

O'Neill v Brumby [2016] NTSC 10

PARTIES: O'NEILL, Wayne

v

BRUMBY, Christine Beverley

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 9 of 2015 (21502939)

DELIVERED: 26 FEBRUARY 2016

HEARING DATES: 17 NOVEMBER 2015

JUDGMENT OF: KELLY J

CATCHWORDS:

RESERVED QUESTION OF LAW – Learner driver driving with high range breath alcohol content – Licensed driver occupying front seat charged with driving with a high range breath alcohol content contrary to the *Traffic Act* s 21 by virtue reg 12(10) of the *Traffic Regulations* – Whether reg 12(10) of the *Traffic Regulations* is a valid exercise of the regulation-making power conferred by s 53 of the *Traffic Act* – A licence holder who is occupying the front seat of a vehicle driven by a learner driver is liable for an offence committed by the driver – Held reg 12(10) of the *Traffic Regulations* is not a valid exercise of the regulation-making power conferred by s 53 of the *Traffic Act* – Licence holder occupying the front seat is not so liable

RESERVED QUESTION OF LAW – Whether Court of Summary Jurisdiction is obliged to find licensed driver occupying front seat not guilty of driving with a high range blood alcohol content – Held Court of Summary Jurisdiction obliged to find the licensed driver not guilty

Criminal Code (NT) s 12
Interpretation Act (NT) s 61
Motor Vehicles Act (NT) ss 9, 25J
Motor Vehicles Regulations (NT)
Traffic Act (NT) ss 3, 21(1), 53
Traffic Regulations (NT) regs 11, 12, 13, 14, 15, 15A, 92, 93

Carbines v Powell [1925] HCA 16, (1925) 36 CLR 88; *Coco v The Queen* [1994] HCA 15, (1994) 179 CLR 427; *Re Bolton; Ex Parte Beane* [1987] HCA 12, (1987) 162 CLR 514; *Widgee Shire Council v Bonney* [1907] HCA 11, (1907) 4 CLR 977; relied on

Kruger v Kidson [2004] NTSC 24 (2004) 14 NTLR 91; *Morton v Union Steamship Company of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402 ; Northern Territory, *Parliamentary Debates*, Legislative Assembly 11 June 1987 (Daryl Manzie, Attorney-General); *Philpott v Boon* [1968] Tas SR 97; referred to

Rowe v Hughes [1974] VR 60; discussed

Shanahan v Scott [1957] HCA 4, (1957) 96 CLR 245; cited

REPRESENTATION:

Counsel:

Plaintiff:	T Moses
Defendant:	L Nguyen

Solicitors:

Plaintiff:	Department of Public Prosecutions
Defendant:	Central Australian Aboriginal Legal Aid Service Inc.

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

O'Neill v Brumby [2016] NTSC 10
No. 9 of 2015 (21502939)

BETWEEN:

WAYNE O'NEILL
Plaintiff

AND:

**CHRISTINE BEVERLEY
BRUMBY**
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 26 February 2016)

Introduction

[1] On 10 April 2015 a complaint was laid against the defendant in the following terms.

On 12 December 2014, at Alice Springs in the Northern Territory of Australia, Christine Beverley Brumby did drive a vehicle, namely [a] Hyundai Accent, on a road, namely Stuart Highway, Alice Springs, with a high range breath alcohol content, namely 0.167 grams of alcohol per 210 litres of exhaled breath, contrary to s 21(1) of the *Traffic Act*.

[2] On 27 August 2015 the defendant pleaded not guilty and the matter proceeded to trial before Mr Trigg SM. Based on the evidence, the trial magistrate, Mr Trigg SM, has made the following findings of fact.

1. On 12 December 2014 police were conducting static roadside breath testing on the Stuart Highway near Palm Circuit in Alice Springs.
2. At about 1507 hours that day a silver Hyundai was directed to stop for breath testing.
3. The driver of the silver Hyundai was Frank Ngala Brown (“Brown”).
4. At the time Brown was the holder of a C class learners permit and was therefore licensed to drive a motor vehicle whilst accompanied by a licensed driver.
5. At the time of the apprehension the silver Hyundai was not displaying any “L” plates.
6. At the time the defendant was the front seat passenger in the silver Hyundai.
7. At the time the defendant was the holder of a C class driver’s licence.
8. At the time the defendant did not appear to be intoxicated when spoken to by first class Constable DeGraff.
9. A breath test conducted on Brown was positive and he was arrested for the purpose of a breath analysis and conveyed to the Alice Springs police station.
10. No evidence was placed before the court as to the observations of Brown by either police officer at the time.
11. A breath analysis was conducted on Brown at 1532 hours on 12 December 2014 using a Drager Alcotest 7110 instrument by first class constable Jason Smith, who was a person authorised by the Commissioner of Police to use the said instrument, which was a prescribed breath analysis instrument.
12. The result of the breath analysis was that Brown had a breath alcohol content of 0.167 grams of alcohol per 210 litres of breath.
13. On 24 December 2014 the defendant was spoken to by first class Constable Samuel DeGraff and under caution the following conversation was recorded in his notebook:

Q: Why were you driving while high range under s 12(10) of the *Traffic Regulations*?

A: No, Frank was driving.

Q: Did you hold a current Northern Territory D/L?

A: Yes.

Q: Did you know Frank was on his learner's licence?

A: Yes.

[3] His Honour has reserved questions of law arising on the hearing of the complaint against Ms Brumby for the consideration of this Court. The questions referred by his Honour for the opinion of the Court are:

- (a) Is reg 12(10) of the *Traffic Regulations* a valid exercise of the regulation-making power conferred by s 53 of the *Traffic Act*?
- (b) If the answer is "NO" to question 1, is the defendant obliged to be found not guilty of the charge before the Court of Summary Jurisdiction?
- (c) If the answer is "YES" to question 1, can the defendant be found guilty of the charge before the Court of Summary Jurisdiction given that the charge seeks to allege a breach of s 21(1) of the *Traffic Act* only, and not a breach of that section when read with reg 12(10) of the *Traffic Regulations*?

[4] His Honour has referred these questions for the opinion of the Supreme Court as a result of the following remarks made by Mildren J in the case of *Kruger v Kidson*¹ (referred to in the case stated by his Honour):

At the hearing of this appeal, counsel for the appellant expressly disavowed any argument that reg 12(10) was invalid, and the appeal was conducted on the basis that the regulation is a valid exercise of the regulation-making power conferred by

¹ [2004] NTSC 24

s 53 of the *Traffic Act*. I have a doubt as to the validity of the regulation in question, but in view of the approach taken by counsel for the appellant, I will confine my consideration of this appeal to the questions argued by counsel on the assumption that reg 12(10) is in fact valid.²

- [5] Regulation 12 of the *Traffic Regulations* is headed “**Learners driving motor vehicles**”. Regulation 12(10) provides:

A licence holder who is occupying a front seat of a vehicle that is being driven by a learner is liable for an offence that is committed by the driver as if the licence holder was the driver of the vehicle.

- [6] “Offence” is not defined for the purpose of reg 12.³

- [7] There are a number of possible constructions of the breadth of the liability purportedly imposed by reg 12(10):

- (a) It could apply to any offence that is committed by the driver, up to and including manslaughter using the car as a weapon.
- (b) It could apply to any offence that is committed by the driver in which driving is an element of the offence – for example driving in excess of the speed limit, driving dangerously or driving with a blood alcohol level in excess of the prescribed limit. (This is the construction contended for by the complainant.)

² at [6]

³ It is defined in reg 39 for the purposes of Part 3 of the *Traffic Regulations*.

(c) It could apply only to an offence against the regulations in Division 3 of Part 2, the division in which this regulation appears. (This is the construction contended for by the defendant.)

[8] The complainant rightly concedes that if the regulation were construed so as to apply to all offences committed by the driver (including manslaughter), the regulation would be beyond power. However, the complainant contends that in that case the regulation should be read down so as to be confined to offences in which driving is an element of the offence in which case (the complainant submits) it would be valid.⁴

[9] I do not think the regulation can be confined in the manner contended for by the defendant. There is nothing on the face of the regulation which would warrant such a narrow construction and, furthermore, such a construction would give the regulation almost no work to do.

[10] Part 2 of the Regulations is headed **Traffic Rules That Apply in Territory**. Division 3 is headed **Learners and provisional drivers**; it contains regs 11 to 15A. Regulation 11 sets out relevant definitions. It contains no offences. Regulation 13 applies to learners riding motor cycles. It can have no application to a front seat passenger.

Regulations 14 and 15 apply to provisional drivers. They can have no

⁴ A regulation must be read and construed subject to the Act under which it was made and so as not to exceed the power of the authority making it. Where the regulation would otherwise have been in excess of the power conferred upon that authority, it is to be construed as valid to the extent to which it is not in excess of that power: *Interpretation Act* s 61. See also *Widgee Shire Council v Bonney* (1907) 4 CLR 977; [1907] HCA 11 per Griffith CJ at 983: “when a by-law is open to two constructions, on one of which it would be within the powers of the local authority, and on the other outside of these powers, the former construction should be adopted”.

application to a front seat passenger of a vehicle driven by a learner driver. Regulation 15A prohibits the use of a mobile phone by a learner or provisional driver unless the vehicle is parked. It could apply.⁵

[11] Regulation 12 governs learner drivers. Regulation 12(1) simply provides that for the purpose of reg 12, a vehicle does not include a motor cycle. Regulation 12(10) is preceded by a series of prohibitions directed towards either a learner driver or the person occupying the front passenger seat while a learner driver is driving.

(a) A learner must not drive a vehicle unless the front passenger seat is occupied by a licence holder or an approved person who is a licence holder, or testing the learner's capability to drive.

[Reg 12(6)]

(b) Conversely, a licence holder must not travel in a vehicle that is driven by a learner unless a licence holder is occupying a front seat, and no-one except a licence holder (or approved tester) may occupy the front seat of a vehicle being driven by a learner.

[Regs 12(2) and (5)]

(c) A learner must not drive a vehicle unless L-plates are displayed front and rear. [Reg 12(4)]

⁵ None of the regulations in Division 3 create offences. However reg 92 provides that an offence against these regulations is a regulatory offence, and reg 93 provides a maximum penalty for contravening the regulations of 20 penalty units or imprisonment for six months.

- (d) Conversely, a licence holder who is occupying a front seat must not permit the vehicle to be driven by a learner unless L-plates are displayed front and rear. [Reg 12(3)]
- (e) A learner must not drive at a speed greater than 80 km/h unless permitted to do so by, and while under the direct supervision of, a person conducting an approved driving course. [Reg 12(7)]
- (f) Conversely, a licence holder who is occupying a front seat must not permit the learner to drive at a speed greater than 80 km/h unless the licence holder is conducting an approved driving course. [Reg 12(8)]
- (g) A learner must not drive a vehicle unless the vehicle is of a class that the learner is permitted by the learner licence to drive.
[Reg 12(9)]

[12] There is no need to impose what could loosely be described as the vicarious (or deemed) liability in reg 12(10) for any breaches by a learner of the obligations imposed by regs 12(6), (4) and (7). If a learner driver breaches reg 12(6) there will be no licensed front passenger on whom reg 12(10) could operate, and in the case of regs (4) and (7), the Regulations impose independent, reciprocal duties on the front seat passenger in regs 12(3) and (8). That leaves reg 12(9).

[13] The effect of all that is that if the defendant is correct, reg 12(10) will impose liability on a licensed front passenger if the vehicle driven by a learner driver is of a class that the learner is not permitted by the learner licence to drive, or if the learner driver uses a mobile phone, but not otherwise. There seems to me to be nothing in the legislative scheme that would warrant such an arbitrary reading down of the regulation.

[14] Counsel for the defendant relied on *Rowe v Hughes*.⁶ In that case a Victorian statute provided that no person was to drive a motor car without a licence. The following sub-section provided that nothing in the preceding provision was to prevent an unlicensed person over 17 who was bona fide learning to drive from driving provided there was a licensed person sitting beside him and that in that case the licensed person was deemed to be the driver. The court held that that deeming provision applied only for the purpose of those provisions in the Act that required every car to be or to be deemed to be driven by a licensed driver, for example requiring the “driver” to produce his licence on demand. It did not apply to impose liability on the licensed passenger for offences committed by the unlicensed learner driver. However, the legislative provisions under consideration in that case were different and of little or no assistance in construing the words of reg 12(10)

⁶ [1974] VR 60

which plainly does purport to impose liability on the passenger for offences committed by the learner driver.

[15] If reg 12(10) is construed in the manner contended for by the complainant (or can be read down to be so construed in accordance with the principle referred to above), is it a valid exercise of the regulation making power conferred by s 53 of the *Traffic Act*?

[16] Section 53 provides:

Regulations

- (1) The Administrator may make regulations, not inconsistent with this Act, prescribing all matters:
 - (a) required or permitted by this Act to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Without limiting the generality of subsection (1), the Regulations may provide for any of the following:
 - (a) an exemption from the application of all or part of the Regulations of:
 - (i) certain persons or classes of persons; or
 - (ii) persons in respect of a specified class of motor vehicle;
 - (b) the erection and operation of, and obedience to, traffic control devices;
 - (c) the regulation or prohibition of persons driving vehicles including:
 - (i) driving on the left, in reverse, at intersections or on beaches, footways, reservations and traffic islands; and
 - (ii) the overtaking or passing of vehicles; and

- (iii) giving way to vehicles; and
- (iv) the parking or standing of vehicles or leaving vehicles unattended; and
- (v) the turning, starting and stopping of vehicles; and
- (vi) the towing of vehicles; and
- (vii) the number of hours which a person may drive a vehicle;
- (d) the regulation of pedestrians on public streets and public places;
- (e) the regulation of persons on or near railway level crossings;
- (f) the prescribing or determining by the Registrar of speed restrictions and the use of traffic infringement detection devices including the testing and operation of such devices;
- (g) the lights, warning signs and equipment to be fitted to vehicles and the use of such lights, warning signs and equipment;
- (h) the regulation of the use of bicycles and toy vehicles on public streets or public places;
- (j) freeways, bus lanes, bicycle ways, truck lanes, truck priority lanes and transit lanes;
- (k) the safety of persons in or on vehicles;
- (m) the authorisation of persons carrying out breath analyses, or of persons or organisations carrying out blood tests;
- (n) the securing of loads on vehicles and the measures to be taken in the event of the loss of material from vehicles;
- (p) the regulation or prohibition of persons obstructing public streets or public places;
- (q) the regulation or prohibition of persons holding:
 - (i) processions, parades or other events; or

- (ii) vehicle trials, speed tests or races,
on public streets or public places;
 - (r) the control of animals on public streets or public places;
 - (s) the payment of a prescribed amount in lieu of a penalty which may otherwise be imposed for an offence against this Act or the *Motor Vehicles Act* or the Regulations made under that Act;
 - (t) the service of notices on persons alleged to have infringed this Act or the *Motor Vehicles Act* or the Regulations made under that Act and particulars to be included in such notices;
 - (u) the proof of ownership of a vehicle and other evidentiary matters in respect of offences committed against the Regulations;
 - (w) the sale or disposal of abandoned vehicles;
 - (y) penalties not exceeding 20 penalty units or imprisonment for 6 months, or both, for offences against the Regulations;
 - (z) the forfeiture of goods on conviction for an offence against the Regulations.
- (3) The Regulations may incorporate or adopt by reference the provisions of any document, standard, rule, specification or method formulated, issued, prescribed or published by any authority or body whether:
- (a) wholly or partly, or as amended by the Regulations; or
 - (b) as formulated, issued, prescribed or published at the time the Regulations are made or at any time before then; or
 - (c) as amended after the making of the Regulations, but only where the Director has published in the *Gazette* a notice that the particular amendment is to be incorporated in the Regulations.
- (4) The Regulations may prescribe different penalties for different classes of offender for an offence against the Regulations.

- (5) The Regulations may:
- (a) make different provision in relation to:
 - (i) different persons or matters; or
 - (ii) different classes of persons or matters; or
 - (b) apply differently by reference to stated exceptions or factors.

[17] The complainant concedes that reg 12(10) cannot be characterised as a regulation providing for the safety of persons in or on vehicles within the meaning of s 53(2)(k). I agree that it cannot be so categorised. There seems to me to be no logical reason why imposing liability on one person for the acts or omissions of another person over whom that person has no control (and no duty to supervise or control except not to permit the person to drive over 80 km/h or without an L-plate) could be said to be conducive of the safety of persons in vehicles.

[18] The complainant contends, however, that reg 12(10) can be categorised as a regulation that is necessary or convenient for giving effect to the *Traffic Act* and so within the regulation making power conferred by s 53(1)(b) - the broadest statement of the regulation making power. The question for the Court, therefore, is this: Does reg 12(10) prescribe a matter which is necessary or convenient to be prescribed for carrying out or giving effect to the *Traffic Act*?

[19] The complainant contends that the objective intention of parliament is that the main lines of policy in relation to the regulation of traffic are contained in the *Traffic Act*, and the detail is to be spelled out in the

regulations;⁷ and that, accordingly, the power given by the legislature to the executive under s 53 of that Act to make regulations must be given wide ambit.⁸ So much may be accepted.

[20] The complainant contends that as a scheme to regulate drivers and road safety, the *Traffic Act* must be read in conjunction with, not just the body of rules contained in the *Traffic Regulations*, but also the licensing and registration rules contained in the *Motor Vehicles Act*. That may be so, but the power conferred on the executive to make regulations under the *Traffic Act*, is to make regulations “necessary or convenient to be prescribed for carrying out or giving effect to” the *Traffic Act*, not the *Motor Vehicles Act*.

[21] To determine whether reg 12(10) is a valid exercise of the regulation making power in s 53, it is necessary to examine the field of operation of the *Traffic Act*.

To ‘carry out’ the Act means to enforce its provisions. To ‘give effect’ to an Act is to enable its provisions to be effectively administered. There is little, if any, difference between the two expressions. They both connote that the ... regulations are to be confined to the same field of operations as that marked out by the Act itself. It cannot be supposed that Parliament gave permission to the Executive to enlarge legislatively that field at discretion.⁹

⁷ Northern Territory, *Parliamentary Debates*, Legislative Assembly 11 June 1987 at 907 [2], 908 [11] (Daryl Manzie, Attorney-General)

⁸ *Morton v Union Steamship Company of New Zealand Ltd* (1951) 83 CLR 402 at 410 [5]-[6]; [1951] HCA 42; *Philpott v Boon* [1968] Tas SR 97 at 100-1

⁹ *Carbines v Powell* (1925) 36 CLR 88 per Isaacs J at 91-2; [1925] HCA 16

[S]uch a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.¹⁰

[22] The long title of the *Traffic Act*, is “An Act to regulate traffic, and for other purposes”. Part I, headed “Preliminary” contains the usual provisions including a definition section.¹¹ That section does not contain a definition of “learner”. That term is defined in the *Traffic Regulations*¹² by reference to the *Motor Vehicles Act*.¹³ The term “Licence holder”, used in reg 12, is defined as a person who is over the age of 18 years and is a holder of a licence to drive the type of vehicle - with some exceptions, which are likewise defined by reference to the *Motor Vehicles Act*.

[23] Part II of the *Traffic Act* relates to Administration, Part III provides for the declaration of “control areas”. Part IV provides for the erection and operation of traffic control devices (street signs, traffic lights, road markings etc) but does not create any obligation to comply with such

¹⁰ *Shanahan v Scott* (1957) 96 CLR 245 per Dixon CJ, Williams, Webb and Fullagar JJ at 250 [4]; [1957] HCA 4

¹¹ Section 3 “Interpretation”.

¹² Regulation 11

¹³ Section 9

control devices. That is contained in the Australian Road Rules which apply by virtue of reg 71 (modified by subsequent regulations).

[24] Part V contains very detailed provisions regulating “driving with alcohol in the breath or blood or a drug in the blood”. The sections in that Part contain prohibitions; provide in detail the classes of people to whom the various prohibitions apply; create various offences; provide detailed enforcement mechanisms; contain evidentiary provisions; and fix penalties. The regulations dealing with driving with alcohol in the breath or blood or a drug in the blood contain a limited number of mainly procedural matters.

[25] Part VA relates to “hoon behaviour” and is similarly detailed. Part VI creates other offences, all related to driving, and fixes penalties for them. Part VII deals with prosecutions and penalties. Part VIII contains a range of miscellaneous provisions mostly ancillary to other provisions of the Act, and Part IX transitional provisions.

[26] The field of operation of the *Traffic Act*, then, is, in general terms, the regulation of traffic (in the broad sense of the movement of things, people and even animals on roads, removal of obstructions and things of that nature) and of the method of driving on those roads for the purpose of regulating traffic and promoting safety (including adoption of road rules and the creation of offences relating to unsafe driving practices). Although the specific regulation making power in s 53(2)

does not limit the general power conferred by s 53(1), the list of particular powers (set out in [16] above) also reflects this general field of operation of the Act. The *Traffic Act* does not regulate who may drive. It does provide in some circumstances for licence suspension,¹⁴ cancellation and disqualification from holding a driver's licence,¹⁵ but these provisions are all consequences of driving offences or of actual or suspected unsafe driving. The licensing of drivers (including the grant of learner's licences) is governed by the *Motor Vehicles Act* which also regulates the registration of vehicles including defining different classes of vehicle.

[27] Does reg 12(10) fall within the field of operation of the *Traffic Act*? Does it prescribe a matter which is necessary or convenient to be prescribed for carrying out or giving effect to the *Traffic Act*? In my view it does not.

[28] Sub-regulations 12(2) to (9) are directed at prohibiting acts by either the learner or the person occupying the front seat of a vehicle being driven by a learner, a learner being defined in reg 11 as the holder of a learner licence granted under s 9 of the *Motor Vehicles Act*. These, it seems to me, relate (broadly) to the method of driving a vehicle being driven by a learner driver for the purpose of promoting safety.

¹⁴ Part V Division 6

¹⁵ Part V Divisions 2 and 7

[29] Regulation 12(10) is different. It imposes no duty and creates no offence. Rather it purports to make the front passenger liable for offences committed by the driver “as if the licence holder was the driver”. That is to say it imposes criminal liability on a person for acts or omissions for which the person is not responsible and over which he or she has no control,¹⁶ no general duty to supervise,¹⁷ and perhaps no knowledge, given that a front seat passenger may not even know the driver is a learner. That, it seems to me, is not a matter which is ancillary to the *Traffic Act*. It does not prescribe any matter necessary or convenient to be prescribed for carrying out or giving effect to the Act. It does not carry out or give effect to the Act at all. It extends beyond the scope or general operation of the Act.

[30] Section 53(2)(y) empowers the executive to make regulations providing for penalties not exceeding 20 penalty units or imprisonment for six months, or both, for offences against the regulations. If reg 12(10) were valid, even given the more limited construction of its operation contended for by the complainant, the effect would be to impose on

¹⁶ By way of contrast, reg 12(8) imposes a duty on the licence holding front seat passenger not to permit the learner to drive over 80 km/h in breach of reg 12(7). If the front seat passenger tells the learner driver to slow down to below 80 km/h, then it seems to me that the passenger would not be in breach of the regulation even if the driver drives at more than 80 km/h – the passenger has not permitted this conduct by the learner driver. Similarly, it seems to me that if the front passenger did not know that the driver was a learner driver, the passenger would not be in breach of reg 12(8) if the learner drove over 80 km/h – in those circumstances it could not be said that the passenger had permitted the conduct by a learner driver. [The same analysis would apply to the interaction of regs 12(4) and 12(3).]

¹⁷ Neither the *Traffic Act* nor the *Traffic Regulations* impose a general duty on the front seat passenger to supervise the learner driver. Nor can any such duty be found in the *Motor Vehicles Act* or *Regulations*.

front seat passengers liability for such offences as dangerous driving or high range drink driving, the maximum penalties for which far exceed 20 penalty units or imprisonment for six months. The specific regulation making powers in s 53(2) do not limit the general grant of power in s 53(1), but s 53(2)(y) can be seen as some indication that the legislature did not intend, by the general grant of power, to permit the executive to make a regulation which would have the effect of imposing on a passenger liability for serious offences committed by a learner driver.

[31] Further, and importantly, reg 12(10) purports to abrogate one of the most fundamental rights (or more accurately immunities) of the individual – the right not to be held criminally responsible for acts beyond the individual’s control.¹⁸ As Brennan J said in *Re Bolton; Ex Parte Beane*:

Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.¹⁹

¹⁸ The complainant pointed to the existence of “vicarious” or rather accessorial liability for the acts of others imposed by s 12 of the *Criminal Code* under which certain persons are deemed to have taken part in committing an offence and may be charged with actually committing it. However that section imposes liability as a result of the acts of the person on whom liability is imposed namely someone who aids the commission of the offence [s 12(1)(a)], does or omits to do any act for the purpose of enabling or aiding another to commit the offence [s 12(1)(b)], or counsels or procures the commission of the offence [s 12(1)(c)]. Moreover, the words by which the legislature imposes the liability are clear and explicit.

¹⁹ (1987) 162 CLR 514 at 523 [4]; [1987] HCA 12

[32] Such an unmistakably clear intention must be manifested in explicit language which shows that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities, but has also determined that they should be abrogated or curtailed. The courts should not impute such an intention to the legislature.²⁰

[33] There is nothing in s 53(1) to suggest that by enacting the power to make regulations in such general and fairly standard terms, the legislature intended to confer on the executive the power to abrogate such a fundamental freedom or immunity as the right not to be held responsible for offences they have not committed.

[34] The answers to the questions referred by his Honour for the opinion of the Court are:

(a) Is reg 12(10) of the *Traffic Regulations* a valid exercise of the regulation-making power conferred by s 53 of the *Traffic Act*?

No.

(b) If the answer is “NO” to question 1, is the defendant obliged to be found not guilty of the charge before the Court of Summary Jurisdiction?

Yes.

²⁰ *Coco v The Queen* (1994) 179 CLR 427 at 437 [10]; [1994] HCA 15

- (c) If the answer is “YES” to question 1, can the defendant be found guilty of the charge before the Court of Summary Jurisdiction given that the charge seeks to allege a breach of s 21(1) of the *Traffic Act* only, and not a breach of that section when read with reg 12(10) of the *Traffic Regulations*?

Not applicable.