

Recent Causes and Courses of Drink-Driving Litigation in Victoria

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ABSTRACT

When one looks at the vigorous amount of criminal litigation in Victoria generated by the Parliament of that State's continuing enthusiastic regulation of drink driving and related matters one quickly sees certain connections. First, the causal link between mandatory sentencing and a motorist's decision to contest the charges. Second, the nexus between complexity of the laws and an unusually high amount of appellate proceedings arising from decisions from courts lower in the hierarchy ending, sometimes, at the Court of Appeal. This article looks at some recent important Victorian superior court decisions on defending charges under the *Road Safety Act 1986 (Vic)* of exceeding the prescribed alcohol concentration whilst driving and refusal to comply with police requirements. References to section numbers relate to provisions of this Act unless otherwise expressly mentioned.

INTRODUCTION

When one takes a good close look at the quite vigorous amount of criminal litigation in Victoria generated by the Parliament of that State's continuing enthusiastic and unrelenting attempts at regulation of drink driving and related matters involving road safety it is not difficult for one to quickly see certain clear connections.

First, the causal link between that State's mandatory sentencing concerning lengthy minimum licence disqualification periods (including often mandatory equally lengthy minimum periods for alcohol ignition interlock conditioning on licence restoration) and the average motorist's decision to contest the charges.

Second, the nexus between complexity of the many labyrinthine legislative provisions and an unusually high amount of appellate proceedings arising from decisions from the courts lower in the hierarchy ending, sometimes, at the Court of Appeal.

This article will take a look at some recent important Victorian superior court decisions over the last few years on defending charges under various provisions of the *Road Safety Act* 1986 (Vic) (“the Act”) of exceeding the prescribed alcohol concentration whilst driving a motor vehicle and refusal to comply with police requirements for accompaniment and testing. References to section numbers relate to provisions of the Act unless otherwise expressly mentioned.

HIGHER PENALTIES, HEAVIER CONSEQUENCES AND NO DISCRETION

On 11 October 2006 the penalties in Victoria for drink driving and related offences were substantially increased. Some changes, too elaborate to list all here, implemented by the *Road Legislation (Projects and Road Safety) Act* 2006 to the Act included substantial increases to maximum prison terms and fines (applying to offences occurring on or after 11 October 2006 per s 103L(1)). Some examples include the following.

Six-fold increase in maximum prison term

A person who offends for a second time (within 10 years of a first offence) against the exceed prescribed alcohol concentration offences in ss 49(1)(b), (f) or (g) of the Act with a reading of less than 0.15% may be fined up to approximately \$6,000 or sentenced to 6 months’ imprisonment; if that person was 0.15% or more for the second offence the maximum fine shoots up to roughly \$12,000 or 12 months’ imprisonment; should a motorist offend against ss 49(1)(b), (f) or (g) for a third or subsequent time (within a 10 year period) the maximum fine escalates to about \$12,000 or 12 months’ imprisonment if less than 0.15% or up to about \$18,000 or 18 months’ imprisonment if 0.15% or more (figures as to fines referred to in this article are expressed in approximations due to the periodic amendments to the monetary amount of individual penalty units over time).

A person offending against s 49(1)(a) (driving under the influence) or committing a refusal offence under ss 49(1)(c), (d) or (e) (within 10 years of a first offence) could then be fined around \$12,000 or receive 12 months’ imprisonment for a second offence, that rising to around \$18,000 fine or 18 months’ prison for a third or subsequent offence.

There were also substantial increases to drug-driving and related offences in s 49(1) involving lengthy prison terms and huge fines and long licence disqualification periods.

Increase in interlock periods

Certain mandatory minimum periods for alcohol ignition interlock conditioning under ss 50AAA and 50AAB on successful licence restoration under s 50(4) also went up. For example, a four year minimum period for motorists who subsequently offend under ss 49(1)(b), (f) or (g) with a reading of 0.15% or more or who subsequent offend by refusal offence under s ss 49(1)(c), (d) or (e) (up from a three year interlock period) and 12 month minimum period for a second offender with a reading less than 0.15%.

Jurisdiction to impose an interlock on a discretionary basis for at least 6 months, even on a first offender under s 49(1)(b), (f) or (g), was reduced from a threshold of 0.10% down to 0.07% where a licence restoration was then be required. That applies to offences committed on or after 11 October 2006 per s 103L(1)

The court was then forced to impose at least a 6 month interlock condition on re-licensing a person disqualified from driving due to a first offence against ss 49(1)(a), (c) (d) or (e) or driving with an alcohol concentration of 0.07% or more contrary to ss 49(1)(b), (f) or (g), if at the time of offence, the person was aged under 26 years or held a probationary licence. That applies only to offences committed after 1 January 2007 per s 103L(2)

Section 50AAA(2A) then provided that the court must impose an alcohol interlock condition when granting a re-licensing application by someone disqualified due to a first offence against ss 49(1)(a), (c) (d) or (e) or driving with an alcohol concentration of 0.07% or more contrary to ss 49(1)(b), (f) or (g), if at the time of offence, the person was under 26 years old or held a probationary licence. That applies only to offences committed after 1 January 2007 per s 103L(2).

Reduction of sentencing discretion

The s 50(1AB)(b) discretion under the Act not to cancel and disqualify a licence would not apply to a person who at the time of offence was aged under 26 years notwithstanding the reading is less than 0.07%. That applied only to offences committed after 1 January 2007 due to s 103L(2) of the Act

Changes fueling desire to contest

The many amendments operating from 11 October 2006 and 1 January 2007 were labyrinthine, difficult to summarise concisely and accurately and, accordingly, they warranted close scrutiny by a practitioner to properly advise clients. The above is just a small selection of the changes. Massively increased penalties (a *seven-fold* increase in maximum fine and *six-fold* increase in maximum prison term for a third offender who is 0.15% or more or who commits a refusal offence, compounded by mandatory four year interlock conditioning on relicensing after a minimum mandatory 30 month licence disqualification period for a 0.15% reading and 48 months disqualification for a refusal

offence) no doubt prompted many accused to consider fiercely defending the charges – and they did!.

EXCEEDING PRESCRIBED ALCOHOL CONCENTRATION OFFENCES

Proving alcohol concentration by PBT alone

In *R v Ciantar; DPP v Ciantar* (2006) 16 VR 26; [2006] VSCA 263 the Full Bench of the Court of Appeal comprising Warren CJ, Chernov, Nettle, Neave and Redlich JJA, dealing with a culpable driving conviction appeal (the Crown relying partly on an alleged excessive alcohol concentration) held from [6] to [14] that evidence of a forensic officer with the Technical Services Laboratory of the Victoria Police Traffic Alcohol Section, and a Victorian Institute of Forensic Medicine forensic physician's evidence, with evidence of the police officer conducting the preliminary breath test on the appellant and saw the reading, was sufficient for the actual reading of the Lion Alcolmeter Preliminary Breath Test device ("PBT") obtained on preliminary breath testing of the appellant to be admitted into evidence. It was established that it was a scientifically accepted instrument for its avowed purpose and that it was handled properly and read accurately.

This case had potentially widespread ramifications for s 49(1)(b) and (f) offences (not just culpable driving charges) as it stands as authority for the proposition that the Crown may prove a drink-driving offence without a blood test or a test on a breath analyzing instrument, simply relying on the reading of the Lion Alcolmeter SD 400-PA (or other prescribed PBT device) with appropriate expert and other evidence to support it as was done in this case. It was argued in the motorist's defence at trial that the reading of the PBT was not admissible. The Court of Appeal rejected this argument.

The Court at [18] to [32] also supported the sufficiency and correctness of a trial judge's directions to a jury on the element of "under the influence" in relation to *Crimes Act* 1958 s 318 culpable driving offences. This part of the case has relevance for s 49(1)(a) driving under the influence charges.

PBT powers s 53(1)(a) & (b) not mutually exclusive

In *Maitland v Swinden* (2006) 46 MVR 507; [2006] VSC 467 Hansen J dismissed that motorist's appeal against conviction for a s 49(1)(f) offence and held that it was open to the Magistrate to conclude that a road block set up by police to intercept motorists to conduct preliminary breath tests and licence and registration checks was not a preliminary breath testing station under the ACT nor so intended by the police concerned but the police concerned exercised power under s 53(1)(a) to require any driver to undergo a PBT via a prescribed device and the certificate of analysis (from the breath analyzing instrument) would not be excluded. Hansen J held at [19] to [22] that powers under s 53(1)(a) and (b) were not mutually exclusive. His Honour also stated at [23] that

“...Parliament intended the power in para (a) to be exercisable in the widest range of circumstances”.

Impermissible use of “no comment” answer after breath test

In *Wilson v County Court & Anor* (2006) 14 VR 461; [2006] VSC 322 Cavanough J, hearing a motorist’s judicial review of a County Court appeal judge’s decision to convict on a s 49(1)(f) offence, held at [34] that the judge erred in using a motorist’s “no comment” answer (following police questioning after a breath analyzing instrument test revealed excess alcohol concentration) to impugn his credibility as a witness on the question of his drinking, and quashed the conviction and remitted the matter to a differently constituted County Court. This was notwithstanding a legal burden on an accused under s 49(4) to prove instrument or operator error on the balance of probabilities.

Not giving blood sample to police requesting it

In *DPP v Colbey* [2006] VSC 357 Redlich J dismissed a Crown appeal against dismissal of ss 49(1)(b) and (g) charges because part of a blood sample taken from a driver who was requested by police to allow a doctor to take his blood under s 55(9A) for analysis (following a failed attempt to obtain alcohol concentration by a breath analyzing instrument) had not been provided to the police officer who requested the sample. This breached s 55(9B) - an element of the s 49(1)(g) offence.

Redlich J stated it was unnecessary to decide whether, in a prosecution for a s 49(1)(b) offence, s 57 certificates relating to taking and analyzing blood may still be admissible where, contrary to s 55(9B), there was no delivery of part of a sample to the police officer requesting it, because it was open to the Magistrate in the circumstances to refuse to act on evidence of the blood analysis as continuity was in issue.

Culpable driving- exclusion of evidence relating to blood alcohol

In one aspect of *DPP v King* (2008) 50 MVR 517; [2008] VSCA 151 the Court of Appeal in *Obiter Dictum*, concerning a Crown appeal ground (subsequently abandoned with leave) that the learned judge erred in exercising a judicial discretion to exclude evidence of an alleged high blood alcohol concentration of the respondent (an analysis revealing 0.184%), stated that it was unnecessary to decide but it should not be assumed that the trial judge was necessarily correct in exercising discretion to exclude the blood alcohol analysis on the ground of unfairness.

The judge had concluded that the respondent was deprived of the opportunity of conducting his own analysis of his blood sample because his sample, placed with his personal property at a hospital, had inadvertently been taken by police. It did not appear

that there was any failure to comply with the Act and regulations as the sample had, in accordance with required procedure, been placed with the respondent's belongings.

The Court observed that want of compliance with the statutory regime relating to s 49 offences would not ordinarily result in the prosecution being precluded from relying on blood alcohol analysis or other proof that a driver's judgment was relevantly impaired by alcohol, for offences such as culpable driving, negligently causing serious injury, manslaughter and murder. There was nothing to indicate that the sample, had it been left at the hospital with his clothes, would have been discovered at any time before the respondent left hospital five months after the accident. However, the Court of Appeal would not consider whether it was an appropriate case for exercise of the discretion.

Culpable driving – double punishment on drink driving offence

In *R v Audino* (2007) 180 A Crim R 371; [2007] VSCA 318 (comprising Maxwell ACJ, Ashley and Neave JJA) in an appeal against sentence in a Culpable Driving count stated that as a matter of substance the act of driving with excess blood alcohol was an element of both the summary offence of Driving whilst Exceeding the Prescribed Concentration of Alcohol under s 49(1) of the Act and of the Culpable Driving offence as particularised. He could not be punished twice for the same act. Accordingly, the Court of Appeal held that the sentencing judge erred in imposing double punishment because there was cumulation of the sentence for the summary exceed prescribed alcohol concentration offence upon the sentence for culpable driving.

Negligently causing serious injury – double punishment on drink driving offence

In a case analogous to *R v Audino* the Court of Appeal (comprising Ashley and Neave JJA and Pagone AJA) in *R v Healey* [2008] VSCA 147 heard that an accused had pleaded guilty to four counts of Negligently Causing Serious Injury under s 24 of the *Crimes Act* (relating to driving a motor vehicle) and to summary offences of driving a motor vehicle while Exceeding the Prescribed Concentration of Alcohol under s 49(1)(b) of the Act and Exceeding the Speed Limit under Road Rule 20 and was convicted and punished on each offence. It was submitted on appeal that the elements of the summary offences of which he was convicted and sentenced provided the basis for the four counts of negligently causing serious injury. The Court of Appeal agreed there was double punishment and set aside the convictions on the summary traffic offences.

“In charge” while exceeding prescribed alcohol concentration

In *Halley v Kershaw* [2013] VSC 439 the Supreme Court dealt with a motorist's appeal against conviction by a magistrate on a charge of being in charge of a motor vehicle whilst exceeding the prescribed concentration under s 49(1)(f) of the Act. Kaye J held at [26] to [33] that to determine whether the motorist was “in charge” of a vehicle purposes

of s 48(1)(b), the magistrate was obliged to consider whether he was satisfied that the case came within one of the four categories set out in s 3AA(1)(a) to (d). At [34] Kaye J stated the “magistrate considered that he was not bound to determine whether the case fell within one of those four categories, but, rather, he concluded that the appellant was ‘in charge’ of the vehicle because, when he woke up, he was in the driver’s seat, with the engine running. That conclusion does not, alone and without more, bring the case within any of the categories specified in subparagraph (a) to (d) of s 3AA(1)...the magistrate made an error of law.”

At [4] to [7] and [46] Kaye J also found that the magistrate should have considered that when the motorist was found his car was parked, the gear was in park, the hand brake was off, the engine was running, the radio was not turned on and neither the heating or cooling was on, that when the informant approached the motorist in the car, the motorist appeared to be sleeping and only woke up when the informant knocked several times on the car’s window.

At [41] Kaye J stated that the informant should give specific evidence as to the belief formed in relation to the accused’s intention to start or drive the vehicle; the informant should expressly state the basis upon which the belief was formed; it is not necessary that the informant be satisfied of the particular fact on the balance of probabilities; rather, the informant must establish that he or she held the belief on reasonable grounds; such belief has been described as an inclination of the mind towards assenting to rather than rejecting a proposition; a belief is something more than suspicion but does not need to approach anything like certainty; the informant’s belief must be a belief that the accused intended to start the engine or drive off forthwith, or to do so at any point of close futurity; the question is not whether the court itself holds, or agrees with, the belief that the accused intended to drive or start the vehicle. Rather, the question is whether the informant actually held such belief and whether it was held on reasonable grounds.

Breath analysing instrument/operator error

In *Wilson v County Court of Victoria & Anor (no.2)* [2013] VSC 369 at [52], in relation prospects of an accused charged with exceeding the prescribed concentration of alcohol and successfully arguing the defence under s 49(4) of the Act of breath analyzing instrument error or operator error, Emerton J held, “The defence under s 49(4) is not made out simply by reference to the ‘possibility or probability’ that the result of the breath test was unreliable. It must be shown on the balance of probabilities that something affected the operation of the breath analyzing machine so as to give rise to the possibility that the result was unreliable.”

Corroboration for Post Driving Drinking Defence

In *DPP v Gibson* [2012] VSC 297 Emerton J allowed a Crown appeal against a Magistrate's dismissal of a s 49(1)(f) charge against the motorist of exceeding the prescribed alcohol concentration whilst driving who successfully argued the post-driving drinking defence under s 48(1A) without having corroborated by material sworn evidence of another the fact that the motorist had claimed the blood alcohol reading on the breath analyzing instrument was due to the consumption of intoxicating liquor after driving.

Admissibility of analysis showing excess blood alcohol in culpable driving

In *DPP v Carletti (Ruling No 1)* [2013] VSC 305, during a culpable driving trial, Kaye J ruled at [56] to [64] that a blood sample taken from the accused was not taken in accordance with s 56 of the Act and, in absence of express consent to the collection of the sample, the evidence of its analysis was inadmissible in the trial. The accused had been taken to hospital due to injuries sustained when bitten by a police dog and not because of any belief or understanding, in a material sense, that he had a head injury in consequence of a motor vehicle accident. Kaye J considered that a 'nod' by the accused when asked at the hospital if he consented to the taking of the sample did not, in the circumstances, amount to an intention to consent to it.

Subpoena of breath analyzing instrument documents

Defence lawyers soon found it easier to show legitimate forensic purpose in seeking, by subpoena, production of documents and records relating to the breath analyzing instrument used to establish a motorist's alleged blood alcohol concentration (where the client instructs to challenge the accuracy of the analysis) thanks to *Johnson v Poppeliers* (2008) 51 MVR 444; [2008] VSC 461. Kyrou J did not follow *Fitzgerald v Magistrates' Court* (2001) 34 MVR 448; (2001) VSC348 and held (at [47]) that the correct test in deciding whether certain items specified in a subpoena, set out at para [9] of *Johnson*), (similar to that sought in *Fitzgerald*) was the "reasonable possibility" test for determining whether items sought concerning the breath analyzing instrument and other items would materially assist the motorist in defending the exceed prescribed alcohol concentration charge under s 49(1)(f) of the Act, in raising the s 49(4) instrument/operator error defence. Kyrou J allowed the motorist's appeal and found that the Magistrate erred in applying the "within the range of probability test" in *Fitzgerald*.

Discretion to exclude certificate

In *Terry v Johnson & Anor* (2009) 198 A Crim R 128; [2009] VSCA 286 the Court of Appeal (comprising Buchanan and Mandie JJA, Byrne AJA) allowed a motorist's appeal (against conviction by a Magistrate for a s 49(1)(f) exceed prescribed alcohol concentration offence) from a Supreme Court judge's dismissal of a judicial review application on a County Court Judge's decision not to exclude a certificate of blood

alcohol concentration following that judge's finding that police advised a driver against taking a blood test after a breath test.

Buchanan JA stated that the County Court judge thought the purpose of a blood test was to disclose a blood alcohol percentage more accurately than a breath test or give the accused a benefit of a different reading if the blood result diverges from the breath result. Thus, a high breath test reading meant the appellant was not denied a potential benefit when he was dissuaded from undergoing a blood test. He stated that Her Honour made a misplaced assumption that the breath result was accurate -there was no evidence it was. She could only speculate that a blood test would produce a like result and could not know whether the blood test might disclose a reading less than 0.05%. It was relevant that there was evidence that the breath test machine malfunctioned and that there was no evidence of the quantity of beer the appellant consumed.

Buchanan JA further stated that different driver's licence disqualification periods are imposed according to whether the accused's alcohol concentration in grams per 100 millilitres of blood is more or less than increments of 0.01%, so that a small discrepancy between results of breath and blood tests determine level of punishment.

Byrne AJA stated that the *Bunning v Cross* discretion to exclude evidence requires the appellant to satisfy the court that the balancing exercise referred to in *Ireland's* case favours exclusion. Weight given to police misconduct in causing an accused to forego an important right, is established. The County Court Judge had discounted the significance of this due to unwarranted assumptions. In the circumstances, a judge properly applying *Bunning v Cross*, must inevitably exercise discretion to exclude the analysis evidence. Her discretion miscarried. The Supreme Court Judge also erred.

The result in *Terry v Johnson* at the Court of Appeal was not dissimilar to the decision of that Court in the early case of *DPP v Moore* (2003) 6 VR 430; [2003] VSCA 90 on the expansion of the general unfairness discretion to exclude the certificate of analysis in circumstances where the motorist was dissuaded by police from obtaining a blood test following a positive evidentiary breath test.

Re-opening to prove authorization to operate instrument

In *Burridge v Tonkin* [2007] VSC 230 Williams J held at [66] to [71] that a Magistrate did not err in exercising discretion to allow the prosecution to re-open its case to prove that the operator was authorized by the Chief Commissioner to operate the breath analyzing instrument in the particular circumstances of the which included late service of a s 58(2) notice, the witness entering the witness box unaware of the magistrate's ruling on that notice and its content. The magistrate had found that there were exceptional circumstances to allow reopening.

Miscarriage of discretion to exclude analysis certificate

In *DPP (Vic) v Riley* (2007) 16 VR 519; [2007] VSC 270 Hansen J allowed a Crown appeal against dismissal of ss 49(1)(b) and (f) exceed prescribed alcohol concentration charges after the Magistrate excluded the certificate of analysis from the breath analyzing instrument on the basis. The magistrate had failed to exercise the *Bunning v Cross* public policy discretion by reference to relevant criteria thereby causing the discretion to miscarry. The magistrate had found that the accused was in lawful custody for a time after lawful arrest after an interception following his erratic driving of a motor vehicle, however, there was a short period of unlawful detention and some excessive pepper-spraying by police.

However, Hansen J found in the circumstances of the case that the magistrate actually did not take into account the period of unlawful detention in the exercise of the public policy discretion to exclude the evidence, rather the discretion was exercised in relation to certain “excessive” conduct by police following the motorist’s removal from the car. Hansen J held at [28] that the motorist in that case was “lawfully arrested” on suspicion of car theft, but the magistrate erred in excluding the certificate because it could not be said that the breath analysis evidence was obtained by means of the excessive roadside conduct which was why the magistrate excluded the evidence.

Excluding evidence if police abuse power

In *DPP v Foot* (2010) 200 A Crim R 558; [2010] VSCA 112, the Crown appeal against dismissal of a drink driving charge under s 49(1)(f) succeeded. The Court referred to its decision in *Mastwyk v DPP* (2010) 27 VR 92; stating (at [6]) “The unanimous view of the Court in *Mastwyk* is that the power conferred by s 55(1) (to require the driver to accompany the officer) does not authorize the arrest or detention of a driver. Moreover, the decision of the majority (Nettle and Redlich JJA) is that the mode of travel by which the driver is required to accompany the officer must be objectively reasonable.”

The Court held (at [9]) that it was not reasonably open to the Magistrate to conclude that there was a ‘short period’ of detention and “The entry into the police vehicle having been voluntary, Mr Foot’s change of mind did not, by itself, convert his presence in the van into involuntary detention. There would [need] ...evidence, and [a]... finding, that the police...refused to release Mr Foot upon his request. The learned Magistrate evidently accepted that the officers did not hear his request and, in the particular circumstances... there was no refusal and no detention.”

The Court also held (at [11]) that it was not correct to say that a prosecution for exceeding the prescribed alcohol concentration under s 49(1)(f) *must* fail if the requirement to accompany under s 55(1) was invalid. The Court (at [13]) referred to the correct approach to be followed in cases where there is involuntary detention by referring to what Winneke P had said in *DPP v Foster* [1999] 2 VR 643; [1999] VSCA 73 and stated “...if the power to require the motorist to accompany the officer is abused, there is a risk that the prosecution will be unable to use the evidence obtained (as the result of...

furnishing of a breath sample)...the risk that the Court would exclude the evidence... in the exercise of its discretion, whether on public policy grounds or on fairness grounds.”

The Court further held (at [14]) “the question of the possible exclusion of the evidence... would fall to be determined in accordance with...the *Evidence Act 2008* (Vic)...and would affect both the charge under s 49(1)(f) and...(b)” and (at [15]) “The position is quite different when a charge is brought under s 49(1)(e)...alleging a refusal...to accompany...if no valid requirement was made it follows necessarily that there can be no question of non-compliance. There was nothing with which the driver was obliged to comply.” The Court of Appeal distinguishes the approach in relation to refusal to accompany offences from exceed prescribed alcohol concentration offences.

Thus, if police require motorists to accompany for breath tests in a manner which a court finds was an abuse of power then evidence of a breath analysis result is not automatically inadmissible, rather judicial discretions to exclude evidence (in this case the analysis certificate) may enliven and, in absence of other evidence, ss 49(1)(b) and (f) exceed prescribed alcohol concentration charges may be dismissed.

If, in a given case, accompaniment in the divisional van’s rear compartment constituted imprisonment, a court may find that that was an abuse of power warranting exclusion of the analysis certificate. It also seems arguable that, even if there was no imprisonment, if police are otherwise found to have abused their power in making requirements under s55(1) then discretion to exclude the analysis evidence may also enliven.

REFUSAL TO COMPLY OFFENCES

Refusing a “preliminary” breath test

In *DPP v Skafidiotis* [2013] VSC 258 the Supreme Court heard that a motorist, who had already left his car after driving, was advised by the informant following interception, “I want you to take a breath test. I don’t think you should be driving.” The informant did not have a preliminary breath test device in his hand when this was said. The motorist responded with expletives, became agitated, argumentative and aggressive. The informant then went to retrieve the device in the police vehicle which was several metres away. The motorist then ran off and was pursued.

The magistrate dismissed a subsequent charge of refusing a preliminary breath test under s 49(1)(c) of the Act and the Director of Public Prosecutions appealed to the Supreme Court.

In dismissing the Director’s appeal Williams J stated at [25] that what the informant said in relation to the requirement “... was ambiguous in all the circumstances.

Notwithstanding the early hour, the location, the previous exchange between the informant and the respondent's flight, the informant might reasonably have been taken to have been requiring the respondent either to undergo a preliminary breath test under s 53(1) or to provide a breath sample under s 55(2), (at the police car or at a police station, without having undergone a preliminary test). There was no specific mention of a preliminary breath test or of the fact that the [informant] was going to the police car to obtain a preliminary breath testing device in order to administer one. Nor had the respondent been stopped at a preliminary breath testing station whilst driving. Someone in his position might reasonably have concluded that it was a potentially incriminating evidentiary sample which was being required of him."

Williams J agreed with the magistrate that there was not reasonably sufficient evidence to establish the requirement under s 49(1)(c) in the absence of the word "preliminary" in the informant's requirement in all the circumstances.

No need to prove subjective understanding of requirement to accompany

In *DPP v Serbest* [2012] VSC 35 Robson J allowed a Crown appeal against dismissal by a Magistrate of a charge of refusing to accompany police for a breath test under s 49(1)(e) of the Act. The extract of the relevant conversation between the police and the motorist is set out at [4]. The police took possession of the accused's licence following the initial road side interception and conversation and returned to their car. Then there was further conversation between the police and the accused relating to whether his licence was suspended. It was later shown that his licence was *not* suspended. The accused's refusal to attend the police station for further testing hinged on the fact that he was told that, because of his suspension, he was not allowed to have any alcohol in his system. A police officer gave evidence, however, that he believed the offence of refusing to accompany to the station was completed at the time the police returned to their vehicle. The second conversation, at the window of the police vehicle, was *after* the offence had been committed. His evidence was: "... The decision was made by the accused not to attend so the offence was complete."

Robson J inferred that the magistrate believed that the police were arguing that, although the accused had a conversation with them in which it appears that he refused to attend the station because they erroneously believed him to have a suspended licence, this conversation was not relevant to laying the charge, and the offence was complete (that is, he had refused to accompany) before the second conversation occurred.

The motorist gave evidence as to his belief arising from the conversation with police and requirement to accompany following a PBT where the police officer said, amongst other things, "The test indicates your breath contains alcohol." The evidence (set out in paragraph [9]) he gave included the following: "They gave me a choice, it's up to you. I

didn't think I had to do it if I didn't blow over. I asked if I have to I'll go, I thought it was relating to my licence suspension."

Robson J held that the accused motorist was not confused as to the necessary elements of the offence. That is,

- (1) police made a request that he accompany them;
- (2) the reason for the accompaniment was for a breath test; and
- (3) his refusal to comply constituted an offence.

Robson J held that the accused's subjective state of mind of was not relevant to the offence with which he was charged. The accused's response to the officer making the requirement indicated that he was aware that he had been requested to accompany the police officer for a breath test and it was an offence if he refused to comply.

In an earlier case of at the Court of Appeal of *Hrysikos v Mansfield* (2002) 5 VR 485; [2002] VSC 35 Ormiston JA had stated in that unsuccessful Crown appeal against a Supreme Court judge's allowing of a motorist's appeal against conviction for refusing to remain for a breath test under s 49(1)(e) (where the motorist walked out of a booze bus to smoke a cigarette over protest of the police who had required a breath test and was required to wait a few minutes for the instrument to be ready), at paragraph [3] "The word "refuses" must be taken to carry with it an element of mental intent, albeit judged objectively for the purposes of an offence such as the present."

No requirement to inform of PBT result

In *DPP v Blango* [2012] VSC 383 Macauley J heard that a motorist wanted to see the reading of the preliminary breath test device upon which the requirement to accompany was predicated prior to his accompanying the police. His Honour allowed a Crown appeal against a Magistrate's dismissal of s 49(1)(e) charge of refusing to accompany for a breath test. The motorist stated, amongst other things, "I will go with you when you tell me the reading". The police officer refused to tell the motorist the reading and repeatedly told him that he would lose his licence for two years if he refused to accompany the police officer. The magistrate was not satisfied that the motorist had the mental element of refusing.

Macauley J held at [16] and [17] "Section 49(1)(e) of the Act does not admit any conditions to compliance with a s 55(1) requirement. And the law is clear that police are not obliged to show, and in fact may be unwise to show, the result of a preliminary breath test to driver... Yet the magistrate seemed to conclude there was an alternative inference available on the facts, consistent with innocence - that is consistent with Mr Blango not refusing to comply with the requirement. Her Honour formulated that alternative inference as being that Mr Blango was being 'argumentative with the police', mistakenly

‘asserting a right’ and ‘he wanted to see the [preliminary breath test] reading’. ... such a position cannot reasonably be seen to be consistent with innocence at all: it is entirely inconsistent with lawful compliance and consistent only with refusal.” He held at [22] “...there was only one inference reasonably open on the facts as found, namely, that Mr Blango had refused to comply...”

Refusal must be conscious and voluntary

In *Dover v Doyle* (2012) 60 MVR 261; [2012] VSC 117 Bell J heard that a County Court Appeal Judge was told that medical evidence suggested that the motorist’s refusal at the hospital to allow a doctor to take blood may have been due to a severe head injury when the motorist fell out of a car when driving. The County Court Judge found it unnecessary to go into the medical evidence because he decided that for this particular type of refusal offence, under s 56(2) of the Act, the act of refusal did not need to be conscious and voluntary.

Bell J, however, allowed that motorist’s judicial review of the County Court Judge’s decision to convict on a charge under s 56(2) of the Act of refusing to allow a doctor to take a blood sample. Bell J held that whilst a refusal to allow a blood sample is a strict liability offence, such a refusal must be committed consciously and voluntarily and the County Court Appeal Judge had erred on the face of the record. In *DPP v Dover and the County Court* [2013] VSCA 233 the Crown appeal against Bell J’s decision failed at the Court of Appeal.

Advice that only medical practitioner/health professional to take blood

In *DPP v Novakovic* (2012) 62 MVR 94; [2012] VSC 397 the Supreme Court heard that a motorist had twice given two insufficient samples into a breath analyzing instrument, and was then required to allow a blood sample. The police did not explain that the blood test was to be conducted by a registered medical practitioner (hence possibly giving the driver the impression that the police may have been involved in drawing of the blood).

Williams J dismissed the Crown appeal against a Magistrate’s dismissal of a charge under s 49(1)(e) of refusing to allow a sample of blood to be taken pursuant to a requirement under s 55(9A), holding that the police must communicate to the person from whom the blood sample was required the essential fact that the person is only required pursuant to a requirement under s 55(9A) to allow a registered medical practitioner or an approved health professional to take the blood sample.

No requirement to again inform requirement to remain 3 hours

Also in *DPP v Novakovic* Williams J, although ultimately dismissing the Crown appeal against dismissal of a s 49(1)(e) charge of refusing to allow a blood sample following a s 55(9A) requirement (because the police never told the motorist he was required to allow a registered medical practitioner or approved health professional to take the blood), actually upheld that part of the Crown appeal dealing with informing the motorist of the temporal limitation of the maximum time to remain. The motorist, when intercepted by police, underwent a PBT and was required to accompany them to the Police Station and to remain there until he had received a certificate of analysis or for a period of “three hours” whichever was sooner. At the station, he was required to undergo a breath test pursuant to s 55(1) but provided an ‘insufficient sample’. He was then required to undergo a further breath test pursuant to s 55(2A) but again provided an ‘insufficient sample’. The informant then required the motorist to undergo a blood test pursuant to s 55(9A). The informant did not *then* mention the three hour temporal limitation for the conduct of such blood test. The motorist refused to allow a sample of blood to be taken and was charged with refusing to allow a sample of blood to be taken, contrary to s 49(1)(e).

After considering recent Supreme Court decisions Williams J held that, in respect of a blood sample requirement under s 55(9A), the police officer was not required to advise the person of the three hour temporal limitation during which the person may be required to remain for allowing the blood sample to be taken - the police officer had already advised of the three hour limit at the time of the requirement to accompany.

Police protocols on blood

Following decisions adverse to the Crown at the Court of Appeal in *DPP v Moore* and *Terry v Johnson* above (relating to the unfairness discretion to exclude breath analysis readings if the motorist was dissuaded by police from requesting blood following a breath test reading revealing excess blood alcohol concentration) police pro-forma drink driving note forms (often used by police involved in interviews relating to drink driving enforcement) have a section towards the end of them for inclusion of details of any discussion about blood sampling.

It is now also not uncommon for some breath analyzing instrument operators, particularly those police attached to the Road Policing Traffic Drug and Alcohol Section and the Highway Patrol, to tape-record conversations with motorists at the relevant times when the topic of blood sampling may arise. Conversation about blood can occur at police request following a failed breath test (under s 55(9A)), or at the motorist’s request following a breath test reading of excess blood alcohol concentration (under s 55(10) where the motorist has a statutory right to request a blood test following a breath test) in order for there to be a corroborated or more accurate version of conversation ensuing for use in a subsequent contested hearing.

In very recent years, it seems that many police are being trained in, or have become aware of, the importance of avoiding any perceived attempt to dissuade a motorist (even benevolently) from obtaining blood should the motorist request a blood test under s 55(10) in an attempt to dispute (through a blood test which possibly might reveal a potential a lower blood alcohol reading) the result of the breath analyzing instrument test.

Defective pleading of refusal charges

In *DPP v Kypri* (2010) 57 MVR 387; [2010] VSC 400 Pagone J dismissed a Crown appeal against a Magistrate's decision dismissing a charge under s 49(1)(e) of refusing to accompany for a breath test. The charge was worded:

“The defendant at Doncaster on 27 November 2005 having been required to furnish a sample of breath pursuant to section 55 of the Road safety [sic] Act 1986 and for that purpose a requirement was made for him to accompany a member of the police force to a police station did refuse to comply with such requirement to accompany the member of the police force prior to three hours since the driving of a motor vehicle.”

Pagone J held at para [5] that “...s 49(1)(e) refers to separate offences...the charge averred a failure to comply with a requirement “to accompany a member” of the police force...but it did not identify which of the possible requirements under s 55 had been invoked and not complied with. Each of ss 55(1) and (2) expressly contemplates a requirement that a person accompany a member of the police force but do so in different circumstances. Section 55(9A) also permits the imposition of a requirement in the context of an earlier requirement... the learned Magistrate cannot be said to have erred in the conclusion that the charge had failed to included essential elements...a reading of the charge would not identify which of the many potential obligations to accompany...which s 55 permitted had not been complied with...”

Although no amendment application was made at the Magistrates' Court hearing, the Crown submitted in its appeal that an amendment should have been permitted. However, Pagone J held at [7] “... I do not think that the amendment which is sought could fairly be described as clarifying something which is otherwise disclosed in the formulation of the charge. An amendment to the charge be referring to subsection 55(1) would, rather, be a selection of one of a number of competing possibilities which the charge in its present form equally permits. Accordingly I would not allow the amendment even if it had been properly engaged...”

A very large number of refusal charges were adjourned pending the outcome of this decision and further adjourned pending another Crown appeal to the Court of Appeal.

However, in *DPP v Kypri* [2011] VSCA 257, the Court of Appeal reversed Pagone J's decision, allowing the further Crown Appeal. Whilst Ashley, Nettle and Tate JJA found

that the s 49(1)(e) refusal to accompany charge was defective in omitting the essential ingredient of the sub-section following “section 55” they held that the Magistrate ought to have of his own motion considered whether to amend the charge notwithstanding there was no amendment application by the police prosecutor before him and notwithstanding the 12 month limitation period had expired by the time of the contested hearing before the Magistrate. Nettle JA set out guidelines for the courts to follow in determining whether to exercise the discretion in favour of amendment which are here set out.

“48 The magistrate having embarked on a consideration of whether the defect in the charge in this case should have been amended, as he was right to do, I consider that the questions which the magistrate needed to decide were as follows:

a) Whether, before the expiration of the limitation period, the police brief was supplied to the accused or his representatives and whether it made clear that the case alleged against the accused was one of failing to comply with a requirement to accompany the informant to a place for the purposes of a breath test, which requirement was made because the respondent had undergone a preliminary breath test and in the opinion of the informant it indicated that the respondent’s breath contained alcohol;

b) If so, whether the accused was able to point to anything which showed that he could not reasonably have been understood that the case alleged against him was one of failing to comply with a requirement to accompany the informant to a place for the purposes of a breath test, which requirement was made because the respondent had undergone a preliminary breath test and in the opinion of the informant it indicated that the respondent’s breath contained alcohol; and

c) If not, whether there was any reason, in those circumstances, which would render it unjust to allow the charge to be amended so as to make specific reference to s 55(1) (and thereby to make the form of the charge accord to the case which the accused had always understood was alleged against him)?

49...the magistrate can hardly be criticized for failing to adopt that course. Hitherto, there has not been any guidance on the point. But now that the point has arisen and been decided, in my view that is what needs to be done.”

The matter was remitted to the learned Magistrate to determine whether, in light of these questions, to amend the charge to include the essential ingredient otherwise missing.

This was landmark decision on pleadings defect arguments, was relevant not just for s 49(1)(e) refusal offences but also in relation to all summary charges where is it alleged that a fundamental element of the offence was missing from the pleaded charge and is thereby defective warranting it be struck out with the consequence that the prosecution will be unable to reissue as the limitation period to commence a summary criminal proceeding had expired. The Court of Appeal stated that the Magistrate must then proactively consider whether to amend the charge, even if the prosecutor makes no such application, and even if the limitation period has expired, and must follow the guidelines adumbrated by the Court of Appeal in determining how to exercise that discretion. It

was also be likely to have encouraged police to ensure that the police brief itself adequately disclosed all elements of the offence charge and be able to prove that it served upon the accused prior to the 12 month limitation period expiring in order to defeat potential arguments that the pleaded charge may have omitted an essential ingredient of the offence.

However, it appears that the effect of the Court of Appeal decision in *Kypri* on amendment when if the police brief has been received containing the elements within 12 months was abrogated by the new *Criminal Procedure Act 2009 (Vic)* s 8 which seems to reflect the common law in Victoria prior to the *Kypri* decision, this new provision relevantly providing,

“(3) An amendment of a charge-sheet that has the effect of charging a new offence cannot be made after the expiry of the period, if any, within which a proceeding for the offence may be commenced.

(4) If a limitation period applies to the offence charged in the charge-sheet, the charge-sheet may be amended after the expiry of the limitation period if-

(a) the charge-sheet before the amendment sufficiently disclosed the nature of the offence; and

(b) the amendment does not amount to the commencement of a proceeding for a new offence; and

(c) the amendment will not cause injustice to the accused.”

Validity of requirements to accompany for breath test

In *DPP v Piscopo* [2011] VSCA 275 the Court of Appeal (comprising Weinberg, Ashley and Tate JJA) reversed Kroyou J’s decision in *DPP v Piscopo* [2010] VSC 498 (who had dismissed a Crown appeal against a magistrate’s dismissal of a s 49(1)(e) charge of refusing to accompany for a breath test), allowed the Crown appeal, and remitted the matter to the Magistrate. At [46] Ashley JA, with whom Weinberg and Tate JJA agreed, stated that in relation to each of the competing interpretations of s 55(1) is grammatically available, however, the Crown’s interpretation is to be preferred for the nine reasons His Honour sets out in lengthy form from [47] to [69] of the judgment. In short, it was found that Kroyou J erred in concluding that the power to require a person to accompany and remain in s 55 (1) is a statement of two component parts of a single requirement rather than a statement of two discrete powers and that the making of a requirement to accompany does not require a statement by the police of the maximum 3 hour period - the motorist did not have to be informed of the temporal limitation of “3 hours” when required to accompany police for a breath test.

The many matters which were adjourned pending the outcome of the Court of Appeal case of *DPP v Piscopo*, in some cases for years, were then re-listed for hearing. Some of

those motorists instructed their legal practitioners to enter guilty pleas and others sought to contest the charge on other arguable grounds.

Validity of requirements to accompany for blood test

In *DPP v Rukandin* [2011] VSCA 276 the Court of Appeal (comprising Weinberg, Ashley and Tate JJA) reversed Kryou J's decision in *DPP v Rukandin* [2010] VSC 499 (who had dismissed a Crown appeal following a magistrate's dismissal of a s 49(1)(e) charge of refusing to accompany for a blood test), allowed the Crown appeal, and remitted the matter to the Magistrate. At [17] Ashley JA, with whom Weinberg and Tate JJA agreed, stated that for the reasons His Honour gave in *DPP v Piscopo* the Court of Appeal found that Kryou J erred in concluding that the power to require a person to accompany and remain conferred by s 55(9A) is a statement of two component parts of a single requirement rather than a statement of two discrete powers and that the making of a requirement to accompany for a blood test does not require a statement of what Ashley JA called "the 3 hour period".

Requirements to remain for blood test

It is important to note the obiter dictum of Ashley JA at the end of [17] of *DPP v Rukandin* "...although the evidentiary provisions respecting the blood test regime somewhat differ from those relating to the regime applicable to breath and other tests, I consider that the power to make a requirement to remain does entail stating both the purpose and the temporal limit" [emphasis added]. This statement seems to approve of what Forrest J held in *Uren v Neale* below.

As with *DPP v Piscopo*, the many matters which were adjourned pending the outcome of the Court of Appeal case of *DPP v Rukandin* were re-listed for hearing before the Magistrates' Court for guilty pleas or for contest on other arguable grounds.

Time limit for requirement to remain for blood test

In *Uren v Neale* (2009) 53 MVR 57; [2009] VSC 267 Forrest J allowed the portion of a motorist's appeal against convictions for three refusal offences relating to the specific ground impugning the conviction for refusing to remain at the police station for a blood test contrary to s 49(1)(e) of the Act. In ([125] to [128]) he stated that the motorist was not given reasonably sufficient information to know what was required of him. The maximum duration of the statutory requirement, a period of three hours after driving, was not conveyed to him. At ([126]) he stated "...the Magistrate misinterpreted s 55(9A)... What...[the motorist] was not told was the most basic proposition required by the section, namely that he did not have to stay once the three hour period after the subject driving had expired" The requirement to remain...was tantamount to an unlawful open ended

requirement to remain interminably because the police never told him he was only required to remain for up to three hours.

Proof of approved breath analysing instrument

In *Uren v Neale* above Forrest J, (at [88]) dismissing the portion of an appeal against conviction relating to a charge of refusing to undergo a breath test contrary to s 49(1)(e), stating that it was not necessary for the prosecution to establish as an element of that charge that the breath analysing instrument was approved. In any event he found (at [90] to [91]) that “...there was before the Magistrate evidence that the breathalyser was an approved instrument and, absent challenge ...was capable of satisfying a requirement (if it existed) of proof of this...”

In dismissing that portion of the appeal against conviction on a charge of refusing to allow a blood sample contrary to s 49(1)(e), he stated (at[98],[99]) that it was not necessary for the prosecution to establish as an element of that charge that the breath analysing instrument was approved.

Refusal of unreasonable police requirements

In *Mastwyk v DPP* (2010) 27 MVR 92; [2010] VSCA 111; *DPP v Foot* (2010) 200 A Crim R 558; [2010] VSCA 112 the Court of Appeal (comprising Maxwell P, Redlich and Nettle JJA) delivered judgments, some eleven months after actually hearing the appeals, on an appeal against Kyrou J’s decision to allow a Crown appeal in *DPP v Mastwyk* [2008] 192 relating to reasonableness of police requirements to accompany for a breath test in a manner imprisoning a motorist, and on a Crown appeal in *DPP v Foot* concerning similar issues. A very large number of contested drink driving and refusal charges were adjourned, in some cases for years, pending the outcome of these decisions. *Mastwyk* originated from a Magistrate’s dismissal of a refuse to accompany charge under s 49(1)(e) of the Act, the alleged offence occurring in 2005. *Foot* originated from a magistrate’s dismissal of a s 49(1)(f) charge of exceeding the prescribed alcohol concentration.

In *Mastwyk v DPP* the appeal was dismissed but for differing reasons among the judges. Maxwell P (at[32]), in separate judgment, found that it was not correct to read s 55(1) as subject to an implied requirement that the exercise of police power to require accompaniment for a breath test must be objectively reasonable at the time it was made. He found that ‘*Wednesbury* unreasonableness’ (as introduced in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) needed to be invoked concerning exercise of the s 55(1) power and every provision of the Act conferring power on an authorized person to require another to do or not do a particular thing. He stated (at [17]) that that ground is difficult to establish and, within the outer limits of validity defined by *Wednesbury* unreasonableness, it is for the decision-maker alone to determine

what is reasonable— it is not for a court engaged in judicial review to decide whether it was reasonable.

However, both Redlich and Nettle JJA, delivering separate judgments, disagreed with Maxwell P on his holding that *Wednesbury* unreasonableness applied. Nettle JA (at [46]) held “if an accused defends a prosecution under s 49(1)(e)... on the basis that the means of travel by which he or she was directed to accompany the police officer were unreasonable, the prosecution will fail unless the Crown establishes that the stipulated means of travel were objectively reasonable”. Redlich JA held (at [54]) “... where a driver does not comply with a requirement to accompany...because the proposed manner of compliance...is objectively unreasonable, the prosecution will fail to establish the element of ‘refusal’...”

Redlich JA stated (at [81]) “The choice which must be presented to the driver, is between compliance and committing an offence under s 49(1)(e)”; and (at [82]) “...where the driver is properly informed as to their choice and is prepared to accompany the officer by the means proposed, the driver will not by entering the rear of the divisional van be imprisoned. Hence an inquiry as to whether the proposed course would constitute imprisonment misconceives the issue. The true question is whether it is, in all the circumstances, objectively reasonable to require the driver to travel by that means...”

Kyrou J had found error in dismissing the refusal charge because the Magistrate reasoned that an accompaniment in the rear compartment of the police divisional van was an imprisonment and invalid as a result. The correct test, according to Kyrou J and Redlich JJA, was whether the Crown could establish that that means of accompaniment was objectively reasonable after the motorist is presented with the choice, to accompany or not by the particular means offered.

It seems that if the Crown cannot establish that it was objectively reasonable to require the motorist to accompany by being transported in the back compartment of the divisional van then the refusal to accompany charge should be dismissed.

CONCLUSION

The above selection of cases from the Victorian Supreme Court and Court of Appeal over the last several years gives some insight into the many courses that litigation has taken arising out of the prosecution of motorists in that state for offences relating to drink driving and the causes behind it.

Constantly changing laws which increase penalties and protract the consequences of offending, fetter the sentencing discretion and expand the range of offences, in addition to the complexity of it all and the difficulty in defending those types of charges in conventional ways (due to the prevalence of numerous reverse onus and conclusive proof

and facilitative provisions), leads to novel and innovative, even adventurous, defences being run and a never ending source of appellate proceedings at the state's highest courts.

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