39/88

SUPREME COURT OF VICTORIA

BAKKER and ORS v BOYLE and ORS (sub nom Miles v Gilmore; Ladgrove v Wain; Bakker v Boyle)

O'Bryan J

31 May, 17 June 1988 — [1989] VicRp 39; [1989] VR 413; (1988) 9 MVR 149

MOTOR VEHICLES – DRINK/DRIVING – EXCEEDING PRESCRIBED CONCENTRATION OF ALCOHOL – CERTIFICATE OF BREATH ANALYSING INSTRUMENT OPERATOR ADMITTED INTO EVIDENCE – "CONCLUSIVE PROOF" – WHETHER EVIDENCE THAT BREATH ANALYSING INSTRUMENT CAN OVER-ESTIMATE ADMISSIBLE: *ROAD SAFETY ACT* 1986, SS47, 49(1), 50, 58(2), 78.

1. The policy of Parliament in Part 5 of the *Road Safety Act* 1986 is to make the result of the analysis as recorded or shown by the breath analysing instrument unassailable by the person charged, unless that person can prove that on that occasion, the instrument was not in proper working order or properly operated.

2. Accordingly, a court was in error in admitting evidence tendered to show that a breath analysing instrument can overestimate the concentration of alcohol in a person's blood.
***McDonald v Bell* (MC 62/1987); and**
***Giankos v Ellison* (1988) 7 MVR 104; (MC 27/1988), followed.**

O'BRYAN J: *[After setting out the facts briefly, the grounds of the orders nisi and provisions of relevant Acts, His Honour continued]:* … **[13]** An important change in the provision for evidence of breath tests has been introduced in s58(2). Section 80F(3) in the 1958 Act provided:

> "A document purporting to be a copy of any certificate given in accordance with the provisions of sub-section (2) and purporting to be signed by a person authorised by the Chief Commissioner of Police to operate breath analysing instruments shall be *prima facie* evidence in any proceedings referred to in sub-section (1) of the facts and matters stated therein unless the accused person gives notice in writing to the informant a reasonable time in the circumstances before the hearing that he requires the person giving the certificate to be called as a witness." (The underlining is mine).

[14] The words underlined may be contrasted with the words "and is conclusive proof of the facts and matters contained in it" used in s58(2). Whereas the document tendered pursuant to s80F(3) provided "*prima facie*" evidence, the document tendered pursuant to s58(2) is "conclusive proof" of the facts and matters contained in it. Evidence may be of varying degrees of cogency. At one level the facts proved in evidence may enable the tribunal of fact to act upon them in the absence of further evidence. In this sense the evidence may be said to be "*prima facie*" because it is not conclusive. At another level facts may be proved conclusively, such as uncontradicted evidence which is reasonable and inherently probable. Cf. *Hardy v Gillette* [1976] VicRp 36; (1976) VR 392; *Read v Nerey Nominees Ltd* [1979] VicRp 6; (1979) VR 47.

A further observation should be made. Whereas it is not uncommon in legislation (e.g. *Evidence Act* 1958) for Parliament to provide that "*prima facie*" evidence of some fact or matter exists if a document is produced to the tribunal of fact, I know of no legislation in Victoria, save s58(2) in the *Road Safety Act* 1986 when a document shall be "conclusive proof" of the facts and matters contained in it. The ordinary meaning of "conclusive" is: "serving to settle or decide a question; decisive; convincing". (*The Macquarie Dictionary*). It is common ground that none of the defendants in the Court below sought to defend the charge on the ground that the breath analysing instrument used was not on the occasion in proper working order or properly operated. **[15]** It is also common ground that in the Court below the evidence of the expert witnesses was not tendered as to the effect of the consumption of alcohol on the defendant for the purpose of establishing a defence to the charge.

Mr O'Bryan of counsel for the applicants submitted that the certificate in the prescribed

form of the concentration of alcohol indicated by the analysis to be present in each defendant's blood, tendered pursuant to s58(2), was "conclusive proof of the facts and matters contained in it" and precluded evidence being called for the defence to contradict the level of concentration of alcohol found to be recorded or shown by the breath analysing instrument. The *Road Safety Act* 1986 was enacted by the Parliament of Victoria in late 1986, some months after the Full Court delivered judgment in *Lamb v Morrow* [1986] VicRp 61; [1986] VR 623; (1986) 3 MVR 175, to which I shall refer shortly. In the Legislative Assembly the Minister for Transport in a second reading speech on 11th September 1986 said:

> "The Bill also contains provisions designed to prevent technical defences against drink-driving charges. In a recent decision, the Victorian Supreme Court decided that it was permissible for expert evidence to be given that breathalysers could give incorrect readings. In an interview given following that decision the Premier referred to 'smart esoteric points of law that lead to a diminution in the capacity of the police to see that our roads are free of motorists who are affected by drink'. He said that "If it were necessary to legislate to tidy this up, we would do it".
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> In other States, the relevant legislation provides for breathalysers in general to be taken to give accurate readings and for readings from a breathalyser not to be changed by subsequent evidence. It is essential that Victorian drink-driving **[16]** legislation follows the approach taken in other States. Following consultation with various organisations including the police, the Road Trauma Committee, the Australian Medical Association, the Victorian Hospitals Association and the Law Institute of Victoria, the blood alcohol content offence will be expanded to include exceeding a prescribed reading on an approved breath analysis instrument.
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> The only grounds on which a breath analysis reading may be challenged will be that the particular instrument was operated improperly or was defective. Motorists will need to be aware that the offence is being over the legal limit at the time of being tested. Consequently, a motorist who drinks after being involved in an accident but before being tested cannot use this to subvert the possibility of a conviction as at present and runs the risk that the penalty may be substantially increased by a higher reading when tested. The seriousness of the offence of drink-driving is such that measures such as these are warranted."

In *Lamb's case* a defendant had elicited evidence that breathalysers in general do not always show accurately the percentage of alcohol in the blood. The evidence which was called and accepted in the Court below showed that the breathalyser reading had over-estimated the blood alcohol concentration shown by the instrument. The appellant, who was the informant in the Court below, submitted unsuccessfully that it was not open to a defendant to adduce evidence which negated the statutory presumption of the accuracy of breathalysers provided in s80F(1) of the *Motor Car Act*. The Court rejected this submission, holding that the accuracy of the reading may be challenged by evidence.

The Court observed, however, that "in a number of other jurisdictions legislation exists which, in one way or another, seeks to give conclusive effect to the results of **[17]** blood or breathalyser tests". It is necessary now to refer to two decisions referred to in *Lamb's case* which show a legislative scheme which effectively shuts out evidence of the type adduced in the present cases. After considering these decisions the policy of the 1986 Act must be considered.

In *Bartlett v Harrison* (1975) Qd R 325 the Full Court of Queensland considered provisions in the *Traffic Act* 1949-1975 (Q) akin to provisions in Part 5 of the *Road Safety Act*. By s16A(15)(e)(i), a certificate of an authorised breath analysing instrument operator is conclusive evidence of the concentration of alcohol in a person's blood at the time at which the analysis is carried out. By s16A15(e)(ii) it is open to a person to negative such evidence by proving, *inter alia*, that at the time of the operation of the breath analysing instrument it was defective. In the Court below evidence was adduced on behalf of the defendant from an expert witness to the effect that breath analysing instruments can produce an over estimate of .003%. This evidence was very similar to that given by Fabb and Young in the present cases.

The evidence was accepted in the Court below with the result that a lesser penalty was imposed by the Queensland Court than the legislation required had the Court accepted as conclusive the certificate as to the concentration of alcohol in the defendant's blood. Lucas J, in whose judgment the Chief Justice, Sir Mostyn Hangar, agreed, held:

> "that the legislative policy disclosed is that the reading indicated by an approved type of **[18]** instrument in proper working order and properly operated, is to be taken as establishing the concentration of alcohol in the blood for the purposes of s16 and 16A."

The evidence of the expert was ruled inadmissible because it was not adduced to establish that the instrument was defective. Williams J, in a separate judgment, considered and followed an unreported decision of a former Chief Justice of Tasmania which in turn followed decisions of English Courts based on similar legislation. His Honour said (at 335):

> "It seems to me that ... the certificate recording the result shown is one which, for the purposes of the sub-section, properly states the concentration of alcohol in the person's blood at the relevant time whatever in fact it may be. The Court is not concerned for these purposes with what the concentration may actually and exactly be but with what the authorized officer duly complying with the Act and Regulations properly records it to be."

In *Richardson v Fingleton* (1980) 24 SASR 511, the Full Court considered similar provisions in the *Road Traffic Act* 1961-1979 (SA). Section 47 of the Act provided in ss(1) that when the concentration of alcohol present in the blood is indicated by a breath analysing instrument operated by an authorised person "it shall be presumed, in the absence of proof to the contrary that the concentration of alcohol so indicated was present in the blood of the defendant etc." Sub-section (1a) provided that in any proceedings for an offence against the Act "no evidence shall be adduced in rebuttal of the presumption created by sub-section (1) ... except evidence of the concentration of alcohol in the blood of the defendant as indicated by analysis of a sample of his blood."

[19] In the Court below the Special Magistrate ruled inadmissible evidence of an expert witness designed to show the possibility of error in the breath analysing instrument. This ruling was upheld on appeal. At the conclusion of the evidence the defendant was convicted. It was contended that the evidence previously rejected was admissible for the purposes of determining whether or not the Court should exercise its powers under the *Offenders Probation Act*. (Similar to Part 9 *Penalties and Sentences Act*). The Court below received the evidence and dismissed the charge because of the possibility of error in the reading. The Full Court ruled the evidence was inadmissible in relation to penalty. Mitchell J said:

> "It is apparent that the legislature, while it may not have intended to exclude evidence that a particular breath analysis instrument was faulty, did intend to exclude evidence of the type tendered upon the hearing of the complaint in question."

There is great similarity now between the Victorian legislation and the legislation to which I have referred in the States of Queensland and South Australia. The intention of Parliament is clear to my mind and it matters not that the provisions in the Act under consideration here are draconian, if Parliament so intended them to be. The policy in Part 5 of the Act is to make the result of the analysis as recorded or shown by the breath analysing instrument unassailable by the person charged, unless the person charged should prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated. **[20]** The facts and matters contained in the copy document admissible in evidence by s58(2) which are conclusively proved are all the facts and matters certified in paragraphs one, two, three, four, five and six of the document. In paragraph four the authorised operator certifies that "the said instrument indicated that the quantity of alcohol present in the blood of the person providing the sample of breath for analysis at the time and place referred to (in paragraph two) was (so many) grams of alcohol per 100 millilitres of blood which, expressed as a percentage is (so many) per centum."

The views I have reached are supported, I consider, by s47 to which I referred earlier and by s49(7). Section 78 operates to increase the penalties for the offences specified by terminating the only method available to Magistrates of avoiding an imposition of the mandatory penalties prescribed by Parliament. *Bakker v Stewart* (*supra*). Once it is conclusively proved at the hearing that the result of the analysis as recorded or shown by the breath analysing instrument, in the case of a person previously convicted of an offence against paragraphs (a), (b), (f) or (g) of s49(1), was more than 0.05 grams per 100 millilitres of blood or in any other case was more than 0.10 grams per 100 millilitres of blood, the provisions of Part 9 of the *Penalties and Sentences Act* 1985 with respect to the adjournment of an information without proceeding to conviction do not apply. The conclusivity of the result of the analysis as recorded or **[21]** shown by the breath analysing instrument requires a Court to convict a person of an offence under s49(1)(a), (b), (f) or (g), if the result of the analysis as recorded or shown in the case of a first offender is more than 0.10 grams and in the case of a person previously convicted is more than .05. On convicting a person the Court must comply with ss(7) of s49 and cause to be entered in the records of the Court the

level of concentration of alcohol found present in the blood or recorded or shown by the breath analysing instrument or present in the sample of blood. The Court must also comply with s50 and proceed to cancel a driving licence and disqualify the offender for such time as the Court thinks fit, not being less than the prescribed period.

I was referred to two recent unreported decisions in this Court in which the *Road Safety Act*, Part 5 is considered. In *McDonald v Bell* (23/12/87) JH Phillips J considered a question of whether evidence may be received to reduce the result of the analysis as recorded or shown by a breath analysing instrument for the purpose of mitigating the penalty for an offence against s49(1)(f). In the Court below the defendant had been convicted and the evidence was received to mitigate the mandatory period of disqualification. His Honour, in holding that the evidence was not admissible said:

> "This statutory format (ss49 and 50) and the plain language used persuade me that it is the intention of Parliament that, in fixing penalty the Court is only to have regard, so far as the minimum period of disqualification is concerned, to the level of concentration **[22]** of alcohol found to be recorded or shown by the breath analysing instrument."

In *Giankos v Ellison* (1988) 7 MVR 104 (30/5/88) McDonald J upheld the decision of a Magistrate who excluded evidence as to the consumption of alcohol before and after an accident by a defendant who had been charged with an offence against s49(1)(f). His Honour followed the decision in *McDonald v Bell* and, in effect, upheld as conclusive the result of the analysis as recorded or shown on the breath analysing instrument.

These recent decisions confirm in my mind that the new legislation has significantly altered the law pronounced in *Lamb's case*. In each of the three cases the evidence of the expert tendered in the Court below was inadmissible inasmuch as it was tendered to show that a breath analysing instrument can over-estimate the concentration of alcohol in a person's blood and was wrongly admitted by the learned Magistrate. It follows that in this type of case the policy of the Parliament precludes evidence of the kind adduced in these cases on behalf of the respondent unless such evidence is tendered pursuant to s49(4) namely, to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated. In each case the grounds of the order nisi are made out. Each order nisi is made absolute with costs. The three matters must be returned to the Magistrates' Courts from whence they came to be dealt with in accordance with law. In the cases of Boyle and Wain the Court may not grant an adjournment instead of convicting the offender and on **[23]** conviction mandatory penalties must be imposed by the Court. In the case of Gilmore, as the concentration of alcohol indicated by the analysis was not more than 0.10 grams per 100 millilitres of blood different considerations will apply. However, it might be desirable that the information be re-heard before another Magistrate.
