EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2018-004-009139
[2020] NZDC 11392

NEW ZEALAND POLICE
Prosecutor

v

[BRIANNA BRIGGS]
Defendant

Hearing: 9 January 2020

Appearances: B Bosomworth for the Prosecutor
A Haskett for the Defendant

Judgment: 18 June 2020

JUDGMENT OF JUDGE R J COLLINS

What happened

[1] I start with my factual findings. On Sunday 7 October 2018 24-year-old [Brianna Briggs] drove her BMW motor vehicle northbound on State Highway 1, the Auckland Southern Motorway, near Ellerslie. That afternoon she had been at a friend's home in Panmure to watch sport on television. She drank a bottle of wine during the afternoon and says that she stopped drinking about 5pm.

[2] At approximately 7pm near the Greenlane Interchange a rear tyre of her vehicle deflated and there was a minor accident or at the very least the vehicle became

undriveable. No other vehicle was involved. An ambulance was called. [Senior Constable A] received a call to attend "the accident". She did so attend.

[3] [Senior Constable A] found the disabled BMW in a side lane, but partially blocking a lane. Ms [Briggs] was in the ambulance being attended. Other than request Ms [Briggs]'s keys the Senior Constable did not interfere with Ms [Briggs] while she was receiving the care of ambulance staff.

[4] Ms [Briggs'] father, [name deleted] arrived after [Senior Constable A] had arrived. He did so while his daughter was being attended by the ambulance officers. Although distressed Ms [Briggs] suffered no injury and after approximately 45 minutes was released by the ambulance staff.

[5] [Senior Constable A] had remained at the scene. She arranged a tow truck for the BMW which she had been unable to move herself. Another police officer also arrived. On release from the ambulance Ms [Briggs] was being comforted by her father who was there to take her home. Versions differ but for this judgment I have no doubt that [Senior Constable A] communicated to both Ms [Briggs] and to her father that the Senior Constable "needed" to speak to Ms [Briggs] about the accident. Indeed, to do her job as a police officer she was obliged to make enquiries about the traffic incident. Therefore from her point of view she did "need" to talk to Ms [Briggs]. The obvious place to talk was in the officer's patrol car. The officer so directed. Ms [Briggs] was not arrested, nor was she detained in any way, nor was she told she had to answer questions nor was she told she could not leave.

[6] It is highly likely, as the defence witnesses assert, that the second officer indicated to Mr [Briggs] not to get into the patrol car. He was not able to help with what had happened. He was not present at the time of the accident. His presence in the patrol car only had the ability to slow down and impede [Senior Constable A]'s enquiries as to what had happened. There was no physical separating of father and daughter. No threats by the police officers and nothing in the form of a command that Mr [Briggs] was not to get into [Senior Constable A]'s patrol vehicle occurred.

[7] Once in the vehicle Ms [Briggs] produced her licence on request. She told the officer she had been drinking and had drunk a bottle of wine. Until that point nothing had occurred which triggered the requirement for [Senior Constable A] to advise Ms [Briggs] of her rights under the New Zealand Bill of Rights Act. Specifically neither the right not to make a statement nor the right to be advised of her right to speak to a lawyer.

[8] Having advised [Senior Constable A] that she had both consumed alcohol and had been driving she was required to undergo a breath screening test. She failed that test. She was required to accompany [Senior Constable A] to the Ellerslie Police Station for an evidential breath test or blood test or both. She did so accompany.

[9] Mr [Briggs] requested to accompany his daughter but was told he could follow in his car and wait for his daughter, and when she had finished the procedures he could take her home.

[10] I accept Mr [Briggs] had to park outside the police station and from that point was not able to reach his daughter by phone.

[11] Thereafter the evidential breath test procedures followed. At the necessary points Ms [Briggs] was advised of her rights under the New Zealand Bill of Rights Act. She signed the officer's procedure sheet to that effect. On being told she was required to undergo an evidential breath test she declined to call a lawyer. Her evidential breath test produced a result of 889 micrograms of alcohol per litre of breath. She was informed of the result. Then, on being advised of her right that she had 10 minutes to elect a blood test she at that point elected to phone a lawyer. The advice in Block J of the procedure sheet was read to her. More about this later. She spoke to Mr Holland, a lawyer available through the Police Detention Legal Assistance Scheme. The officer recorded the time Ms [Briggs] spent obtaining legal advice as being from 20.59 hours to 21.05 hours. The defendant says she spoke only briefly to Mr Holland and was not confident in his advice.

[12] I note here Mr Holland, an experienced and very capable lawyer was not called as a witness. There was no need for the prosecution to call him. There was no

evidence put before me that Ms [Briggs] had waived privilege, communicated that to the prosecution and put the prosecution on notice that the defence would challenge the adequacy of Mr Holland's advice. If I was to entertain a possibility that there was anything deficient in Mr Holland's advice those steps needed to have happened.

[13] At the conclusion of the 10-minute period Ms [Briggs] did not elect to have a blood test. She was consequently charged with driving with an excess breath alcohol level.

[14] I have given the above narrative without recording an important factual finding on an issue where the defendant and [Senior Constable A] gave differing evidence. After being told the result of the evidential breath test, her right to elect a blood test and her right to speak to a lawyer Ms [Briggs] as noted above spoke to Mr Holland. Ms [Briggs] says before speaking to a lawyer she did not know she had requested to ring her father because "he would know a lawyer". Ms [Briggs] was told she could speak to a lawyer but could not speak to her father. [Senior Constable A]'s evidence was that she did not recall the request nor the purported refusal and she did not accept such a discussion took place.

[15] On balance I accept it did take place. I do not believe [Senior Constable A] set out to mislead the Court. I consider, for her, the exchange was of no moment. She struck me as an organised methodical officer. She followed the procedure sheet. For her I am sure that the approach taken was that motorists had a right based on that procedure sheet to speak to a lawyer – not anyone else. She had a clear view throughout the entire process as to who she saw could be legitimately involved when the police had a job to do.

[16] [Senior Constable A] had formed an opinion that the defendant was reluctant to have her father involved that evening. That is inconsistent with the evidence of both Ms [Briggs] and her father. It is also inconsistent with his particular father/daughter relationship. It is inconsistent with him coming to the scene of the accident, waiting for his daughter, following her to the police station and waiting to take her home. Ms [Briggs'] evidence would be a strange contrivance on this point if indeed it was a contrivance. Nothing about her evidence suggested she was not doing her best to tell

the truth. She made many admissions against her interest throughout her evidence and she did so willingly. She was asked the following question and gave the following answer.

> Q. What was the difference to you of wanting to speak to a lawyer that your dad could offer versus a name off the duty list?
>
> A. Because he'd trust that lawyer, he'd know that lawyer, rather than some random person on a list that has nothing next to their name other than their phone number.

[17] Such an exchange is something that Ms [Briggs] would remember. It is not something that the police officer would have any particular reason to remember. I make this finding fully cognisant of the fact that one of the participants was affected by alcohol and the other not. I find Ms [Briggs] asked to ring her father, was told that she could not and that she could call a duty lawyer, which is what happened.

The issues

[18] Mr Haskett contended on multiple grounds for the charge to be dismissed. The charge is to be dismissed based on two of the reasons advanced by Mr Haskett. I therefore do not deal with his other arguments which I do not accept. Most of them, if not all, are resolved by the factual findings I have made above.

[19] The operative issues are:

19.1 Did the refusal to allow the defendant to phone her father produce an unfairness which invalidated the procedures from that point such that the charge should be dismissed? This is the Bill of Rights issue.

19.2 Secondly, did the use of the wording in Block J of the checklist materially fail to comply with s 77(3A) Land Transport Act 1998 and therefore preclude the result of the evidential breath test from being admissible on the prosecution. This is the s 77 issue.

The Bill of Rights issue

[20] I consider this issue is determined by applying the authority and reasoning of the Court of Appeal decision in *Ahuja v New Zealand Police.*[1] It is necessary to set out a number of the paragraphs from that judgment.[2]

> [18] It is well-settled that drivers must be afforded their fundamental right to consult a lawyer when detained for the purposes of carrying out the statutory breath and blood testing procedures under the Land Transport Act. The opportunity may be limited but it must be reasonable in all the circumstances. In *Ministry of Transport v Noort*, Hardie Boys J emphasised the importance of the right to legal advice in maintaining the freedom and dignity of the individual against the power and authority of the State. He pointed out that it was wrong to perceive the lawyer as impeding law enforcement or hindering the administration of justice. On the contrary, responsible lawyers are part of the process and facilitate it.
>
> [19] Subject to reasonable and practical limitations consistent with the statutory scheme, drivers are entitled to consult a lawyer of their choice. This is based on the social value of freedom of choice and the importance of there being no interference by the State in the private and professional relationship that exists between a lawyer and client.
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> [20] Reasonable steps must be taken to facilitate the exercise of the right in a real and practicable way. In *Rae v Police*, decided in 2000, this Court held that where a motorist communicates a wish to consult a lawyer, this should be facilitated by supplying a telephone, providing a telephone book or list of lawyers willing to give advice to detained motorists and providing reasonable privacy. The practical equivalent today might be access to online sources such as the Register of Lawyers maintained by the New Zealand Law Society.
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> [21] The test procedures in this case were undertaken during normal working hours at a police station. The Judge accepted Mr Ahuja's evidence that he told the constable he wished to speak to his own lawyer, provided her name and said he did not have her contact details. Mr Ahuja was entitled to consult counsel of his choice, assuming she was available. Reasonable steps were required to facilitate this right. While what is reasonable in any given case is not to be judged with the benefit of hindsight or by reference to the standard of perfection, we consider that in circumstances such as the present the constable was at least required to offer to take the simple and obvious step of obtaining the named lawyer's telephone number from the internet or the Register of Lawyers on the New Zealand Law Society website. This could have been done easily and without any material delay.

[1] *Ahuja v New Zealand Police* [2019] NZCA 643.
[2] At [18] – [24].

> [22] The failure at the second stage of the process, prior to the commencement of the 10-minute election period, was far more serious. It was simply wrong for the constable to remove Mr Ahuja's cell phone from him and insist that he could only exercise his right to consult a lawyer by speaking with the same duty lawyer he had already spoken to. It was for Mr Ahuja to decide who he wished to consult. His choice at the second stage was not fettered by the choice he made at the first. In the factual circumstances that developed in this case, it was not a reasonable limitation of the right to require that any further advice must be obtained from the same lawyer. Although the right to consult a lawyer of choice is not an unfettered right, here there was no indication that Mr Ahuja's lawyer would not have been available if her number, or the means of accessing it, had been provided to Mr Ahuja at the time. On the Judge's findings, it could not be said that Mr Ahuja's wish to speak with his own lawyer was a delaying tactic and not genuine.
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> [23] The Courts below relied on the decisions in *Police v Hendy* and *Patel v Police* as justifying the course taken by the constable at the second stage in this case. Those cases are distinguishable. In Hendy, Judge Kiernan stated that there was no legal requirement for a police officer to offer multiple lawyers if the person is not satisfied with the legal advice they have obtained when their rights have been properly facilitated. That is not the situation here. Mr Ahuja wished to exercise his right to consult a lawyer at the second stage. That right was not facilitated and he was not able to exercise it. The right exercisable at the second stage cannot be conflated with the earlier right. As this Court pointed out in *Rae*, this is the stage of the process where a motorist can be expected to be in most need of legal advice because the result of the evidential breath test indicates that an offence may have been committed.
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> [24] In *Patel*, Moore J agreed with Judge P Sinclair's observation that a police officer is not required to ensure the motorist is happy with the legal advice received or whether the advice was appropriate. We agree with this uncontroversial proposition. However, it is not relevant in this case where Mr Ahuja's right to consult a lawyer was not facilitated. On the contrary, his right to consult a lawyer of his choice was denied.

[21] In this case the defendant requested one phone call to her father to ascertain the name of a lawyer she should call. She clearly wanted legal advice because she did in fact ring a duty lawyer. But it is clear she wanted the lawyer she believed her father would recommend. Her father was available. He was waiting to take her home. He was contactable by cellphone. One call to him for that purpose would have taken just seconds. It was not unreasonable, it was not for the purpose of delay nor for frustrating the police procedures. It came at the critical stage when she had to make a decision

on whether to elect a blood test. One phone call to her father was all that was needed to facilitate her right to consult a lawyer. In *Ahuja* the Court stated:[3]

> [30] We prefer the view that the same analysis applies to a breach of the right to consult a lawyer at the second stage. The admissibility of the evidential breath test result depends upon the non-election of a blood test. There is therefore a causal connection between the admissibility of the result of the evidential breath test and the exercise (or non-exercise) of the election having been accorded the right to consult a lawyer.
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> [31] It follows that we accept Mr Haskett's submission that the evidence was improperly obtained for the purposes of s 30.

[22] Consequently, in dealing with s 30 Evidence Act 2006 balancing test, the Court stated in *Ahuja*:[4]

> [35] If the only breach under consideration was at the first stage of the process, we would have agreed with the Judge's assessment. Although Mr Ahuja's right to consult a lawyer of his choice was not facilitated adequately, he nonetheless had the benefit of advice from a duty lawyer he selected from the duty list. There was no indication at that stage Mr Ahuja was unhappy with the lawyer or the advice he received. However, as we have observed, the breach at the second stage was of a much more serious character. Based on the unchallenged findings made in the District Court, Mr Ahuja was told at the second stage that he was not entitled to consult his own lawyer and he was effectively prevented from doing so. Not only did the constable remove Mr Ahuja's phone, he made no attempt to facilitate Mr Ahuja's stated desire to consult his own lawyer. The stance adopted by the constable could not be justified on the grounds of urgency. There is no effective remedy for the breach other than exclusion of the evidence. Given the fundamental importance of the right breached and the serious intrusion upon it, we consider that the evidence ought to have been excluded.

[23] Mr Bosomworth in his thorough written submissions argued that this objection be dismissed on the basis of a factual finding that the request to phone her father was never made. I have made the opposite finding. The police submissions did not seek to argue that *Ahuja* could be distinguished and should not apply should I make the factual finding that I have.

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[3] At [30] – [31].
[4] At [35].

[24] Although the combination of facts in *Ahuja* might make for a more compelling case for exclusion there is no material difference here nor principled basis to distinguish such that I could decline to follow the approach in *Ahuja*. Therefore on that basis the charge will be and is dismissed.

The second issue – Block J and s 77 (3A) Land Transport Act

[25] Section 77(3) and (3A) of the Land Transport Act provide:

> (3) Except as provided in subsections (3B) and (4), the result of a positive evidential breath test is not admissible in evidence in proceedings for an offence against any of sections 56 to 62 if—
>
> (a) the person who underwent the test is not advised by an enforcement officer, without delay after the result of the test is ascertained,—
>
> (i) that the test was positive; and
>
> (ii) of the consequences specified in subsection (3A), so far as applicable, if he or she does not request a blood test within 10 minutes; or
>
> (b) the person who underwent the test—
>
> (i) advises an enforcement officer, within 10 minutes of being advised of the matters specified in paragraph (a), that the person wishes to undergo a blood test; and
>
> (ii) complies with section 72(2).
>
> (3A) The consequences referred to in subsection (3)(a)(ii) are—
>
> (a) that the positive test could of itself be conclusive evidence to lead to that person's conviction for an offence against this Act if—
>
> (i) the test indicates that the proportion of alcohol in the person's breath exceeds 400 micrograms of alcohol per litre of breath; or
>
> (ii) the person is younger than 20 and the proportion of alcohol in the person's breath exceeds 150 micrograms of alcohol per litre of breath; or
>
> (iii) the person holds an alcohol interlock licence or a zero alcohol licence:

> (b) that the positive test could of itself be conclusive evidence that the person has committed an infringement offence against this Act if the person is younger than 20 and the test indicates that the person's breath contains alcohol but the proportion of alcohol does not exceed 150 micrograms of alcohol per litre of breath.

[26] Mr Haskett submitted that the combined effect of s 77(3) and (3A) is that an evidential breath test is deemed at law to be inadmissible if the police do not make the motorist subjectively aware that the evidential breath test could of itself be conclusive evidence to lead to the motorist's conviction for an offence against the Land Transport Act. He referred to *Tolich v New Zealand Police*:[5]

> [8] I am satisfied that that concession is properly made. The test for admissibility under s 77(3) is not discretionary. Parliament has decreed that the result of a positive evidential breath test is not admissible unless certain steps are taken and in particular the driver is advised properly of his or her rights. There is no discretion on this topic. If the advice is not given or if the advice given does not comply with the statutory regime, then the results of the positive evidential breath test are not admissible.

[27] As Mr Haskett argues the officer did not advise the defendant that the evidential breath test could of itself "lead to her conviction for an offence". Rather, the advice in Block J of the procedure sheet was used. It states that the defendant's breath test could be conclusive evidence "in a prosecution against" the defendant. There is no doubt, as the evidence discloses, that [Senior Constable A] used the words in Block J of the procedure sheet. That is an exhibit in the case. The Block J advice states "… conclusive evidence in a prosecution against you". Section 77(3A) as stated above provides "…conclusive evidence to lead to your conviction".

[28] There are a number of District Court decisions dealing with the difference between Block J and the requirement of s 77(3A). One of those decisions is a decision of mine in *New Zealand Police v Gagas.*[6] In *Gagas* I effectively decided that there was no material difference between using the word prosecution as opposed to conviction. In that decision I failed to address the two-tier offence regime which now applies in terms of drink-driving. I was in error in failing to do that. As a consequence I do not consider it is safe to follow the reasoning I adopted in *Gagas*. Importantly,

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[5] *Tolich v New Zealand Police* HC Auckland (10 December 2002) Chambers J A175/02 at [8].
[6] *New Zealand Police v Gagas* [2015] NZDC 25831.

given the two-tier offence regime there is a legal and practical difference between a prosecution and a conviction. It was put this way by Judge Thomas in *New Zealand Police v [Kusek]*:[7]

> I disagree with the police that this would mean that you would know what a prosecution was and what a conviction was. There is, as I have said, a difference: a legal difference and a practical difference between an infringement notice and a conviction. Parliament, of course, recognises that there is a distinction and has expressly provided for it in s 77(3A).

[29] With respect I agree, with regret it is belated. Mr Haskett argues that there is a material difference between prosecution and conviction. I agree. As he points out there is the additional element that not all offences may result in a prosecution, not all offences prosecuted may result in a conviction and that there are offences that can be proceeded against by infringement notice. The section itself draws that distinction in the wording of the two separate warnings. The section separately deals with the warning (or absence thereof) that is to be given when a reading would result in an infringement notice as opposed to a conviction. The section requires the police to give the warning depending on what reading is applicable.

[30] There are a number of cases which on this issue have been before the District Court. It is yet to come before the High Court. The District Court decisions include *New Zealand Police v Dezpot*;[8] *New Zealand Police v Tolcher*;[9] *New Zealand Police v Brodie*;[10] *New Zealand Police v Mumford*;[11] *New Zealand Police v Wynyard*;[12] *New Zealand Police v Durkin*;[13] *New Zealand Police v King*;[14] *New Zealand Police v Hipkins*[15] and *New Zealand Police v [Kusek]*.[16]

[31] Each of those cases of course were decided on their own facts and nothing in this judgment suggests that there was any error in those other than to confirm what I

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[7] *New Zealand Police v [Kusek]* [2019] NZDC 14473.
[8] *New Zealand Police v Dezpot* [2015] NZDC 20922.
[9] *New Zealand Police v Tolcher* [2016] NZDC 11890.
[10] *New Zealand Police v Brodie* [2016] NZDC 11797.
[11] *New Zealand Police v Mumford* [2016] NZDC 13408.
[12] *New Zealand Police v Wynyard* [2016] NZDC 18766.
[13] *New Zealand Police v Durkin* [2017] NZDC 5138.
[14] *New Zealand Police v King* [2017] NZDC 15166.
[15] *New Zealand Police v Hipkins* [2018] NZDC 4465
[16] *New Zealand Police v [Kusek]*, above n[7].

have stated above that I no longer consider it safe to follow the reasons I had put forward in *Gagas.*

Context and conclusion

[32] The law does not like unmeritorious defences to drink-driving offences. However the law protects the rights of citizens. Parliament has built-in safeguards.

[33] One of the reasons for safeguards are the presumptions created by s 75A(3) and s 77(1) Land Transport Act.

[34] Such a safeguard against these presumptions is the right of a motorist to have the competency and accuracy of an evidential breath test checked by a blood test.

[35] The combined effect of the s 77 subsections is that unless a motorist is told that in the absence of a blood test the breath test could lead to their conviction the breath test is inadmissible in the prosecution against them.

[36] If there is no material difference between using the word prosecution instead of conviction Parliament's requirement has arguably been met. I found as such in *Gagas.* But contrary to my reasoning in *Gagas* there is a material difference between a prosecution and a conviction. There may be other reasons, as Mr Haskett contends, for a distinction. But, at the very least the two-tier offence regime produces a material difference. If an adult motorist has a reading between 250 micrograms and 400 micrograms they commit an infringement offence for which there is no conviction nor disqualification. If a motorist records a reading over 400 micrograms they commit an imprisonable offence, they are convicted, have their criminal conviction on their record and except in the rarest of cases must be disqualified from holding or obtaining a drivers licence for six months.

[37] Therefore in the absence of the word conviction being used as mandated by Parliament the result of the evidential breath test is inadmissible.

[38] Finally on this aspect. Prosecutors have relied on *Scown v Police*[17] to argue a motorist's understanding of the right to a blood test is a subjective test. Prosecutors then go onto erroneously argue that even if the wrong word is used the enquiry should be what did the particular motorist or defendant understand by what they were told. However in *Scown*, drawing on the reasoning in the Bill of Rights case of *Mallinson,*[18] Venning J concluded that even where the words required by Parliament are used the motorist or defendant needs to appreciate what is meant by those words. In *Scown* the correct words were used. The defendant argued that subjectively he did not understand. In *Scown*, on appeal Venning J held:

> While he was just very average in auditory skills he held a responsible position as an operations manager. On the evidence, taken as a whole, the Judge was entitled to conclude Mr Scown understood the s 77(3) advice contained in the form that Sergeant Faith read out to him.[19]

[39] The important point here is, distinct from *Scown* the word required by Parliament was not used. It is not legitimate then to go on and argue, relying on *Scown* that there should be some enquiry as to what was the defendant's subjective understanding.

Does s 64(2), reasonable compliance, apply?

[40] As Mr Haskett points out, for many years the police procedure sheet used the correct word. The police changed the wording. It was clearly a conscious decision made at a level of some seniority. In light of the dismissal of charges in *Dezpot* and *Koliandr* the police continued to use a word that is different to that required by Parliament.

[41] Mr Haskett advises that in none of the District Court cases cited had the police called evidence to explain the policy decision. Various individual prosecutors have given submissions as to their view of the change.

[42] In these circumstances Mr Haskett argues that there can be no reasonable compliance when a conscious decision has been made at a senior level not to use the

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[17] *Scown v Police* [2015] NZHC 106.
[18] *R v Mallinson* [1993] 1 NZLR 528.
[19] At para [37].

word required by Parliament. I agree. If there has not been strict compliance or reasonable compliance with a pre-requisite step in the breath or blood testing regime then it is not a question of applying the s 30 Evidence Act balancing test.[20]

[43] The issue here is not one of inadvertence. It is not a situation of an inexperienced officer late at night making a slipup. The police have decided not to use the word Parliament requires, have directed officers to use the wording set out in Block J, have persisted with that despite at least two decisions of the District Court dismissing charges for non-compliance with s 77(3A), and the police have not appealed those two decisions. In those circumstances I am not prepared to find reasonable compliance.

[44] Therefore the charge against Ms [Briggs] is also dismissed on account of this factor because the result of the evidential breath test is inadmissible on account of the failure of the police officer to have complied the s 77(3) and (3A) of the Land Transport Act.

R J Collins
District Court Judge

[20] *Birchler v Police* [2010] NZSC 109 at [17].