel surface before a guard rail. He approached from behind a group of cyclists who were riding in single file along the roadside. Cars were approaching from the opposite direction in the opposing lane. The offender later told police he thought it was going to be a "tight squeeze" but he "believed there was enough room to get through".[67]

[93] The left side of the offender's wide load struck one of the cyclists in the back of her head, propelling her and her bike into another cyclist. The offender's load then brushed a third cyclist causing her and a fourth cyclist to be thrown from their bikes.[68]

[94] The first cyclist died as a result of a cervical spine fracture caused by the collision. The second cyclist was injured, but not grievously. The third cyclist suffered grievous bodily harm in the form of subarachnoid haemorrhage and multiple facial injuries. The fourth cyclist suffered multiple rib fractures and a fractured scapula; he would have died at the scene in the absence of medical treatment.[69]

[95] The offender stopped his vehicle and attempted to render assistance at the scene. He cooperated with police at the scene, answering their questions. Two and a half months after being charged, he indicated his intention to plead guilty and was committed for sentence through the registry. There was very compelling evidence of great remorse, including a psychologist's report as to his overwhelming emotional response. He ceased driving heavy vehicles. Prior to the offending, he had led a blameless and productive life with no previous convictions and a minor traffic history.[70] No aggravating circumstance was present, so the maximum sentence was 10 years.

[96] On appeal, Mr Osborne did not challenge the head sentence of three and a half years imprisonment. This Court expressed the view that the decision in *Huxtable*, which had been delivered after Mr Osborne was sentenced, supported the conclusion that Mr Osborne's head sentence "fell within the sound exercise of the sentence discretion."[71] However, the Court considered that the suspension of his "significant head sentence" after 14 months "did not give adequate recognition to his compelling mitigating circumstances" which included:

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66 at [28], [29], [30].
67 (2014) 69 MVR 45; [2014] QCA 291 at [7]-[13].
68 at [14].
69 at [15]-[18].
70 at [19]-[21].
71 at [40].

> "a lifetime lived as a productive and law abiding member of the community, over two decades service in the military, exceptionally powerful evidence of prompt and profound remorse and very early notification of his intention to plead guilty."[72]

[97] The period to be served prior to suspension "should have been materially shorter." The sentence was varied so that the three and a half year term of imprisonment was suspended after nine months, rather than after 14 months.[73]

[98] In *Schoner*, the then 37 year old offender had driven a Toyota Camry from Melbourne, a distance of about 1,600 km, in a little under 18 hours. She was south of Stanthorpe driving north on the New England Highway, a dual carriageway divided by a double white line. On approach to a left-hand bend in the road, she steered the Camry across the double line and travelled around the bend on the wrong side of the road. The Camry collided with a Toyota Echo being driven in the opposite direction on the correct side of the road. The offender's car continued on the wrong side of the road and, immediately after the Echo collision, collided with a second southbound car.[74]

[99] Ms Schoner's dangerous driving involved her travelling for 300 metres, at speeds between 90 and 100 km/h, for a number of seconds on the wrong side of the road.[75]

[100] One of the passengers in the Echo died. The driver and the other passenger, who were the daughters of the deceased passenger, were injured, one of them quite seriously. Aged 20 at the time of the collision, she suffered traumatic brain injury, was in a coma for a lengthy period, in hospital for over 10 months and was left without any memory of events in the period from 12 months before the injury until nine months afterwards. She suffered fractures to her left femur, tibia, fibula and pubic ramus. She was unable to walk at the time of sentence.[76]

[101] At the time of the collision, Ms Schoner had been disqualified from holding a driver's licence, for driving under the influence of alcohol. About 75 minutes before the collision, Ms Schoner had been given a speeding ticket south of Tenterfield. In the four months before the collision, she had committed three other speeding offences.[77]

[102] Amphetamine and methylamphetamine were present in Ms Schoner's blood on the date of the collision, but at quite low levels. She was not charged with being adversely affected by drugs. She did not leave the scene of the collision; it may not have been realistic for her to do so. No excessive speeding was involved. As in *Huxtable* and *Osborne*, in *Schoner* the maximum penalty was 10 years imprisonment.

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72 at [49].
73 at [49]-[50].
74 (2015) 73 MVR 107; [2015] QCA 190 at [10], [12]-[13].
75 at [75].
76 at [14], [15], [17]. It does not appear the two occupants of the second car were injured.
77 at [9], [11].

[103] Ms Schoner pleaded guilty on the fourth day of her trial.[78] She was sentenced to five years imprisonment, suspended after two years.

[104] On appeal, this Court identified that some of the aggravating factors in Ms Schoner's offence were of greater significance than those in *Huxtable* and *Osborne*. However, she was not a professional driver with a higher duty of care, distinguishing her from the offenders in those cases. Ms Schoner's conduct bore some similarity to that in *Maher*, as the offending conduct was operative for an appreciable, though relatively short, period of time. The Court concluded that none of the cases would support a head sentence of five years for Ms Schoner; and that the sentence imposed was outside the boundaries of the proper exercise of the sentencing discretion.[79]

[105] Re-exercising the discretion, this Court sentenced Ms Schoner to four years imprisonment. The Court considered the learned sentencing judge's approach to suspension to be appropriate, i.e. to suspend the sentence after 40 per cent had been served. As Ms Schoner had been in custody for a little over 19 months, the Court suspended the substituted sentence forthwith with an operational period of four years.[80]

The applicant's sentence in the context of the comparable cases

[106] For the reasons noted at [67]-[76] above, the decisions in *Harris, Gruenert, Proesser* and *Vance* are of limited utility. To the extent that any comparison may be drawn, they do not drive one to conclude that the learned primary judge's discretion as to the head sentence was affected by error.

[107] With respect to the other comparable decisions, it is convenient to examine them in relation to each of the elements of the sentence imposed on the applicant.

The head sentence

[108] The three year head sentence not set aside in *Maher* and the 18 month sentence not disturbed in *MacDonald* indicate only that those sentences were not manifestly excessive. They do not indicate any relevant upper limit for offences of a similar kind. The Court did not opine, for example, that had Mr Maher not been a professional driver, the sentence would have been set aside. For similar reasons, the sentence not challenged in *Stevenson*, and that not disturbed in *Liu* are not of present assistance.

[109] The applicant's dangerous driving was less serious than that in *Schoner*, which attracted a four year head sentence on appeal, and it was somewhat similar to that in *Huxtable*, where this Court imposed a head sentence of three and a half years imprisonment. The harm caused in *Schoner* and *Huxtable* – one death, one grievous bodily harm and another injured – was very serious, but slightly less serious than that caused by the applicant. The applicant caused harm comparable to that in

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78 at [3], [20]. She also pleaded guilty to driving while disqualified, driving having consumed drugs, failing to use care with the disposal of a syringe and possessing a spoon and scales used in the commission of an offence.

79 at [79]. Other decisions, not put to the Court in the present case, were also considered in *Schoner*, including: *R v Wilde; ex parte Attorney-General (Qld)* [2002] QCA 501; *R v Murphy* [2009] QCA 93; *R v Hoad* (2005) 43 MVR 475; [2005] QCA 92; *R v Evans* [2005] QCA 455; *R v Ruka* (2009) 53 MVR 304; [2009] QCA 113; *R v Hopper* [2011] QCA 296.

80 (2015) 73 MVR 107; [2015] QCA 190 at [27], [81].

Osborne – one death, two persons suffering grievous bodily harm and another injured. The learned primary judge considered the "extraordinarily significant" consequences of the offending conduct a factor that "weighs heavily" in the sentence to be imposed, requiring "punishment which strongly denounces that conduct".

[110] The applicant is not a professional driver of the kind sentenced in *Huxtable* and *Osborne*, but a tradesperson who used his vehicle to travel from workplace to workplace and to and from his home. It follows that the applicant's head sentence might be expected to be less than the three and a half years imposed in *Huxtable* and not challenged in *Osborne*, absent other considerations.

[111] The important other consideration is the aggravating circumstance of the applicant leaving the scene. It attracts the higher maximum penalty of 14 years, and was not present in any of *Schoner*, *Huxtable* and *Osborne*. Nor was it a factor in *Maher*, *MacDonald*, *Stevenson* or *Liu*. It is apt to justify a higher head sentence for the applicant than would apply if he had not left the scene before the police arrived.

[112] This leads to the conclusion that, by comparison to other decisions, the applicant has not shown the learned primary judge's head sentence of three years imprisonment to be outside the boundaries of the proper exercise of the sentencing discretion.

The period before suspension of the head sentence

[113] As this offence resulted in physical harm, the principles in s 9(2)(a) of the Act do not apply to the sentencing of the applicant.[81] As this Court has previously noted, the removal of those sentencing principles indicated the legislature's view that courts should be less reluctant than previously to imprison offenders in cases of physical harm.[82] Those principles, that might lead a sentencing judge to immediately suspend or set parole eligibility or a suspension period very early in a sentence, are not applicable.

[114] This Court observed in *Osborne*, that the cases do not suggest "the existence of a norm for the timing of the suspension relative to the duration of the head sentence."[83] Rather, this particular aspect of a sentence may be thought to turn on the personal circumstances of the offender: the mitigating features of youth, good character, a record of hard work, remorse and the timeliness of the guilty plea; and on any aggravating factors such as a criminal and traffic history; as well as a gauge of the impact of imprisonment on the offender and his or her dependents.[84]

[115] The sentences in *Maher*, *MacDonald* and *Liu* were not disturbed and in *Stevenson* the sentence was not challenged. No authoritative comparison may be drawn about the period after which the sentences were suspended in those cases.

[116] In *Huxtable*, this Court suspended the substituted three and a half year sentence after 14 months was served, being one-third of the head sentence. This was based upon the "many mitigating features", including his "plea of guilty, cooperation with

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81 PSA, s 9(2A). The principles are: that a sentence of imprisonment should only be imposed as a last resort; and that a sentence that allows the offender to stay in the community is preferable.

82 *R v Harris; ex parte Attorney-General (Qld)* [1999] QCA 392 at [5] (de Jersey CJ).

83 (2014) 69 MVR 45; [2014] QCA 291 at [46].

84 at [48].

the authorities, genuine remorse, good work history including three and a half years military service, his present ill health and sound rehabilitative prospects".[85]

[117] The decision of the learned primary judge to suspend the applicant's sentence after 12 months, or one third of the head sentence, accords with the decision in *Huxtable* and is more lenient than this Court's decision in *Schoner*. In both those cases, the offender pleaded guilty at or on the eve of trial, as did the applicant.

[118] Like the applicant, Mr Huxtable had a relevant traffic history and was of good character.

[119] In *Osborne*, the "compelling mitigating circumstances" led this Court to reduce the period of imprisonment to be served before suspension to a little over 20 per cent of the three and a half year sentence.

[120] The applicant's personal mitigating factors are not as favourable as those of Mr Osborne, who had a creditable traffic history "for one who has long driven for a living." Mr Osborne pulled over and proffered assistance at the scene. He indicated a guilty plea very early and was committed for sentence through the registry. A psychologist's report attested to Mr Osborne's deep remorse and, notwithstanding it had been his career, by the time of his sentencing hearing he had ceased driving heavy vehicles.[86]

[121] Whereas, in *Schoner*, an offender with fewer personal mitigating factors than the applicant, the Court suspended the four year sentence after 40 per cent was to be served.

[122] These comparisons do not demonstrate that it was excessive to require the applicant to serve 12 months (one third of his head sentence) before his custodial sentence is suspended.

Disqualification period

[123] The applicant was disqualified from holding or obtaining a driver's licence for a minimum period of 12 months from his conviction on 29 May 2018, without the need for a specific order.[87] The learned primary judge, by order, disqualified the applicant for a period of two years from 24 September 2018, the date of his sentence.

[124] As noted above, the loss of his driver's licence affects the applicant's livelihood as a carpenter living on the Sunshine Coast, and necessarily affects his family. This same consequence must flow from any period served in prison and for the automatic statutory period of disqualification for 12 months from conviction.

[125] In each of *Huxtable*, *Osborne* and *Stevenson*, the offender was a professional driver. For each, the disqualification period barred the offender from continuing in his life-long work, while it endured. Each of Mr Huxtable and Mr Stevenson was in his mid-50's at sentence; and Mr Osborne was over 65. Their respective ages probably made a change of employment very challenging.

[126] The applicant is not a professional driver. His trade will be affected during the disqualification period, but it will not be made unlawful. He would need to arrange

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85 (2014) 68 MVR 367; [2014] QCA 249 at [28].
86 (2014) 69 MVR 45; [2014] QCA 291 at [19]-[21].
87 TORUM Act, s 86(3AA)(b).

alternative transport to continue to work. To the extent that he may need to make changes in his work-life, in his mid-40's, he is better placed to do so than the older offenders.

[127] The disqualification is part of the overall sentence. It follows that the disqualification must serve the sentencing purposes of rehabilitation, deterrence, denunciation and community protection.[88]

[128] In *Huxtable*, disqualification for two years was not disturbed by this Court on appeal.[89] In *Osborne*, this Court fixed a two year period of disqualification. In doing so, the Court noted that to some extent the period of imprisonment before suspension (in that case nine months) served the purposes of punishment, deterrence and denunciation, so that the period of disqualification longer than "about two years" could be said to lack proper purpose.[90] That proposition was respectfully adopted by the Court in *Stevenson*, where a two year disqualification was also ordered by this Court.[91]

[129] Having regard to his driving history, it cannot be said the likelihood of the applicant's future driving presenting a risk to community safety is low, as it was said of Mr Osborne.[92]

[130] The learned primary judge's two year disqualification order is consistent with that in each of *Huxtable*, *Osborne* and *Stevenson*.

[131] The detention of an offender in custody serves the purpose of protecting the community from the risk of physical harm or unsafe driving by the offender until the sentence is suspended or the offender is released on parole. In *Huxtable* the disqualification effectively operated for ten months after his sentence was suspended. In *Stevenson*, the head sentence was suspended after nine months, so that the effective operation of the disqualification order was for 15 months. In *Osborne* the effective period of disqualification after release from prison was also 15 months.

[132] If the learned primary judge's decision on suspension of the head sentence is not disturbed, then the applicant's period of disqualification will continue for 12 months after his sentence is suspended. This is not discordant with the post-release disqualification periods accepted in *Huxtable*, *Osborne* and *Stevenson*.

Conclusion

[133] There is no single correct sentence for an individual offender, such as the applicant. As Kirby J noted in *Markarian v The Queen*:[93]

> "In sentencing there is sometimes a legitimate role for differences of judicial view. These may occasionally favour the extension of leniency, as *Osenkowski* shows. Necessarily, there must also be room for the views of a judicial officer who takes a more punitive view of all of the relevant considerations in the case. So long as all

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88 PSA, s 9(1).
89 (2014) 68 MVR 367; [2014] QCA 249 at [28].
90 (2014) 69 MVR 45; [2014] QCA 291 at [61].
91 (2016) 76 MVR 39; [2016] QCA 162 at [42].
92 (2014) 69 MVR 45; [2014] QCA 291 at [60].
93 (2005) 228 CLR 357.

> relevant considerations are given due attention, the discretionary character of sentencing will inhibit appellate interference."[94]

[134] The learned primary judge considered the relevant purposes of sentencing in reaching a conclusion. His Honour took into account the maximum sentence, identified and considered the actual driving of the applicant, noted the aggravating circumstance and considered the applicant's personal circumstances. The learned primary judge concluded that: the punishment imposed ought to be such that "strongly denounces" the applicant's conduct; there was no need to protect the community from the applicant; that rehabilitation was "undoubtedly important"; but that the need for deterrence and denunciation were more significant in informing the decision reached on sentence. The weight attributed to each was a matter for his Honour and cannot be separately discerned or measured.[95]

[135] In combining the individual elements of the sentence, the totality of the penalty imposed by the learned primary judge is also not shown to be excessive, given the statutory maximum sentence of 14 years, the gravity of the offence on the scale of such offending, the personal circumstances of the applicant, the sentencing principles of deterrence and denunciation and the range of sentences that have been imposed in other cases for the same or a relevantly similar offence since the 2007 amendment of the Code.

[136] I would refuse leave to appeal.

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94 at 405-406 [133], omitting citation for *R v Osenkowski* (1982) 30 SASR 212 at 212-213 (King CJ).

95 See: *R v Baker* [2000] NSWCCA 85 at [11] (Spigelman CJ).