**52/83**

**SUPREME COURT OF VICTORIA**

# *MATTHEWS v VAN DE MAAT*

**Gobbo J**

**28 September 1983**

**MOTOR TRAFFIC – DRINK/DRIVING – BLOOD/ALCOHOL EXCEEDING .05% – CONSUMPTION OF ALCOHOL AFTER DRIVING BUT BEFORE TEST – PRESUMPTION: *MOTOR CAR ACT* 1958, S80G.**

V. was the driver of a motor car which was involved in an accident. After the accident V. ran to his brother's home where he was given some brandy "to settle his nerves". When V. was subsequently tested, he had a blood/alcohol concentration of .170%. At the hearing, V. said that he had consumed some 7-8 glasses of beer prior to the accident. At the end of the case, it was submitted that the charge should fail because of the post-accident consumption of alcohol. The magistrate agreed, and he dismissed the charge. Upon order nisi to review—

**HELD: Order nisi absolute.**
**1. Once the presumption created by s80G of the *Motor Car Act* took effect, it was for the defendant to prove by admissible evidence, that his blood/alcohol level at the time of driving was lower by some relevant amount.**

**2. It was not open to the court to make any findings as to the effect of post-accident consumption of alcoholic liquor without the assistance of expert evidence.**
***Holdsworth v Fox* [1974] VicRp 27; (1974) VR 225, applied.**

**GOBBO J:** *[After setting out the facts and the grounds of the order nisi, His Honour continued]:* … **[3]** In this case a certificate had been admitted into evidence pursuant to s80F of the *Motor Car Act*, which makes the certificate *prima facie* evidence of its contents. There was no challenge to the admission of the certificate, which recited that at 2.16 am on the 26th March 1982 the breath analysing instrument indicated that the quantity of alcohol present in the blood of the defendant was 0.170 per centum. It was accordingly submitted on behalf of the applicant on **[4]** the return of this Order Nisi that, in view of the Magistrate's finding that the test was conducted within the necessary two hours, it was established that for the purposes of s80G, .170 per cent of alcohol was present in the blood of the defendant within two hours after the alleged offence of driving a motor car at Box Hill.

It was contended that s80G created a presumption that not less than .170 per cent of alcohol was present at the time of which the alleged offence was said to have been committed. It was argued that the contrary was not proved within the meaning of s80G by mere evidence that some quantity of brandy had been consumed between the time of driving at the time of the breath analysis test.

Reliance was placed in particular upon the decision in *Holdsworth v Fox* [1974] VicRp 27; (1974) VR 225. In that case the defendant was convicted of driving a motor car whilst the percentage of alcohol in his blood was in excess of .05 per cent and had sought to review the Magistrate's decision by reason of the Magistrate's finding that the defendant had consumed a small can of beer after he stopped driving but before he had been tested. It was there submitted on review on behalf of the defendant that on its proper construction s80G meant that the presumption there specified applied until it was proved that the percentage of alcohol present at the time of the test was higher than at the time of the alleged offence. Once it was so established, it was said, the otherwise existing presumption ceased to operate and the matter then had to be decided on the whole of the evidence.

In *Holdsworth v Fox*, the construction of s80G was closely considered. Menhennitt J expressed this view, with which I agree, at p229:

**[5]** "In other words, in my view, once that it is proved that within two hours of driving the percentage

> of alcohol present in the blood of a person was a certain figure, the onus is then thrown on that person to prove that at the time of the driving the percentage of alcohol present in his blood was a different percentage, being either some other precise percentage or, at the very least, a percentage lower than is significant for any relevant purpose."

In the present case the evidence plainly established the percentage of alcohol present in the defendant's blood at the time of the test and that percentage was presumed present at the time of the driving until the defendant proved the contrary, either by proof of some other precise percentage or by proof, that it was less than was significant for any relevant purpose. Thus the defendant might prove that it was less than .05 per cent or he might prove that it was less by some amount that brought the level into a lower category of penalty. It would not suffice to displace the presumption simply to prove that the level was probably less at the time of driving than it was at the time of the test.

How then is the defendant to prove that to a relevant extent the percentage of alcohol was less? In *Holdsworth's case* it was indicated that that should be done by a doctor or some other expert. I do not read His Honour as stating any rule that expert evidence was necessary in all cases. But in the normal course that would be true, as a Court could not make findings as to the likely effects of the consumption of liquor without expert evidence. A Court may reach certain conclusions as to the effect of consumption of liquor either by non-expert evidence or even by taking judicial notice of notorious facts, but neither method in my view would normally suffice to provide contrary proof for the purposes of s80G in the present type of case. Here the Court, for **[6]** example, had no evidence of the effect of consumption of varying quantities of brandy and could not be expected to attempt to make findings without the assistance of admissible evidence, that is to say expert evidence.

The respondent sought to uphold the dismissal in two main ways. It was argued first of all that the learned Stipendiary Magistrate had considered that any onus on the defendant was discharged and had found on the evidence that it was more probable than not that the blood alcohol level was no greater than .05 per cent at the time of the alleged offence. In particular, it was argued that the Magistrate was entitled to find that the defendant had only consumed seven – eight glasses of beer in the period of over five hours before the accident and that he consumed a quantity of brandy amounting to a half bottle of brandy between the time of the accident to a half bottle of brandy between the time of the accident and the breath analysis test. It was argued that even though the Stipendiary Magistrate made no such explicit findings, it was open to him to do so and in view of the dismissal the decision should be so read so as to make every reasonable presumption in favour of the decision. Reliance was placed on the decision in *Saxe v Kellett* [1970] VicRp 79; (1970) VR 600 and the unreported decision of Beach J in *Vaughan v Beckmann* 31st July 1979.

In the first case, there was a test that showed .245 per cent but also on express finding of the justices that they accepted that the defendant had only consumed a maximum of four beers before the alleged offence. It was held on review that the justices were entitled in effect not to accept the certificate in view of all the other evidence. In my view the decision simply illustrates how a Court may in certain circumstances decline to go beyond giving *prima facie* effect to the certificate. **[7]** In effect the justices had a doubt as to the accuracy of the machine. The decision does not assist the respondent here.

As to *Vaughan v Beckmann*, though the certificate showed a reading of .250 per cent, the Magistrate there found that the defendant had only consumed five beers and that his demeanour was that of a sober man. Nevertheless, he was convicted of the offence. There was considerable dispute as to the accuracy of the actual reading and reference was sought to be made to a Government publication with wide circulation that stated that "five standard drinks will take you to about .05 per cent, more than one drink an hour after that will take you over the legal limit". His Honour stated:

> "In my opinion it is now a matter of notoriety that the consumption of approximately five 7-oz. glasses of beer could not produce a percentage of alcohol in a person's blood as high as .250 or anything like that figure. I consider that that fact is now so generally known as to give rise to the presumption that all persons are aware of it. Since the introduction of the legislation under discussion the authorities in this State have constantly been at pains to bring home to the public the fact that the consumption of five standard alcoholic drinks will produce a blood content of about .05 per cent."

His Honour went on to hold that once the Magistrate accepted the defendant's evidence he had no alternative but to reject the evidence as to the breathalyser reading. Again that decision does not assist the respondent. In the present case there was no dispute as to the accuracy of the test reading. It was argued on review that if the Magistrate was able to take judicial notice as to the effect of five standard glasses of beer then it was open to him to apply this to a possible finding of consumption of seven - eight beers and thereby reach a view that the level at the **[8]** time of driving did not exceed .05 per cent. In my view such a process was not open to the Magistrate in the absence of admissible evidence explaining the relationship in the circumstances before the Court of the effect of the consumption of eight beers, the last reading and the intervening consumption of alcoholic liquor.

In any event, the Magistrate in fact made no such finding that the defendant consumed only seven - eight beers. The second argument of upholding the dismissal was that it was open to the Magistrate to doubt the accuracy of the test reading. This was based on the view that if the Stipendiary Magistrate accepted the evidence as to consumption of seven - eight beers and if he accepted the evidence of consumption of a limited amount of brandy, he must have doubted the accuracy of the reading and so s80G could not operate. Here again, it was sought to use the notoriety of the effect of consumption of five beers to reach a view as to the effect of a possible finding of consumption of seven - eight beers.

In my view this argument fails at the threshold because of the absence of any challenge as to the accuracy of the reading and in view of the absence of any such finding. Furthermore, it is not open to a Court to expand the effect of what may be notorious knowledge by its own unaided intuition, there being no evidence at all as to the effect that eight beers could have in relation to this defendant in the present circumstances. Once the presumption created by s80G of the *Motor Car Act* took effect, it was for the defendant to prove by admissible evidence, whether in the prosecution's case or **[9]** his own, that the blood alcohol level at the time of driving was lower by some relevant amount.

If all that occurred was that the Stipendiary Magistrate felt that some unknown increase in the blood alcohol level was caused by subsequent drink between driving and testing, then in my view he was obliged to give effect to the reading. In the present case, at most the learned Stipendiary Magistrate appears to have found a doubt on the substantive offence because of his finding that some brandy had been consumed and his uncertainty as to the effect of that intervening consumption. It follows that Ground 2 of the Order Nisi is made out and the Order Nisi is made absolute. The case should be remitted to the Magistrates' Court to be dealt with in accordance with these reasons for judgment.

I note finally one particular argument of the respondent. It was argued that, because of the inconvenience and expense, the Court should not place any burden on the defendant to provide expert evidence to establish the effect of intervening consumption of alcohol. I am unable to accept this argument. A defendant who, having previously consumed some alcoholic liquor, has an accident, and then consumes some further alcoholic liquor does not have much basis for evoking concern for possible expense to him arising out of a self-imposed difficulty. Community attitudes have greatly hardened in recent years against driving whilst affected by liquor and a defendant who in the particular circumstances described decides to take the perilous course of further consumption of liquor should not be relieved from the limited inconvenience of finding some appropriate evidence as to the effect of such further consumption.

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