

PUNISHING THE FAILURE TO COMPLY WITH STATUTORY DUTIES IN THE EVENT OF AN ACCIDENT

1 Introduction

Drivers of vehicles on public roads have long been subject to various duties upon being involved in a collision or an accident. It seems that the earliest formulation of a duty upon a driver involved in an accident was promulgated in Durban in 1906, where hit-and-run motorists were targeted (Reg 13i of Motor Car and Cycle Regulations – Proc 136 of 1906, published in Natal *GG* 3571 of 1906-10-23), with the same regulation being promulgated a year later in Pietermaritzburg (Reg 672i of Proc 57 of 1907 published in Natal *GG* 3647 of 1907-12-03). This regulation required the driver of a motor car, if an accident occurred involving a pedestrian, a person on horseback or in a vehicle, or to any horse or vehicle in the charge of a person, to stop and, if required, to give his name and address, the name and address of the owner of the motor car and its registration mark and number. The obligation to stop, to provide name and address and registration number, was repeated in the provincial ordinances which replaced these local regulations (see, eg, s 9(1) of Ord 12 of 1926 (C)).

The duties presently imposed on a driver in the event of an accident (for a discussion of the use of the term “accident”, see Hooft “Accidentally on Purpose? The Purpose of Imposing Duties Following Road Traffic Collisions” 2003 *Obiter* 174) are set out in section 61 of the National Road Traffic Act 93 of 1996 (hereinafter “the Act”):

- “(1) The driver of a vehicle on a public road at the time when such vehicle is involved in or contributes to any accident in which any other person is killed or injured or suffers damage in respect of any property or animal shall –
- (a) immediately stop the vehicle;
 - (b) ascertain the nature and extent of any injury sustained by any person;
 - (c) if a person is injured, render such assistance to the injured person as he or she may be capable of rendering;
 - (d) ascertain the nature and extent of any damage sustained;
 - (e) if required to do so by any person having reasonable grounds for so requiring, give his or her name and address, the name and address of the owner of the vehicle driven by him or her and, in the case of a motor vehicle, the registration or similar mark thereof;
 - (f) if he or she has not already furnished the information referred to in paragraph (e) to a traffic officer at the scene of the accident, and unless he or she is incapable of doing so by reason of injuries sustained by him or her in the accident, as soon as is reasonably practicable, and in any case within 24 hours after the occurrence of

such accident, report the accident to any police officer at a police station or at any office set aside by a competent authority for use by a traffic officer, and there produce his or her driving licence and furnish his or her identity number and such information as is referred to in that paragraph; and

- (g) not, except on the instructions of or when administered by a medical practitioner in the case of injury or shock, take any intoxicating liquor or drug having a narcotic effect unless he or she has complied with the provisions of paragraph (f), where it is his or her duty to do so, and has been examined by a medical practitioner if such examination is required by a traffic officer.
- (2) No person shall remove any vehicle involved in an accident in which another person is killed or injured from the position in which it came to rest, until such removal has been authorized by a traffic officer, except when such accident causes complete obstruction of the roadway of a public road, in which event the vehicle involved may, without such authority and after its position has been clearly marked on the surface of the roadway by the person moving it, be moved sufficiently to allow the passage of traffic.
- (3) Subject to subsection (2), no person shall remove a vehicle involved in an accident from the scene of such accident, except for the purpose of sufficiently allowing the passage of traffic, without the permission of the owner, driver or operator of such vehicle or a person who may lawfully take possession of such vehicle.
- (4) In any prosecution for a contravention of any provision of this section it shall be presumed, in the absence of evidence to the contrary, that the accused was aware of the fact that the accident had occurred, and that he or she did not report the accident or furnish the information as required by subsection (1)(f).
- (5) In this section the word 'animal' means any bovine animal, horse, ass, mule, sheep, goat, pig, ostrich or dog."

The current formulation is substantially similar to its antecedents, in the form of section 135 of the uniform Road Traffic Ordinance of 1966 (in which the traffic rules of the then four provinces of the Republic of South Africa were set out (hereinafter "the Ordinance"); for a discussion of this section and the relevant case law, see Cooper *Motor Law Volume I* (1982) 486ff; and s 118 of the Road Traffic Act 29 of 1989 (hereinafter "Road Traffic Act")). The most substantial change between the various formulations was the inclusion in the Road Traffic Act of section 118(2A), in terms of section 20 of Act 39 of 1993. This provision is found in the present formulation at section 61(3).

Section 61(1) creates seven separate offences, thus consequently, where an accused has knocked down and injured or killed a pedestrian and has failed to comply with the provisions of section 61(1)(a) and section 61(1)(b) he or she may be charged with contravening both of these sections (*S v Bruce* 1970 1 SA 291 (N); see also *S v Phyffers* 1970 4 SA 104 (A); and a similar approach is followed in English law – see *Roper v Sullivan* [1978] RTR 181). Two further offences are created in section 61(2) and section 61(3), relating to the removal of a vehicle which has been involved in an accident, from the scene of such accident.

It is not unknown for a driver who has collided with another vehicle, or pedestrians, to seek to evade civil or criminal liability by fleeing the scene of

the accident in order to escape identification. Such “hit-and-run” driving (*R v Boyd* 1960 4 SA 218 (T) 221A-B; and *R v Breingan* 1966 3 SA 410 (RA) 414E-F), besides defeating the proper course of justice, often involves a callous disregard of the physical injuries suffered by the victims of collisions (eg, *R v Verster* 1952 2 SA 231 (A) 234E-F refers to “skokkende ongevoeligheid”). Legislatures seek to inhibit such conduct by imposing upon the driver of any vehicle involved in accidents the duty to stop and render such assistance as may be appropriate and to report the accident.

Given that the “hit and run” offence has been variously described as “one of the most serious of offences in which a motorist can become involved” (*S v Mavridopolos* 1973 2 SA 44 (RA) 45H), “almost invariably despicable and mean” (*R v Chipunza* 1967 3 SA 589 (RA) 590F-G), and “the meanest type of case it is possible for a motorist to be concerned in” (*R v Pather* 1942 NPD 247 248), it is proposed to examine the sentencing guidelines in relation to punishment of the failure to fulfil the duties imposed by section 61. The note will first briefly advert to each of the individual duties, before concluding with some general comments about the sentencing regime established in the Act.

2 Punishing the duties contained in section 61

2 1 Sentencing guidelines

2 1 1 Failing to stop

A person convicted of contravening section 61(1)(a) is liable –

- (a) in the case of death or serious injury to a person, to a fine or to imprisonment for a period not exceeding nine years (s 89(4)(a) of the Act); and
- (b) in the case of damage in respect of any property or animal of another person, to a fine or to imprisonment for a period not exceeding three years (s 89(4)(b) of the Act).

It is evident from the prescribed penalty that the legislature takes as serious a view of the failure to stop after an accident in which a person is killed or injured as it does of the failure to ascertain the nature of a person’s injuries, the failure to render assistance, and of the failure to report an accident. (Cf *R v Chipunza supra* 590E; *S v Phyffers supra* 112D; *S v Munks* 1972 2 SA 651 (RA) 656A; and *S v Qunta* 1982 3 SA 525 (TkSC) 527B-C, where it was stated that due to its seriousness the offence “normally calls for a heavy deterrent sentence”. For cases in which the courts emphasised the seriousness of the offence of failing to stop and render assistance see *R v Shikuri* 1939 AD 225 232; *R v Fisher* 1941 CPD 154 160; *R v Horn* 1944 NPD 176 183; *R v Verster supra* 234G; *S v Wood* 1966 4 SA 107 (C) 110A; *S v Mavridopolos supra*; and see too *R v Pather supra* 248.) Further, the penalty for failing to stop after causing damage in respect of any property or animal of another person is the same as for failing to ascertain the nature of the damage in an accident with such consequences, or failing to report an

accident with such consequences, and when determining an appropriate penalty for these offences a court will be guided, it is submitted, by the same principles.

Since by stopping after an accident in which a person has been injured a driver might save the life or alleviate the suffering of the injured person, the moral blameworthiness of a driver who fails to do so may be regarded as equivalent to that of a driver who fails to ascertain the nature of a person's injuries or to render assistance (see *S v Flight* 1976 4 SA 550 (RA) 551G; but see *S v Square* 1981 4 SA 356 (Z) 359A-B). It is usually regarded as an important mitigating factor that an accused who failed to stop reported the accident without delay to the nearest police station (*S v Chretien* 1979 4 SA 871 (D) 880A; and *S v Qunta supra* 527c). A driver who fails to stop after an accident in which only damage to property is done would be regarded as less culpable than a driver who causes injury (*S v Fuller* 1966 1 PH H158 (A); and *R v Chipunza supra* 591A).

A court is entitled to accept, in the absence of an explanation to the contrary, that a hit-and-run driver's failure to stop and render assistance when he was aware that a person might have been injured in the accident is an indication of a callous indifference to human life and suffering, and to regard this as an aggravating factor (*R v Breingan supra* 417E, see also *R v Fisher supra* 160; *R v Horn supra* 183; *R v Verster supra* 234E; and *S v Wood supra* 109H). It is submitted that the fact that the accused is only charged with failing to stop does not mean that the court cannot have regard to the hit-and-run driver's indifference to human suffering (*cf R v Taylor* 1951 2 PH O9 (E)). However, it has been held that the presence at the scene of an accident of persons able to assist an injured person (see *R v Fisher supra*; *R v Ind* 1941 NPD 331 332; *R v Kundamal* 1952 1 PH O4 (T); *S v Mavidopolos supra*; and *S v Flight supra* 552B) and the accused's conduct in reporting the accident are factors which might mitigate the offence (*S v Fuller supra*; and *R v Muchena* 1967 1 PH O28 (R)).

With regard to a driver who fails to stop after an accident in which only damage to property is done, an important factor bearing upon sentence is the extent of the damage. Whilst the prescribed penalty in the case of injury to an animal is the same as in the case of damage to property, this does not preclude a court, when imposing sentence, from having regard to a hit-and-run driver's indifference to the suffering of an animal injured in the accident (see *R v Vogt* 1937 SWA 11).

A court should not impose imprisonment without the option of a fine on a first offender in the absence of aggravating circumstances (*R v Pretorius* 1959 1 PH H33 (O); *S v Mohamed* 1965 2 PH O34 (N); *R v Muchena supra*; and *S v Mavidopolos supra*). Even if the accused's contravention involves a high degree of blameworthiness, it is submitted that a court is not obliged to impose imprisonment.

It has been held that when a prison sentence is indeed considered to be an appropriate punishment, the court should consider whether periodic imprisonment should not be imposed (*R v Wegkamp* 1960 2 SA 665 (T)).

It is not permissible to punish a person twice for the same offence and, if as a result of the same occurrence, an accused is convicted of failing to stop and other breaches of section 61(1) the court should have regard to the cumulative effect of the separate offences (*R v Horn supra* 183; *R v De Villiers* 1949 3 SA 149 (E) 155; *R v Malope* 1957 2 PH H187 (O); and *R v Hartley* 1966 4 SA 219 (RA) 222C) and for the purpose of sentence it may treat them as one (see, eg, *R v Van Zyl* 1935 CPD 370; *R v Dignan* 1956 2 SA 89 (SR); *R v Bhengu* 1962 2 PH O37 (N); *S v Mofokeng* 1964 1 PH O5 (O); *S v Wood supra*; *S v Bruce supra*; and *S v Phyffers supra*) or may make them run concurrently (see, eg, *R v Roberson* 1958 1 SA 676 (A)).

Similarly, when sentencing an accused convicted of culpable homicide, driving under the influence of intoxicating liquor or of reckless or negligent driving along with one or more contraventions of section 61(1), the court should have regard to the cumulative effect of the sentences for the separate offences (see *R v De Villiers supra*; *S v Mohamed supra*; and *S v Phyffers supra*). Culpable homicide (see *R v Ind supra*; *R v Horn supra*; and *S v Phyffers supra*) and driving under the influence of intoxicating liquor (see *R v De Villiers supra*) are usually treated as more serious offences than contraventions of section 61(1). Convictions of reckless or negligent driving are also usually regarded as more grave than failing to comply with one or more of the duties set out in section 61(1). Where the accused's moral blameworthiness regarding his failure to stop is greater than his culpability on the charge of reckless or negligent driving the court may, however, impose a heavier sentence in respect of the former offence (see *R v Francis* 1947 2 PH O35 (N); and *R v Morar* 1952 1 PH O2 (N)).

2 1 2 Failing to ascertain nature of injury

A person convicted of contravening section 61(1)(b) is, in terms of section 89(4)(a) read with section 89(1), liable to a fine or to imprisonment for a period not exceeding nine years in the case of the death or serious injury to a person.

The penalty for this offence is the same as for failing to stop after an accident in which a person has been killed or seriously injured, or failing to render assistance in such circumstances, or failing to report an accident with such consequences, and when determining an appropriate penalty for these offences a court will be guided, it is submitted, by the same principles. Indifference to the fate of the victim is indicative of moral blameworthiness, and will discourage alternative punishment such as correctional supervision (see *S v Andhee* 1996 1 SACR 419 (A), where the accused, a medical doctor, got out of his vehicle briefly, and merely glanced at the fatally injured victim, prior to driving away).

2 1 3 Failing to render assistance

It has been held that the gravamen of the statutory offence punishing the failure to fulfil certain duties in the event of an accident is the failure to render assistance to an injured person (*S v Square supra* 359B). A person

convicted of contravening section 61(1)(c) is, in terms of section 89(4)(a) read with section 89(1), liable to a fine or to imprisonment for a period not exceeding nine years in the case of death or serious injury to a person.

The penalty for this offence is the same as for failing to stop after an accident in which a person has been killed or seriously injured, or failing to ascertain the nature of the injury in such circumstances, or failing to report an accident with such consequences, and when determining an appropriate penalty for these offences a court will be guided, it is submitted, by the same principles.

2 1 4 Failing to ascertain nature of damage

A person convicted of contravening section 61(1)(d) is, in terms of section 89(4)(b) read with section 89(1), liable in the case of damage in respect of any property or animal of another person to a fine or to imprisonment for a period not exceeding three years.

The penalty for this offence is the same as for failing to stop after an accident involving damage to property or an animal, or failing to report an accident with such consequences, and when determining an appropriate penalty for these offences a court will be guided, it is submitted, by the same principles.

2 1 5 Failing to furnish particulars

A person convicted of contravening section 61(1)(e) is, in terms of section 89(4)(c) read with section 89(1), liable to a fine or to imprisonment for a period not exceeding one year.

The gravity of the accident, it is submitted, will have an important bearing upon sentence.

2 1 6 Failing to report an accident

A person convicted of contravening section 61(1)(f) is liable on conviction –

- “(a) in terms of s 89(4)(a) read with s 89(1), in the case of death or serious injury to a person, to a fine or to imprisonment for a period not exceeding nine years; and
- (b) in terms of s 89(4)(b) read with s 89(1), in the case of damage in respect of any property or animal of another person, to a fine or to imprisonment for a period not exceeding three years.”

An attempt to avoid detection by failing to report an accident aggravates the offence and merits a heavier punishment than failure to report due to negligence (see *R v Tazwipesa* 1966 3 SA 695 (R) 699D).

The penalties for failing to report in the event of an accident involving death or serious injury to a person are the same as for failing to stop after an accident involving death or serious injury to a person, or failing to ascertain the nature of the injury in such circumstances, or failing to render assistance

in an accident with such consequences, and when determining an appropriate sentence on a charge of contravening section 61(1)(f) similar considerations apply. Further, the penalty for this offence is the same as for failing to stop after an accident involving damage to property or an animal, or failing to ascertain the nature of the damage in an accident with such consequences, and when determining an appropriate penalty for these offences a court will be guided, it is submitted, by the same principles.

2 1 7 Consumption of intoxicating liquor/narcotic drug after accident

A person convicted of contravening section 61(1)(g) is, in terms of section 89(4)(c) read with section 89(1), liable on conviction to a fine or to imprisonment for a period not exceeding one year.

An attempt to avoid prosecution for a contravention of an offence under section 65 by taking intoxicating liquor or a narcotic drug after an accident is an aggravating factor.

2 1 8 Unauthorised removal of vehicle involved in accident

A person convicted of contravening section 61(2) is, in terms of section 89(3) read with section 89(1), liable on conviction to a fine or to imprisonment for a period not exceeding three years.

A person convicted of contravening section 61(2) or section 61(3) is, in terms of section 89(6) read with section 89(1), liable on conviction to a fine or to imprisonment for a period not exceeding one year.

The removal of a vehicle from the position in which it came to rest in order to interfere with the proper investigation of an accident is an aggravating factor.

2 2 *Suspension/cancellation of driving licence*

The punitive effect of a cancellation or suspension of the driver's licence of the accused should be taken into account by the court (*R v Pretorius supra*).

A court may, in terms of section 34 of the Act, make an order suspending or cancelling a licence or permit, or disqualifying a person from obtaining a licence or permit, following a conviction relating to the driving of a motor vehicle. In terms of this provision, since a contravention of section 61(1)(g) is not an offence relating to the driving of a motor vehicle the suspension, cancellation or endorsement of a driving licence of an accused convicted of this offence is not competent (*S v De Nobrega* 1970 3 SA 232 (SWA)).

The power to suspend or cancel the driving licence of an accused convicted of these offences has a dual purpose: to protect society and to punish the offender (*cf R v Hickman* 1961 4 SA 457 (SR); *S v Mofokeng supra*; *S v Van Rensburg* 1967 2 SA 291 (C); and *S v Markman* 1972 3 SA 650 (A)). Therefore, as in the case of sentence, the degree of the offender's

moral blameworthiness has an important bearing on the question whether his driving licence should be suspended (and the period of suspension) or even cancelled because the higher the degree of his blameworthiness the greater the need and justification for a measure which will act as a safeguard against possible repetition and be a punishment to the accused as well as a deterrent to others (see *R v De Villiers supra*).

In fixing the period of suspension the court should take into account the fine or period of imprisonment it intends to impose, and where the period of suspension and the penalty make the sentence as a whole unduly severe or excessive the court on appeal will set aside the order or reduce the period of suspension (see *R v De Villiers supra* 155; *R v Malope supra*; and *S v Mohamed supra*). For the same reason an order suspending the driving licence of an accused for a specified period may be substituted for an order cancelling a driving licence (see, eg, *S v De Villiers supra*).

An order of cancellation or disqualification should be made in the case of a first offender only where the offence is a grave one (see, eg, *S v De Villiers supra*).

In terms of section 35 of the Act, it is obligatory to suspend the driving licence or permit of an accused convicted of a contravention of section 61(1)(a), (b) or (c) (or disqualify an accused similarly convicted who is not a licence-holder from obtaining a licence for a period), in the case of the death of or serious injury to a person, in the absence of the existence of circumstances which in the view of the court do not justify the suspension (or disqualification).

3 Concluding remarks

It is apparent that there are some inconsistencies in the new sentencing framework, set out in section 89 of the Act, for failing to comply with the duties incumbent on vehicular road users who have been involved in an accident.

The increasing gravity of these offences in the view of the legislator is evident from the steady increase in the past quarter of a century in the prescribed maximum sentence for the offences punishing the failure to comply with these statutory duties from (in 1982) the Ordinance (in terms of which the maximum penalty was a fine not exceeding R1 200 or imprisonment for a period not exceeding three years, or both), to (in 1992) the Road Traffic Act (in terms of which the maximum penalty, after amendment, was a fine not exceeding R36 000 or imprisonment for a period not exceeding nine years, or both). The current sentencing framework reflects the same maximum prison sentence as in the Road Traffic Act, although the amount of the fine is now unrestricted. Whilst this may be regarded as being consistent with the apparent deepening policy concern regarding these offences, it is unclear why in terms of section 89 a court is no longer granted the discretion to sentence an offender who has contravened section 61 to *both* a sentence of imprisonment *and* a fine, as was the case in the preceding legislation. (It should be noted that this is not

an isolated instance, as the new sentencing framework in s 89 of the Act has consistently dispensed with the possibility of such a combination of forms of punishment, as permitted in antecedent penal provisions, in relation to all offences.) Whilst this course of action may only be appropriate in limited instances, it is submitted that it would have been preferable not to limit the sentencing discretion of the judicial officer in this manner.

It is noteworthy that, unlike its antecedents (s 180A(2)(a) of the Ordinance and s 149(4)(a) of the Road Traffic Act), section 89(4)(a) of the Act requires “serious injury”, as opposed to merely “injury” for the stipulated punishment to apply. Thus, it is evident that the legislature has narrowed the ambit of the specified penalty. This approach is perhaps questionable on two grounds: it is doubtful whether there has been any policy-based reason to so limit the size of the category; and the qualification begs the question as to what constitutes a “serious injury”, thus providing a ready challenge to a sentence handed down in terms of this subsection.

The evident inconsistency in the sentencing rules for section 61 is apparent from the fact that where the injury is not “serious”, in terms of section 89(6) read with section 89(1) the offender will be liable to a fine or imprisonment for a period not exceeding one year. As a result, infliction of an injury to a person which is not classified as “serious” may be punished less severely than an offender who causes damage to property or an animal belonging to another person (in terms of s 89(4)(b), such conduct can be punished with a fine or imprisonment for a period not exceeding three years). If the gravamen of section 61 is indeed focused on the duty to assist an injured person, as suggested below, then this disparity is difficult to explain.

The purpose of section 61 may be expressed as follows:

“[T]o ensure that drivers who are aware that they have been involved in, or contributed to, any accident will stop and, having stopped, that they will be available to carry out any of the various duties imposed by the section” (*cf R v Breingan supra* 414g, where the erstwhile Rhodesian provision was being discussed).

If one accepts that this provision is based on strong policy foundations, and one takes into account the noted antipathy for the callousness of the hit-and-run driver, then some searching questions may be posed in respect of the new sentencing framework.

Shannon Hctor
University of KwaZulu-Natal, Pietermaritzburg