IN THE COURT OF APPEAL OF NEW ZEALAND

CA663/2015
[2016] NZCA 417

IN THE MATTER OF	SOLICITOR-GENERAL'S REFERENCE (NO 1 OF 2016) FROM CRI-2015-485-52, HIGH COURT AT CHRISTCHURCH)

Hearing:	7 July 2016
Court:	Wild, Cooper and Kós JJ
Counsel:	Solicitor-General U R Jagose QC and Z R Johnston for Referrer A N Isac and T Mijatov as Counsel assisting
Judgment:	5 September 2016 at 3 pm

JUDGMENT OF THE COURT

The questions of law referred are answered:

(a) **Question One: Was the High Court correct to conclude that the requirements of s 90 of the Land Transport Act 1998 had not been met in this case?**
Answer: Yes.

(b) **Question Two: If the requirements of s 90 were not met, was the correct remedy the quashing of the defendant's conviction?**
Answer: Yes.

REASONS OF THE COURT

(Given by Kós J)

[1] When a licenced driver accrues 100 or more demerit points in a two-year period, the Land Transport Agency must give the driver notice of that fact and that their licence is suspended with immediate effect. In practice what happens is that a police officer checking the licence of such a driver will be alerted by electronic notification by the Agency, and automatically requested to issue the notice on the Agency's behalf. The police officer then fills in a standard paper notice kept in the patrol car and gives it to the driver.

[2] Does this procedure meet the requirements of s 90(1) of the Land Transport Act 1998 (the Act), that "the Agency must give notice in writing advising the person" (ie the driver) of the accumulation of those demerit points and the suspension consequences? That is the first question in this appeal.

[3] And if it does not, does s 379 of the Criminal Procedure Act 2011 deem the notice valid when a driver is subsequently prosecuted for driving while his or her licence is suspended? That is the second question.

[4] It is common ground that until mid-2015 the delegations given by the Agency to the police to perform the Agency's notification duty were defective. So the first question turns on whether the Agency itself has performed its notification duty.

[5] On appeal from two inconsistent District Court decisions on this question, Williams J in the High Court held the procedure adopted did not meet the requirements of s 90(1) of the Act. The notice given was invalid and the conviction for driving while suspended was set aside.[1]

[6] The Solicitor-General sought and obtained leave to refer two questions of law to this Court:[2]

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1 *Police v Haunui* [2015] NZHC 2456. The appeal involved two cases: one concerning a Mr Haunui and the other concerning a Mr Miller. Formally the present reference concerns only Mr Miller's conviction.

2 *Solicitor-General's Reference (No 1 of 2016) from CRI-2015-485-52, High Court at Christchurch* [2016] NZCA 76.

(a) Was the High Court correct to conclude that the requirements of s 90 of the Act had not been met in this case?

(b) If the requirements of s 90 were not met, was the correct remedy the quashing of the defendant's conviction?

[7] This is a Solicitor-General's reference.[3] The outcome is moot for the two drivers concerned. The Crown does not and cannot seek to reinstate their convictions. Neither participated in the hearing. Accordingly this Court appointed Mr Andru Isac as counsel to assist.

Statutory framework

[8] Section 90 of the Act provides:

> **90 Suspension of licence or disqualification from driving under demerit points system**
>
> (1) If, in any 2-year period, a person has accumulated a total of 100 or more demerit points, the Agency must give notice in writing advising the person that—
>
> (a) the person has accumulated 100 or more demerit points; and
>
> (b) the penalty specified in subsection (3) or (5) has been imposed and takes effect immediately.
>
> (2) The notice given under subsection (1) may be served by—
>
> (a) the Agency; or
>
> (b) a person approved for the purpose by the Agency; or
>
> (c) an enforcement officer.
>
> (3) If the person holds a current driver licence, the effect of a notice given under subsection (1) is that the licence—
>
> (a) is suspended for a period of 3 months or, if longer than 3 months, the period calculated under section 90A; and
>
> (b) remains of no effect when the period of suspension ends until the person applies to the Agency to have the licence reinstated and the Agency reinstates the licence.

[3] Criminal Procedure Act 2011, s 313(3).

> (4) A person whose driver licence has been suspended under subsection (3) may not hold or obtain a driver licence while the suspension is in force.
>
> (5) If the person does not hold a current driver licence, the person is disqualified from holding or obtaining a driver licence for a period of 3 months or, if longer than 3 months, the period calculated under section 90A.
>
> (6) A suspension or disqualification under this section begins on the date specified in the notice, which may not be earlier than the date on which the notice is served on the person.

[9] We note four things about this provision.

[10] The first is that the provision uses the words "give" and "serve" in different places. For instance, by s 90(1) the Agency must "give" the notice ("advising" the driver of the 100-plus demerit points accumulation, that the statutory penalty, (suspension or disqualification) has been imposed, and that it takes effect immediately). That terminology is reflected in s 90(3). But s 90(2) refers to the notice being "served". And s 90(6) also reflects that terminology.

[11] Secondly, the notice may be "served" in three ways, under s 90(2): by the Agency; by a person approved for that purpose by the Agency; or by an enforcement officer. By virtue of s 2 of the Act, the last includes a constable. As we note later, it is distinctive that Parliament has given responsibility for giving the notice to the Agency, not to the police. The Agency may delegate that responsibility, pursuant to ss 73 and 74 of the Crown Entities Act 2004.[4] As noted already, it is common ground that it had not done so effectively in this case.[5] Defects in the original delegation have since been rectified.

[12] Thirdly, we note the immediate legislative history. Prior to 19 December 2005, s 90 read as follows:

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4 And formerly could do so under s 205 of the Land Transport Act 1998, which was repealed in 2008.

5 The problem, the Solicitor-General informed us, concerned the ministerial approval required by s 73(1)(d) of the Crown Entities Act 2004.

> **90 Suspension of licence or disqualification from driving under demerit points system**
>
> (1) If, in any 2-year period, a total of 100 or more demerit points is recorded against a person, the Director must, by notice in writing given to that person, either—
>
> (a) suspend that person's current driver licence for 3 months; or
>
> (b) if the person does not hold a current licence on the date of the giving of the notice, disqualify the person from holding or obtaining a driver licence for 3 months,—
>
> and the suspension or disqualification starts on the date the notice is given to that person.
>
> (2) A person whose driver licence has been suspended under subsection (1) is disqualified from holding or obtaining a driver licence while the suspension is in force.

It will be noted that the subsequent formula of the Agency "giving" notice in writing was there then, but with the specific words "given to that person" — ie the driver. So it was for the Agency to give the notice to the driver. It was this version of s 90 that this Court considered in *Henderson v Director of Land Transport New Zealand*.[6]

[13] Then from 19 December 2005 to 9 May 2011 the provision read:

> **90 Suspension of licence or disqualification from driving under demerit points system**
>
> (1) If, in any 2-year period, a total of 100 or more demerit points have effect against a person, the [Agency] must, by notice in writing given to that person, either —
>
> (a) suspend that person's current driver licence for 3 months; or
>
> (b) if the person does not hold a current licence on the date of the giving of the notice, disqualify the person from holding or obtaining a driver licence for 3 months.
>
> (2) If the [Agency] has been unsuccessful in giving notice to a person under subsection (1), an enforcement officer may, by notice in writing given to that person, either —
>
> (a) suspend that person's current driver licence for 3 months; or

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6 *Henderson v Director of Land Transport New Zealand* [2006] NZAR 629 (CA). The focus of that case was more on s 89 than s 90, however. Prior to August 2008 the Agency was known as Land Transport New Zealand and s 90 referred to the "Director" of the same.

(b) if the person does not hold a current driver licence on the date of the giving of the notice, disqualify the person from holding or obtaining a driver licence for 3 months.

(3) A suspension or disqualification under subsection (1) or subjection (2) starts on the date the notice is given to the person.

(4) A person whose driver licence has been suspended under subsection (1) or subsection (2) may not hold or obtain a driver licence while the suspension is in force.

[14] This repeated the formula of the Agency having the duty to give notice in writing to the driver. But it then enabled an enforcement officer to perform that duty where the Agency had been unsuccessful in giving notice. As Williams J noted:[7]

> In those earlier iterations "give notice" referred to the physical act of communicating to the driver, in written form, the information required by s 90(1).

[15] Section 90 was then amended to its present form, with effect from 10 May 2011. The rationale for reform was to "enhance the enforceability" of the Act, including by:[8]

> ... improving the effectiveness of the driver licence demerit point suspension system by allowing the Police to serve a suspension on a driver on the roadside when it transpires that a driver has 100 or more active demerit points (currently this can only occur where service has been attempted by the Agency and been unsuccessful) ...

[16] To summarise, then, in the two earlier iterations the Agency was required to give notice in writing <u>to</u> the driver. In the current iteration the requirement is to give notice in writing "<u>advising</u>" the driver. In the first iteration the Agency had to give the notice itself (although the duty was delegable); in the second an enforcement officer was expressly empowered to perform the duty (if the Agency was unsuccessful in "giving" notice to the driver); and in the current iteration the concept of the Agency "giving" the notice but others being empowered to "serve" it first arises.

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7 *Police v Haunui*, above n 1, at [31].

8 Land Transport (Road Safety and Other Matters) Amendment Bill 2010 (213–1) (explanatory note) at 4–5.

[17] Fourthly, we note the relevant legislative context. Companion legislation, the Land Transport Management Act 2003, provides for a national land transport fund which is used to pay, inter alia, for approved police activities contributing to the purpose of that Act (being "to contribute to an effective, efficient and safe land transport system in the public interest").[9] The Agency has what are called "statutorily independent functions" including issuing, suspending and revoking land transport documents (which include driver licences) and enforcing provisions of the Land Transport Act that confer functions or duties on the Agency.[10] Further, the Agency must comply with overarching operating principles, including that it acts in a transparent manner in its statutory decision-making, and uses its revenue in a manner that seeks value for money.[11]

[18] Reverting to the Land Transport Act, it may be observed that demerit points are part of the driver licensing functions of the Agency. These are set out in pt 4 of the Act. Issue, suspension and revocation are all matters where the Agency is empowered.[12] Section 88 imposes the duty to record demerit points on the Agency, which it does on receipt of particulars of conviction from a Court. Once 50 or more demerit points have been accumulated the Agency "must, when reasonably practicable, send that person a notice in writing" telling them of that fact and the consequences of further demerit points being accumulated.[13] Curiously, then, s 89(1) requires the Agency "send" a notice, but goes on in s 89(3) to deem the notice "served" in certain circumstances. These are the provisions immediately before s 90, in issue in this appeal.

Essential facts

[19] The essential facts are set out in the judgment of Williams J, which we adopt here:[14]

> [7] As the position stands currently, the Agency enters information in relation to demerit points accumulated by drivers into its database and the Agency maintains an interface between its data management system and the

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9 Land Transport Management Act 2003, ss 3, 10 and 18I–18L.
10 Section 95(2).
11 Section 96(1).
12 Land Transport Act 1998, ss 23, 27 and 30.
13 Section 89(1).
14 *Police v Haunui*, above n 1.

> independently run police National Intelligence Application (NIA) database. Through this interface, the NIA receives automatic alerts for all drivers recorded in the Agency database as having accumulated 100 or more demerit points. These show up in the NIA as an alert on the system "wanted for service of a demerit point suspension".
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> [8] The police then have an automatic number plate recognition (ANPR) alert system which, as I understand it, operates from certain specialised vehicles. These ANPR vehicles are linked to the NIA database. These vehicles automatically recognise the number plates of passing cars, particularly those whose owners are liable to service of a demerit point suspension notice. It is through this technology that Mr Miller's and Mr Haunui's vehicles were picked up as owned by drivers liable to service of such notices.
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> [9] The notice itself is a police generated standard form (POL 1006). It is for the most part a template based on s 90 with blanks to be filled in by the serving officer. The details of the recipient driver, date, place and time of service and the officer who effected service are all handwritten into those blank spaces. This was done in the case of both Mr Miller and Mr Haunui by Constable Murrell and Constable Ross respectively.
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> [10] Relevant excerpts from the template section of the form are as follows:
>
> > New Zealand Transport Agency records indicate that you have accumulated 100 or more demerit points within a two-year period and that you are wanted for service of a driver licence suspension notice.
> >
> > Under the provisions of Section 90 of the Land Transport Act 1998 – *(Tick appropriate box)*
> >
> > ☐ (a) Your driver licence is suspended for a period of three (3) months starting from the time this notice is given to you and you will be unlicensed when the period of suspension ends.
> >
> > ☐ (b) Because you do not hold a driver licence you are disqualified from holding or obtaining a driver licence for a period of three (3) months starting from the time this notice is given to you.
> >
> > You are required under section 30 of the Land Transport Act 1998 to surrender your driver licence to the officer serving this notice.
>
> [11] In both of the appeals before me, box (a) is ticked in pen to indicate the relevant consequence "from the time this notice is given to you" (i.e. the driver). And in both cases, the drivers, having been served, were subsequently stopped while driving during the currency of the suspension period.

[20] In Mr Miller's case, he was stopped by a police officer because his car had a defective light. Mr Miller admitted at once that he was a disqualified driver. The

officer checked on his portable data terminal, which informed him that Mr Miller's disqualification had another three weeks to run. He summonsed Mr Miller and impounded his car.

High Court decision

[21] Williams J began his analysis by holding that the current iteration of s 90(1) was different to the two earlier ones: the earlier ones required the Agency to physically communicate the notice in writing to the driver. The current iteration did not.[15] But, he concluded, the Agency still had to generate the notice and then give it to the police officer serving it:

> [34] But the notice must be "in writing advising the person" (i.e. the driver). That means the notice given by the Agency to the party effecting service must *itself* advise the driver of the matters set out in s 90(1). The only way for the Agency to avoid that responsibility is to lawfully delegate the giving of notice pursuant to ss 73 and 74 of the Crown Entities Act. In other words, it is the Agency's job to compose the advice and the enforcement officer's job to ensure it is handed to the driver.
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> [35] It follows that I do not agree with Judge Mill that the Agency's responsibility under s 90(1) is discharged when an enforcement officer fills in the details of the notice's addressee on a template form not created by the Agency. The Agency has failed thereby to advise the driver. Rather, I agree with Mr Ewen, that it is the enforcement officer who has performed the task of advising.

[22] The Judge did not accept that the 2011 amendment mandated a more liberal interpretation of s 90(1). The revision was modest, and did not extend to an express statutory delegation of the Agency's duty to compose the notice — a duty which had not changed throughout the various amendments made to s 90:

> [42] What is more, the Act's overall objective is perfectly well served by the Agency executing a valid delegation of its function under s 90(1). If that seems a technical interpretation of s 90(1), it is one the Agency itself adopted after 2011 when it attempted to delegate the relevant function. The problem is that its numerous attempts at delegation were defective.

[23] Williams J did not consider s 379 of the Criminal Procedure Act, which we address under the second issue below. It does not appear to have been referred to him. The Judge simply concluded:

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15 *Police v Haunui*, above n 1, at [31]–[33].

> [49] In light of my answer to the first question, Mr Miller's appeal must nonetheless be allowed accordingly. Mr Miller's conviction is set aside accordingly and an acquittal is entered.

Question One: Was the High Court correct to conclude that the requirements of s 90 of the Land Transport Act 1998 had not been met in this case?

[24] The Solicitor-General submitted that the proper interpretation of s 90(1) is that the Agency must "cause a notice to be generated". That notice must then be served. For that purpose, the notice is given to one of the three classes of people able to serve it, set out at s 90(2).

[25] On that basis the Agency had given notice in this case, in accordance with s 90(1). The Agency's electronic database had told the police database the relevant information, and they entered it on a physical paper demerit points suspension form. That form was then served on the driver.

[26] Such an approach was consistent with the statutory purpose of ensuring that the demerit point suspension notice can be served in a timely manner, without technical arguments.[16]

Analysis

[27] We do not accept the Solicitor-General's submission.

[28] First, the effect of the legislation is clear: Parliament has imposed the duty to give notice on the Agency. This has never changed since s 90(1) was first enacted. It is the Agency that has responsibility for licensing drivers. Alone it maintains driver licensing records, including records of demerit points. The Agency must "send" notice of the accumulation of 50 points. And it must give notice of the accumulation of 100. The legislation does not expressly anticipate that the latter is done only when the driver falls into the Agency's net (for instance, when pulled over by a police officer). Section 90(1) anticipates that when 100 demerit points are accumulated, notice will then be given, and served.

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[16] See [15] above.

[29] Secondly, the Agency has always had the ability to delegate the duty to give notice. Originally by s 205 of the Act, although that was repealed in 2008. More latterly the power to delegate is vested in ss 73 and 74 of the Crown Entities Act.

[30] Thirdly, we agree with Williams J that the Act distinguishes between composition of the notice and its communication to the driver. The composition (giving) of the notice is and always has been the Agency's duty. The notice must also be served, but that is now expressly delegated in s 90(2). We agree with Mr Isac that it does not suffice, without delegation, for the Agency simply to "cause" the notice to be given by someone else, as a result of automated data sharing. Overall, this reasoning reflects the careful choices made by the legislature in allocating the relevant functions between the Agency and others (including the Police).

[31] Finally, in our view the Solicitor-General's submissions read too much into the 2011 amendment. Those amendments bypassed technicalities of service only to the extent of averting challenges to the efforts made by the Agency to serve the notice given. It did not alter the fact that it remained for the Agency to give the notice. Both before and after the amendment it lay within the power of the Agency also to delegate the giving of the notice. The only "technical difficulty" was that it attempted to do so, and got the delegation process wrong. That does not justify judicial subversion of the plain meaning of the statutory provision.

Conclusion

[32] For these reasons we find the High Court was correct to conclude that the requirements of s 90 of the Act had not been met in Mr Miller's case. We therefore answer Question One, "Yes".

Question Two: If the requirements of s 90 were not met, was the correct remedy the quashing of the defendant's conviction?

[33] The Solicitor-General submits that if Mr Miller's notice was not given in accordance with s 90(1), the error is one of "process or form, rather than substance". In that event, it is submitted that s 379 of the Criminal Procedure Act applies. That provides:

> **379 Proceedings not to be questioned for want of form**
>
> No charging document, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding may be dismissed, set aside, or held invalid by any court by reason only of any defect, irregularity, omission, or want of form unless the court is satisfied that there has been a miscarriage of justice.

[34] The Solicitor-General submits that the focus of the position is on substantive harm, rather than technical failure. Its predecessor, s 204 of the Summary Proceedings Act 1957, was considered by the Supreme Court in *Dotcom v Attorney-General*.[17] Applying that decision, it is submitted that the fundamental question is whether the defect was so serious that the document or process should be treated as a nullity, and beyond the reach of ss 204/379. That is a conclusion the Court should be slow to reach. Even relatively serious defects may receive protection of ss 204/379. Nullity is a question of degree, and the issue often merges with the question of miscarriage of justice.

[35] The Solicitor-General accepted that in the event the notice in this case was a nullity, it would not be saved by s 379.

Analysis

[36] This issue was not considered by the High Court Judge. Section 379 does not seem to have been referred to him. We infer that the Crown did not seek to engage it in the High Court.

[37] We do not accept the Solicitor-General's submission in this issue.

[38] The error in this case was not, as she put it, one of "process or form, rather than substance". Rather, it related to the power to issue the notice in the first place. The notice was composed (or given) by the police. Absent effective delegation, they had no power to do so. Their power was confined to service once the Agency had given notice to it for service purposes.

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[17] *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745.

[39] In our view that renders the notice a nullity, rather than a "defect, irregularity, omission or want of form".[18] As Mr Isac submitted, the defect was that the wrong authority generated the notice. The Agency had failed to give notice to the driver at all.

[40] That defect goes beyond the sort of cases which might be saved by s 379 (and previously s 204 of the Summary Proceedings Act). In *Hall v Ministry of Transport* the error was one of terminology used in an infringement notice, not authority.[19] In *Moffat v Police* an attorney had signed a trespass notice on behalf of an occupier, but failed to state that she was signing on the occupier's behalf.[20] The defect was one of description, rather than authority; the attorney had authority to sign the notice. In *Henderson v Director of Land Transport New Zealand* the defect was again one of expression (referring to "disqualification" instead of "suspension" in a demerits point suspension notice).[21] This Court considered that the notice had still conveyed the required message. Again, the defect was not such as to render the notice a nullity. That is not the case here. It is of fundamental importance that notices issued by agents of the Executive and intended to have effect under statutory provisions emanate from the agency empowered by Parliament for the purpose.

Conclusion

[41] For these reasons we conclude that the notice served by the police officer on Mr Miller was a nullity, and that his conviction had to be quashed. Accordingly we answer Question Two, "Yes".

Result

[42] The questions of law referred are answered:

(a) Question One: Was the High Court correct to conclude that the requirements of s 90 of the Land Transport Act 1998 had not been met in this case?

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18 *Murray v R* [2016] NZCA 221 at [40].
19 *Hall v Ministry of Transport* [1981] 2 NZLR 53 (CA).
20 *Moffat v Police* HC Auckland CRI-2010-404-176, 17 September 2010.
21 *Henderson v Director of Land Transport New Zealand* [2006] NZAR 629 (CA).

Answer: Yes.

(b) Question Two: If the requirements of s 90 were not met, was the correct remedy the quashing of the defendant's conviction?

Answer: Yes.

Solicitors:
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