25/08; [2008] VSC 123

SUPREME COURT OF VICTORIA

TERRY v JOHNSON and ANOR

Judd J

2 April, 8 May 2008

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER UNDERWENT BREATH TEST – INSTRUMENT MALFUNCTIONED AND FAILED TO PRINT THE CERTIFICATE AUTOMATICALLY – CERTIFICATE MANUALLY PRODUCED – READING 0.127% BAC – REQUEST BY DRIVER FOR SECOND TEST REFUSED BY OPERATOR – DRIVER INFORMED THAT HE COULD REQUEST A BLOOD TEST – DRIVER ALLEGEDLY TOLD BY OPERATOR THAT A BLOOD TEST COULD PRODUCE A HIGHER READING – NO BLOOD TEST TAKEN – DRIVER CHARGED AND SUBSEQUENTLY CONVICTED – APPEAL TO COUNTY COURT UNSUCCESSFUL – OPERATOR NOT CALLED AS A WITNESS IN EITHER COURT PROCEEDINGS – DECISION IN *DPP v MOORE* [2003] 6 VR 430 CONSIDERED – WHETHER DRIVER PREJUDICED BY NOT REQUESTING A BLOOD TEST – WHETHER BLOOD TEST WOULD HAVE ASSISTED DRIVER IN HIS DEFENCE – WHETHER ERROR DEMONSTRATED.

T. was intercepted whilst driving his motor vehicle and underwent a breath test. Before the results of the test were automatically printed from the instrument there was a mechanical problem and it became necessary for the instrument operator to manually produce a certificate which showed a reading of 0.127% BAC. T. claimed that he queried the malfunction with the operator and was told that he could request a blood test. T. said that the operator stated that the blood test results are "always higher". T. said that having a blood test would be "futile" and the operator effectively "talked him out of it". At the subsequent hearings, the certificate of the instrument was admitted into evidence, the operator was not called to give evidence and T. was convicted. Upon appeal against the order in the County Court—

HELD: Application to quash conviction dismissed with costs.
1. T. could have compelled the attendance of the operator by serving a notice within time under s58(2) of the *Road Safety Act* 1986 ('Act'). This notice must be given, in the absence of agreement or order of the court, not less than 28 days prior to the hearing. By giving such a notice within the prescribed time the defendant can avoid the conclusiveness of the certificate as evidence of its content. Had that notice been served within the prescribed time, the prosecution would have been required to call the operator, thus exposing him to cross-examination about the operation of the instrument. In such cross-examination, counsel for T. would have been required to put to the operator the conversations about which T. proposed to give evidence. The s58(2) notice was ineffective unless the time for giving it was abridged by agreement or by order of the court. No application was made to the judge to abridge time for service of the notice and the operator was not called to give evidence. Accordingly, T. was not able to put his account of the conversation to the operator and instead put his account to the Informant who was not in a position to contradict any part of it because she said that she could not recall any such conversation. She said that she was "coming and going from the interview room".

2. The authorities establish that where a defendant has suffered any unfairness or unlawfulness, a Magistrate has a discretion whether to accept or reject the breath analysis evidence. The Magistrate must consider the competing public requirements of the public need to bring to conviction those who commit criminal offences with the public interest in the protection of the individual from unlawful and unfair treatment. Where a Magistrate found that a driver had acted on advice from a police officer which denied him evidence which could possibly have defeated the charge, the subsequent conviction was "obtained at too high a price".

***R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263;**
***DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323; and**
***Nolan v Rhodes* [1982] 32 SASR 207, applied.**

3. While the right to a blood test is undoubtedly important, the potential prejudice or unfairness to the plaintiff may be more or less depending upon the likelihood that a blood test might assist in his defence. The obvious reason for highlighting the difference between the breath analysis results and the legal limit in *DPP v Moore* and *Nolan v Rhodes* was the likelihood of a blood test assisting a defence to the charge. The greater the gap between the reading and the legal limit the less likely it will be that a blood test would have assisted the person.

4. As T. chose not to challenge the operation or working order of the instrument or the validity of its

product – the manually produced certificate – he could not rely upon the malfunction as a springboard to enhance his submission about the unfairness of his having been denied a blood test. There was no evidence that a blood test was likely to assist T. in his defence. While the right to a blood test was denied, T. chose not to give a notice under s58(2) within the prescribed time nor did he request an abridgment of time nor did he challenge the operation or working order of the instrument and its reading.

5. Accordingly, the error complained of by T. was not "central" to the jurisdiction or orders made by the County Court and was not reviewable so as to justify relief in the nature of *certiorari*.

JUDD J:

INTRODUCTION

1. This proceeding, commenced by originating motion, is brought by the plaintiff Adrian John Terry, against the Informant Brodie Melissa Johnson, pursuant to Order 56 of the Rules of Court. The Informant is now known as Brodie Melissa Sontag. The plaintiff seeks an order in the nature of *certiorari* quashing the decision made in the County Court at Melbourne. The plaintiff had been convicted in the Magistrates' Court at Heidelberg on 10 June 2005 of a charge under s49(1)(f) of the *Road Safety Act* 1986 (the Act). He was fined, ordered to pay costs and disqualified from driving. His appeal was heard and dismissed on 17 November 2006 and he was convicted of the same offence, with the same penalty and period of disqualification, as had been imposed by the magistrate.

2. The plaintiff contends that the judge hearing his appeal in the County Court failed to properly exercise her discretion to reject evidence constituted by a certificate of analysis tendered by the prosecution and relied upon as conclusive proof of the facts alleged therein. The certificate indicated that at the relevant time, the plaintiff had a blood alcohol reading of 0.127 grams of alcohol per 100ml of blood. The plaintiff alleges that the judge failed to apply the decision of the Court of Appeal in *DPP v Moore*[1] to exclude the evidence on public policy grounds because of the improper conduct of Senior Constable Warr (the operator) who operated the breath analysis instrument and who, it is said, talked the plaintiff out of having a blood test.

3. The grounds for relief relied upon by the plaintiff are as follows:

> (a) That the [judge] erred in law in refusing to dismiss a charge under s49(1)(f) of the *Road Safety Act* 1986 brought against the Plaintiff.
>
> (b) That the [judge] denied the Plaintiff procedural fairness and/or natural justice and/or refused to exercise a jurisdiction that she had and/or erred at law and/or there was error on the face of the record in convicting the Plaintiff of an offence under Section 49(1)(f) of the *Road Safety Act* 1986 where under the circumstances:
>
> (i) There was uncontradicted evidence from the Plaintiff which satisfied the criteria at law as laid down by the Court of Appeal in *DPP v Moore* (2003) 6 VR 430 regarding *inter alia* the right to a blood test; and/or
> (ii) The learned Judge was bound to consider the exercise of her discretion with respect to the admission into evidence of a breath analyses result conducted upon the plaintiff; and/or
> (iii) The learned Judge did not give consideration to the exercise of the said discretion; and/or
> (iv) The learned Judge did not give proper consideration to the exercise of the said discretion; and/or
> (v) The learned Judge in exercising a discretion (if she did so exercise a discretion) did not exercise that discretion in accordance with law; and/or
> (vi) The learned Judge should not have admitted into evidence a breath analysis certificate and/or breath analysis result alleged against the plaintiff.

4. The plaintiff abandoned ground (c) in his originating motion. The remaining grounds, set out above, are expressed as if grounds of appeal. Notwithstanding the breadth of the remaining grounds, counsel for the plaintiff confined his challenge to the refusal by the judge to reject the certificate of analysis on public policy grounds, submitting that she was bound, as a matter of law, to do so.

5. The evidence before me is contained in three affidavits sworn by the plaintiff and an affidavit sworn by Leigh Andrew Kelly, a legal executive with the County Court Appeals Section of the Office of Public Prosecutions. I am concerned about the accuracy of the plaintiff's account of what occurred in the County Court and, in particular, his account of the reasons for judgment given by the judge.

6. Notwithstanding my reservations, I am prepared to proceed on the basis that the plaintiff's account of events is accurate, although in the case of the reasons for judgment, incomplete. There are grounds to conclude that the plaintiff's account of the reasons for judgment is probably incorrect when describing the material findings of fact made by the judge. I will say more about that matter below. The proceedings in the County Court were not transcribed or recorded and consequently the parties are dependent upon their notes (such as exist) and recollections of what transpired before the judge and, in particular, her reasons for judgment.

BACKGROUND

7. On 27 November 2003, the plaintiff was intercepted while driving his vehicle in Banksia Street, Heidelberg at about 2.30am. He was asked his name, address, date of birth and to produce his licence. A preliminary breath test was carried out, following which he was asked to accompany the police to Heidelberg Police Station for the purpose of a breath test. At the police station he was interviewed and furnished a sample of his breath to the operator.

8. Before the results of the test were automatically printed from the instrument there was a mechanical problem and it became necessary for the operator to manually produce a certificate which purported to record the results of the plaintiff's breath analysis. The certificate so produced had the words "RECALL DATA" at the top. A copy of the certificate was given to the plaintiff. It provides details of analysis, including a test result of 0.127 grams of alcohol per 100ml of blood.

9. The plaintiff deposed that when he noticed that the certificate had "RECALL DATA" printed at the top of the document he asked the operator what that meant. The operator told him that the instrument had malfunctioned and would not print certificates automatically and that the certificate he had been given was printed manually from the software in the instrument. The plaintiff then asked the operator what had happened to the instrument and the operator replied that he was unsure. The plaintiff asked the operator how, given the malfunction of the instrument, could he be sure that the reading on the certificate was his and was accurate.

10. The plaintiff deposed that he told the operator that he was concerned about the malfunction and asked the operator if he could undertake a second breath test using another instrument. His request was refused, although the operator told him that he could request a blood test. The plaintiff asked the operator how long it would take to arrange for a blood test. The operator replied that "it could take all night". The operator then said that there is commonly a difference between breath and blood results. The plaintiff asked the operator: "So if I have a blood test, what difference is there between the breath and the blood readings, higher or lower?" The operator replied by saying, "in my experience blood is always higher". The plaintiff claims that as a result of this conversation with the operator he felt that having a blood test would be futile and not in his best interests. He says that he would have had a blood test if not for the advice given by the operator, who effectively talked him out of it.

THE RECORD

11. The plaintiff's first affidavit in support of his originating motion was sworn on 7 December 2006. In that affidavit, the plaintiff referred to the proceeding in the Magistrates' Court but did not depose as to the evidence given in that court. The plaintiff deposed that he was present in the County Court for the whole of his appeal. He said that the hearing in the County Court was "video taped and audio taped by equipment operated by the learned judge's tipstaff". He said that he instructed his solicitor to seek copies of the tapes, and after having them transcribed, proposed to swear a further affidavit. Nothing is said in the plaintiff's first affidavit about the existence of any notes taken by a solicitor acting on his behalf, his counsel or by him; nor is anything said in that affidavit about the evidence and submissions in the County Court or the reasons for judgment, except for the fact of conviction and penalty.

12. On behalf of the Informant it was submitted that this omission, and the delay in filing the substantive affidavit sworn 22 August 2007, deprived her and her legal representatives of an early opportunity to reflect on the accuracy of the plaintiff's version of events in the County Court. The prejudice caused by the delay is said to be compounded by the Informant's inability to locate the police file. These matters were advanced in support of the submission that this court should refuse relief in the exercise of discretion. They were also advanced as part of a submission that I should not be satisfied with the accuracy of the account given by the plaintiff of what transpired in the County Court and, in particular, the reasons for judgment. There is substance in these

complaints, although the plaintiff points to circumstances which, at least to some extent, explain the delay.

13. On 5 December 2006, the plaintiff's solicitors wrote to the judge's associate requesting any tape or other recording of the hearing in the County Court. It was not until 7 May 2007 that the associate responded, "I have made appropriate enquiries and there is no record of any recording, official or otherwise, having been made on that date". The associate noted that there was no record of counsel making a request for recording or transcript. A delay of five months was unfortunate, as a prompt response may have required the plaintiff to commit to his version of events at a much earlier date than he did. Even so, it took the plaintiff a further three months to file his substantive affidavit after receiving the letter from the judge's associate.

14. It was not until 22 August 2007 that the plaintiff set out, for the first time, his version of the events that took place on the hearing of his appeal. He did so from his "knowledge, recollection and belief after assistance from notes made by his counsel". Those notes were not called for or produced. At times he set out the evidence in question and answer form, but in relation to his own evidence he set out a summary of what was said. He did not explain why such different styles were employed by him.

15. In his affidavit sworn 22 August 2007, the plaintiff deposed to the fact that the judge left the bench and upon returning "delivered the following judgment and her reasons for ruling, saying as follows or to the effect of the following":

> (a) I accept the evidence of the appellant as to the conversation that he had with Senior Constable Warr; and
>
> (b) I accept his evidence that he was talked out of taking a blood test by Senior Constable Warr by accepting the advice of Senior Constable Warr; however
>
> (c) The result of analysis is a high reading and I bear in mind that the conversation had with Senior Constable Warr occurred after the breath analysis;
>
> (d) Because the result of analysis of 0.127% is significant, I am persuaded that I should not exercise my discretion in favour of refusing to admit the certificate of analysis and I thereby accept the certificate into evidence; and I find the charge against the Appellant proved;
>
> (e) I also say that despite *Moore's* Case, I do not see any unfairness suffered by the appellant in being talked out of a blood test by Senior Constable Warr.

16. On 31 March 2008, Mr Kelly swore his affidavit in response to the plaintiff's affidavit sworn 22 August 2007. Mr Kelly deposed to conversations he had with the plaintiff's counsel about a week before the hearing in the County Court. He said that he had a personal recollection of the hearing and made notes. He produced his notes. Although there was an initial objection to the use of the notes as evidence, the objection was later abandoned.

17. Mr Kelly challenged the plaintiff's account of the reasons given by the judge. He did not give his own account and instead relied upon very sketchy notes. Mr Kelly did not say that the plaintiff's recollection was incorrect. His evidence was confined to the production of his file note and a comment that "if her Honour had specifically said that she had found that 'The operator had talked the appellant out of taking blood tests' it would have certainly been noted by me". His file note is consistent with the judge having refused to reject the certificate as evidence on the basis that there was no unfairness to the plaintiff. His note also indicates that the judge dealt with an argument advanced on behalf of the plaintiff which turned upon the different identity of the person who requested the plaintiff to attend the police station and the person who requested the plaintiff to furnish a sample of breath. That argument is reflected in ground (c) of the originating motion which was abandoned. Nothing, however, is said in the plaintiff's account of the reasons for judgment about that matter. This omission merely confirms that the plaintiff's account of the reasons for judgment is, at the very least, incomplete.

18. Mr Kelly's note goes further. Doing the best I can to interpret his note, it records:

> Inf not party to discussion re blood tests Time to discuss with operator minimal – not pursued by Appellant with her or others.

This note seems consistent with an expression of dissatisfaction by the judge with the evidence about the conversation between the plaintiff and operator. In other words, the note seems to contradict the findings of fact identified by the plaintiff in paragraphs (a) and (b) of his version of the reasons for judgment. But, having regard to my decision in this matter, it is unnecessary for me to resolve these discrepancies, although I would be inclined to reject paragraphs (a) and (b) of the plaintiff's account of the reasons for judgment as an accurate record of the factual findings by the judge.

19. The plaintiff filed a third affidavit sworn 1 April 2008 in reply to the affidavit of Mr Kelly. The plaintiff challenges some of what Mr Kelly said, including conversations between the plaintiff's counsel and Mr Kelly. In the end, there was no objection by either party to the affidavit material filed by the other and the only material conflict was in relation to the reasons for judgment.

20. The affidavit material discloses that about a week before the hearing in the County Court there were telephone conversations between the plaintiff's counsel and Mr Kelly concerning the proposed service of a notice under s58(2) of the Act and the availability of the operator to give evidence. The plaintiff's counsel sought to persuade Mr Kelly to call the operator and said that, if he was to be called to give evidence, the plaintiff may well serve a notice under s58(2) challenging the functioning or operation of the instrument. This was a curious request because the plaintiff could have compelled the attendance of the operator by serving such a notice within time. A notice under s58(2) must be given, in the absence of agreement or order of the court, not less than 28 days prior to the hearing. By giving such a notice within the prescribed time the defendant can avoid the conclusiveness of the certificate as evidence of its content. Mr Kelly did not agree to short service of a notice, nor would he agree to call the operator.

21. On 16 November 2006, the day before the hearing of his appeal, the plaintiff served a notice on the Informant under s58(2) of the Act. That notice required the operator to attend to give evidence as a witness for the prosecution and set out matters to be challenged, as required under s58(2A) of the Act. Had that notice been served within the prescribed time, the prosecution would have been required to call the operator, thus exposing him to cross-examination about the operation of the instrument. In such cross-examination, counsel for the plaintiff would have been required to put to the operator the conversations about which the plaintiff proposed to give evidence. The s58(2) notice was ineffective unless the time for giving it was abridged by agreement or by order of the court. No application was made to the judge to abridge time for service of the notice and the operator was not called to give evidence. Accordingly, counsel for the plaintiff was not able to put the plaintiff's account of the conversation to the operator and instead put his account to the Informant who was not in a position to contradict any part of it because she said that she could not recall any such conversation. She said that she was "coming and going from the interview room".

22. The plaintiff deposed that in final submissions to the court, his counsel referred to the provisions of s55(10), (11), (12) and (13) of the Act, pointing out the obligations of the police with respect to blood tests; that a blood test was effectively the only means by which a breath test might be challenged; and that the loss of such a right was a serious matter. His counsel submitted that the right to a blood test was all the more important in this case, because of the malfunction of the instrument and the plaintiff's concerns regarding the accuracy of the certificate and test. The plaintiff's counsel submitted that the plaintiff had been talked out of undertaking a blood test by the operator, and that this fact was unchallenged. He submitted that the authorities were very clear and that, under the circumstances, the certificate of analysis should be ruled inadmissible in the exercise of discretion. The plaintiff's counsel then handed the judge a copy of each of the decisions in *Thompson v Judge Byrne*;[2] *Nolan v Rhodes*;[3] and *DPP v Moore*[4] and read from those cases.

JUDICIAL REVIEW

23. The jurisdiction of this court to review a decision of the County Court is limited. The procedure is set out in Order 56 of the Rules of Court. This is not an appeal. The procedure is not concerned with the merits of the decision under review but whether or not there is an error of law apparent on the face of the record. *[After discussing this point and concluding that the "purpose of limiting the grounds to ones which are central to jurisdiction and the validity of the order or decision of a court is to avoid judicial review becoming a back door avenue to appeal" His Honour continued] ...*

ERROR OF LAW

32. The plaintiff submitted that the judge misdirected herself in the exercise of her discretion by failing to apply the principles enunciated in *DPP v Moore* and, in particular, did not consider that the plaintiff had suffered any unfairness when talked out of a blood test by the operator. The plaintiff also argued that the judge misdirected herself by taking into account the results of the breath analysis.

33. It is common ground that the certificate of analysis, manually produced by the operator on 27 November 2003, was tendered in evidence by the prosecution in the County Court and became Exhibit 1. As no notice under s58(2) of the Act had been given and the prosecution did not call the operator to give evidence, the certificate of analysis became conclusive evidence of its contents. A no-case submission had not been made on behalf of the plaintiff and it was not until after he had given his evidence and an account of his conversation with the operator, that an application was made on his behalf to the judge to exclude the certificate as evidence.

34. On behalf of the Informant it was submitted before me that in the circumstances it was too late to attempt to exclude the certificate as evidence. Although it would have been more in accord with conventional practice for the exclusion argument to have taken place on a *voir dire*, the fact that the argument did not take place until after the Informant had closed her case does not, in my view, deprive the presiding judge of the discretion to exclude evidence. Such a course appears to have been followed in the Magistrates' Court leading to the appeal in *DPP v Moore*[16] without comment by the Court of Appeal.

35. In his submissions to the court, counsel for the plaintiff relied upon the three cases referred to in paragraph [22] above. The first case, *Thompson v Judge Byrne*, was relied upon, as it was before me, to demonstrate the significance of a blood analysis when the breath analysis is challenged. I do not doubt the significance of a blood analysis "which is seriously inconsistent with the analysis of breath... to cast doubt on the working order or proper operation of the breath analysing instrument".[17] It was submitted that the malfunction of the instrument made the significance of a blood analysis more potent.

36. *Nolan v Rhodes* involved a fact circumstance similar in some material respects to the present case. Nolan was convicted by a magistrate of driving a motor vehicle with a prescribed concentration of alcohol in his blood. The magistrate accepted Nolan's evidence of a conversation with the police officer operating the breath analysing instrument. After informing Nolan of his right to a blood test the officer said, "Do you want to have a sample of your blood taken by a medical practitioner at your own expense? It's my advice that you don't have it because in my experience it's always higher". Nolan replied, "If that's advice, I'll accept it".[18]

37. The magistrate found that Nolan had acted on the advice. Having accepted the evidence, the magistrate was asked to exercise his discretion to reject the breath analysis evidence which, unless rejected, constituted a "conclusive presumption". The discretion the magistrate was called upon to exercise was that enunciated by Barwick CJ in *R v Ireland*[19] and adopted by Stephen and Aickin JJ in *Bunning v Cross*.[20] Barwick CJ said:

> Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. This is so, in my opinion, whether the unlawfulness derives from the common law or from statute. But it may be that acts in breach of a statute would more readily warrant the rejection of the evidence as a matter of discretion: or the statute may on its proper construction itself impliedly forbid the use of facts or things obtained or procured in breach of its terms. On the other hand evidence of facts or things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. Whenever such unlawfulness or unfairness appears the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirement must be considered and weighed each against the other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price.

38. The magistrate admitted the evidence and convicted Nolan. The matter came before Bollen

J by way of appeal from the magistrate. The question was – "should the magistrate have exercised his discretion to exclude the evidence of the breath analysis?"[21] His Honour concluded that the discretion had been wrongly exercised because the magistrate overlooked the fact, found by him, that Nolan had "acted on the advice in a way which denied him evidence which could possibly have defeated the charge". Bollen J concluded:

> I think that a conviction obtained by the use of the evidence of the breath analysis in the proven circumstances would be obtained at too high a price.[22]

39. In *Nolan v Rhodes* the breath analysis reading was relatively close to the prescribed limit whereas, in the present case, the result of the breath analysis is very much higher. The result of the analysis was, in this case, a matter which the plaintiff submits the judge wrongly took into account when refusing to exclude the certificate as evidence. The plaintiff points to the evidence of a malfunction; to the fact that the operator had not been called to explain the malfunction; and to the fact that he raised questions about the accuracy of the manually produced certificate and whether or not it related to him, to support his submission that any discrepancy between a blood test and the breath analysis results may have cast serious doubt upon the evidentiary value of the certificate tendered in evidence.

40. The plaintiff's counsel also directed the judge's attention to *DPP v Moore* and invited her to exercise her discretion to exclude the certificate of analysis as evidence "on the general unfairness discretion or public policy ground…" The two categories of discretion referred to by counsel for the plaintiff are discussed in each of the judgments of the Court of Appeal in *DPP v Moore*. It is now generally accepted that, in the case of non-confessional evidence, there is a general unfairness discretion and a public policy discretion which may overlap.[23]

41. The nature of the discretions and the overlap was described by Eames JA in *DPP v Moore* in the following terms:

> The overlap between the public policy discretion and the unfairness discretion was acknowledged both in *Cleland* and *Swaffield*. The unfairness discretion is concerned with the question whether the fair trial of the accused has been prejudiced, but it is not confined to the question of reliability of evidence, and once other considerations are introduced the line between unfairness and policy become blurred. Even so, "the chief object of the public policy discretion is the constraining of law enforcement authorities so as to prevent their engaging in illegal or improper conduct, although the securing of fairness to an accused is a relevant factor in the exercise of the discretion.

42. Having referred to the celebrated passage from the judgment of Barwick CJ in *R v Ireland*,[24] Chernov JA said:

> The underlying basis of the existence of the public policy discretion in a case such as the present has been variously expressed by the courts but in essence its rationale is to prevent the administration of criminal justice from being brought into disrepute. If courts permitted, without qualification, law enforcement officers to rely in the prosecution of a case on evidence which they obtained by unlawful or improper means, it would not only allow them to benefit from their own wrongdoing but it would also create the appearance of the courts condoning or approving the illegality or impropriety by which the evidence was obtained. Hence, in appropriate circumstances, courts exercise the discretion to exclude such evidence if the price of conviction that could be obtained by reason of such evidence, would be "too high".[25]

43. Assuming, for present purposes, that the judge made the finding of fact in paragraphs (a) and (b) of her reasons as stated by the plaintiff. That conduct would be improper conduct for the purposes of the discretion which the court had been called upon to exercise when considering the plaintiff's application to exclude the evidence. This is because the plaintiff's evidence concerning the conversation between the plaintiff and the operator regarding the blood test, if accepted, would fall into the same category as that described by Chernov JA in *DPP v Moore*. In that case Chernov JA said:[26]

> In the circumstances, the statutory option given to a driver in the position of the respondent is an important right and the police, who are charged with the administration of this important legislation, should not use their position to dissuade or discourage such a person from exercising it. In this case, the operator's apparent experience in this area and his standing as a senior constable and his older

> years would no doubt have formed a relevant context in which the respondent assessed the advice, although in fairness it should be made plain that there was no suggestion in the evidence that the police officer used his position or office to give credibility to his advice. *Had the respondent pursued his apparent intention and exercised his right in that regard, the result of the blood test may have thrown into doubt the reliability of the breathalyser reading, particularly given that it showed that the respondent's blood alcohol level was in the order of 0.024% above the statutory limit.* True it is that the respondent did not say in his evidence that, but for the advice, he would have requested a blood test, but in my opinion, it is implicit from the totality of his evidence that he would have taken that step.

In the circumstances, I consider that the conduct of the operator in this case, although not unlawful, was improper in the sense that it was, in the circumstances, of sufficient seriousness to warrant "sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end".[27]

44. On behalf of the plaintiff it was submitted that the judge misunderstood the importance attaching to the opportunity to have a blood test, particularly as the plaintiff had been denied a second breath test and the instrument had apparently malfunctioned. This, it was submitted, follows from the judge's acceptance of the evidence given by the plaintiff about the conversation he claims to have had with the operator, coupled with her conclusion that she did not see any unfairness suffered by the plaintiff in being talked out of the blood test. In my view, however, the judge's reasons are capable of a different interpretation. When the judge said, "despite Moore's case, I do not see any unfairness suffered by the appellant in being talked out of the blood test..." her comments might have reflected an undervaluing of the importance of a blood test and the loss of that right or, as I think more likely, a conclusion that a blood test would not have assisted the plaintiff in challenging the correctness of his breath analysis.

45. In *Nolan v Rhodes*, Bollen J said that the effect of the advice given by the police officer in that case was to deny to Nolan evidence which could possibly have defeated the charge.[28] His Honour went on to say:[29]

> The advice amounted to advice that it might go worse with him if he had a sample of blood taken. Chirgwin said, "Its my advice that you don't have it because in my experience it is always higher". If that advice had been added to the correct information given to the plaintiff about the conclusive presumption, the appellant must have thought his position quite hopeless. Perhaps it was. But perhaps not. *After all, the concentration was only 0.09%. The blood test may have shown a lesser reading perhaps below 0.08% grams per 100mm. Generally speaking, it would seem advisable for a motorist in relation to whom the breath test shows a concentration a little above the prescribed concentration to seek a testing of his blood.* The advice given the appellant, which understandably he accepted, prevented him finding out what the blood sample, when analysed, would establish.[30]

46. In *DPP v Moore*, the prejudice to Moore was that the result of a blood test may have thrown into doubt the reliability of the breathalyser reading, particularly because it showed that the respondent's blood alcohol level was in the order of 0.024 above the statutory limit.[31]

47. The plaintiff argues that the quantitative difference between the legal limit and the result of the breath analysis is irrelevant because of the loss of the important right to a blood test. While the right to a blood test is undoubtedly important, it is my opinion that the potential prejudice or unfairness to the plaintiff may be more or less depending upon the likelihood that a blood test might assist in his defence. In this regard, I note that the plaintiff did not call any evidence on his appeal to contradict the observation made by the operator about the likely outcome of a blood test, nor did he challenge the operation or working order of the instrument.

48. The obvious reason for highlighting the difference between the breath analysis results and the legal limit in *DPP v Moore* and *Nolan v Rhodes* was the likelihood of a blood test assisting a defence to the charge. The greater the gap between the reading and the legal limit the less likely it will be that a blood test would have assisted the person.

49. There are a number of other material differences between the circumstances of this case and those in *DPP v Moore* and in *Nolan v Rhodes*. In the present case, there was evidence of a malfunction. That evidence, if coupled with a blood test result below the legal limit, may have been sufficient to establish a defence under s49(4) of the Act. Notwithstanding the evidence of a malfunction, the plaintiff did not challenge the operation or working order of the instrument and,

more particularly, did not challenge the efficacy of a manually printed certificate as an accurate reflection of what might otherwise have been printed automatically, or the relationship between the information contained in the certificate and the plaintiff's breath analysis.

50. It was submitted by the plaintiff that a challenge to the operation or working order was pointless without the additional evidence of a blood test. The plaintiff described his challenge to the operation or working order of the instrument as his second defence, referring to his application to have the certificate rejected as evidence as his principal defence. Nevertheless, the plaintiff chose not to challenge the operation or working order of the instrument or the validity of its product – the manually produced certificate. Accordingly, he could not rely upon the malfunction as a springboard to enhance his submission about the unfairness of his having been denied a blood test.

51. This is not a case where the content of the certificate of analysis, including the result of the analysis, could be regarded as irrelevant to the exercise of the discretion to exclude the certificate as evidence. In the absence of a challenge to the operation and accuracy of the instrument or evidence to support the likelihood that a blood analysis would produce a more favourable result, I regard the content of Exhibit 1 to be highly relevant to the exercise of discretion to reject it as evidence. If, as I think probable, when referring to the breath test result, the judge was drawing a distinction between the facts in this case and those in *Nolan v Rhodes* and *DPP v Moore* then, in my view, she was quite justified in doing so.

52. It follows, in my opinion, that even accepting the plaintiff's account of the reasons for judgment, the plaintiff has not demonstrated an error of law on the face of the record and his application must fail.

53. Even if, contrary to my conclusion, the judge misunderstood *DPP v Moore* and the significance attaching to the blood test as a right lost to the plaintiff, such an error would be, in my opinion, one made within jurisdiction in the sense that the judge exercised her discretion, albeit wrongly.

54. This is not a case where the breath analysis was only slightly above the legal limit. There was no evidence to the effect that a blood test was likely to assist the plaintiff in his defence. While the right denied to the plaintiff was an important right, the plaintiff chose not to give a notice under s58(2) within the prescribed time. He did not request an abridgment of time. He chose not to pursue his secondary or "sub-defence", challenging the operation or working order of the instrument and thus the breath analysis reading. The plaintiff enjoyed the forensic advantage of not being required to put his account of the conversation with the operator to the only person who could verify or contradict it, namely, the operator. He allowed the prosecution to close its case before leading evidence to support the exercise of discretion and making the application for exclusion. By the time his application to exclude evidence was made, the certificate was in evidence with the status of conclusive evidence. In the circumstances of this case, and assuming the correctness of the plaintiff's evidence as to the judge's reasons, the error complained of by the plaintiff would not have been central to the jurisdiction or orders made by the County Court and in my opinion would not be a reviewable error under Order 56 of the Rules of Court so as to justify relief in the nature of *certiorari*.

55. For the same reasons, I would, if called upon to do so, exercise my discretion to refuse relief in any event. This is so even if the judge's reasons were to disclose a reviewable error in the exercise of her discretion to exclude the certificate as evidence which would otherwise justify an order in the nature of *certiorari*.

56. For the foregoing reasons, the plaintiff's application commenced by originating motion to quash his conviction and the other orders made by the County Court on 17 November 2006 is dismissed with costs.

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[1] [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.
[2] (1999) 196 CLR 141 at 154.
[3] [1982] 32 SASR 207.
[4] [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.
[16] [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.

[17] *Thompson v Judge Byrne* (1999) 196 CLR 141 at 154.
[18] *Nolan v Rhodes* [1982] 32 SASR 207at 210.
[19] (1970) 126 CLR 321, 335.
[20] (1978) 141 CLR 54.
[21] *Nolan v Rhodes* [1982] 32 SASR 207 at 208.
[22] *Nolan v Rhodes* [1982] 32 SASR 207 at 214.
[23] *R v Ireland* (1970) 126 CLR 321, 334-5, *Bunning v Cross* (1978) 141, 74, *R v Swaffield; Pavic v R* (1998) 192 CLR 159, *R v Juric* (2002) 4 VR 411, 441.
[24] (1970) 126 CLR 321 at 334-5.
[25] *DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430 at para [45]; (2003) 39 MVR 323.
[26] *DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430 at paras [41] and [42]; (2003) 39 MVR 323.
[27] Emphasis added.
[28] [1982] 32 SASR 207 at 213.
[29] [1982] 32 SASR 207 at 214.
[30] Emphasis added.
[31] [2003] VSCA 90; (2003) 6 VR 430 at para [41]; (2003) 39 MVR 323.

APPEARANCES: For the plaintiff Terry: Mr P Billings, counsel. MK Steele & Giammario, solicitors. For the first defendant Johnson: Mr AD Halse, counsel. Solicitor for Public Prosecutions.
