09/04; [2004] VSC 48

SUPREME COURT OF VICTORIA

SANZARO v COUNTY COURT of VICTORIA & ANOR

Nettle J

23 February, 3 March 2004 — (2004) 42 MVR 279

MOTOR TRAFFIC – DRINK/DRIVING – PBT POSITIVE – DRIVER TAKEN TO BOOZE BUS – DRIVER TOLD TO WAIT OUTSIDE BOOZE BUS WHILST LICENCE CHECK CONDUCTED BY POLICE OFFICER – DRIVER TOLD THAT HE WOULD BE REQUIRED TO ACCOMPANY POLICE OFFICER INTO BOOZE BUS FOR A BREATH TEST AFTER CHECKS COMPLETED – DRIVER AGREED WITH THIS REQUIREMENT – DRIVER LATER LEFT SCENE BEFORE BREATH TEST COULD BE CONDUCTED – LATER CHARGED WITH REFUSING TO COMPLY WITH A REQUIREMENT TO UNDERGO A BREATH TEST – DRIVER LATER CONVICTED OF CHARGE – WHETHER COURT IN ERROR: *ROAD SAFETY ACT* 1986, S49(1)(e).

S. was intercepted whilst driving his motor vehicle. S. underwent a preliminary breath test which proved positive and was required by a police officer, to accompany him to a breath-testing vehicle for the purpose of a breath test. S. agreed and accompanied the officer to the rear of the booze bus. S. was told to wait whilst the officer went on board the bus to carry out some checks. The officer told S. that after the checks were completed he would be required to accompany him on board the bus for the purpose of a breath test. S. said that he was prepared to accompany the officer. After the checks were completed, the officer moved outside the bus to find that S. had left the scene. S. was later charged under s49(1)(e) with failing to comply with a requirement to remain at the bus. S. was convicted. Upon application in the nature of *certiorari*—

HELD: Application refused.

1. The test of whether the prosecution has proved a requirement is whether the accused was given reasonably sufficient information to know what was required of him and why. Such may be achieved in a number of ways, by terms formal or informal, imperative or precatory, and officious or polite. Whether there has been a refusal to comply with the requirement may also be proved in a number of ways: either by direct evidence, as, for example, when a defendant has said "I refuse" or "No"; or by inference drawn from circumstantial evidence, as, for example, when a defendant has turned and run or even later left the scene. Each case will depend on its own circumstances and it must be remembered that a failure to comply must always be shown to be such that implicitly the driver is refusing to comply with the relevant requirement. But it is plainly not the case that the only way in which that can be established is by direct refusal.

2. It did not necessarily follow that the fact that the requirement in the present case was couched in the future simple tense was not a valid requirment. The test was whether S. was given reasonably sufficient information to know what was required of him and why. The police officer made plain his intent that S. should remain at the rear of the bus and that S. was left in no doubt that he was obligated to remain there. Accordingly, the court was not in error in finding the charge proved.

NETTLE J:

1. This is an application for an order in the nature of *certiorari*[1] to quash an order of the County Court at Melbourne that the plaintiff be convicted of an offence under s49(1)(e) of the *Road Safety Act* 1986.

2. Section 49(1)(e) of the Act provides that a person is guilty of an offence if he or she refuses to comply with a requirement made under s55(1), (2), (2AA), (2A) or (9A).

3. Section 55(1) provides that:

> "(1) If a person undergoes a preliminary breath test when required by a member of the police force or an officer of the Corporation or of the Department of Infrastructure under section 53 to do so and—
> (a) the test in the opinion of the member or officer in whose presence it is made indicates that the person's blood contains alcohol; or
>
> (b) the person, in the opinion of the member or officer, refuses or fails to carry out the test in the manner specified in section 53(3)—
> any member of the police force or, if the requirement for the preliminary breath test was made by an officer of the Corporation or of the Department of Infrastructure, any member of the police force

> or any officer of the Corporation or of the Department of Infrastructure may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force or an officer of the Corporation or of the Department of Infrastructure authorised in writing by the Corporation or the Secretary of the Department of Infrastructure, as the case requires, for the purposes of section 53 to a place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and been given the certificate referred to in sub-section (4) or until 3 hours after the driving, being an occupant of or being in charge of the motorcar, whichever is sooner. **Example** A person may be required to go to a police station, a public building, a booze bus or a police car to furnish a sample of breath."

The County Court proceeding

4. Before the County Court the second defendant, Constable Sadler, gave evidence which the judge accepted, that:

> (1) On Friday 31 March 2001 he was attached to the Traffic Alcohol Section carrying out random breath-testing duties on the Monash Freeway at Dandenong North, just east of Studd Road (sic) heading towards Dandenong.
> (2) At 1.43 am on Saturday 31 March 2002 he intercepted the plaintiff's vehicle for the purpose of a random breath test. He explained to the plaintiff that he required him to undergo the breath test and he further explained to him that he required one continuous breath into the breath-testing device, which was provided.
> (3) In Constable Sadler's opinion the result of the preliminary breath test indicated that the plaintiff's blood contained alcohol, and therefore he said to the plaintiff:
> "I now require you to accompany me to the breath-testing vehicle for the purpose of breath test, are you prepared to accompany me?"
> (4) The plaintiff replied that he was, got out of his car, and walked with Constable Sadler to the rear of the "booze bus" which was parked close by.
> (5) Once they were at the rear of the bus, one or two metres from the rear stairs of the bus, Constable Sadler said to the plaintiff that it seemed to be fairly busy on board and that he would have to go on board to carry out some checks.
> (6) Constable Sadler thereupon asked the plaintiff for his driving licence, which was produced, and obtained from the plaintiff his full name and address for the purpose of carrying out the checks. He then said to the plaintiff:
>> "After I complete the checks I will require you to accompany me on board the vehicle for the purpose of a breath test. If you refuse to accompany me to the breath testing vehicle for the purpose of the a breath test you may be charged with this offence and if found guilty you may be fined or imprisoned for three months and you will lose your licence for a minimum of two years. Do you understand this and are you prepared to accompany me?"
> (7) The plaintiff replied: "Yes, I understand and I will come with you."
> (8) At that point Constable Sadler left the plaintiff in a safe location at the rear of the bus and went inside the bus to the area where the radio was located to carry out the checks.
> (9) After completing the checks, which took approximately three minutes, Constable Sadler returned to the rear of the bus and moved outside to speak to the plaintiff. By that time Sanzaro had gone (on his own admission to his home in Narre Warren.)
> (10) The plaintiff was later charged on summons under s49(1) (e) with failing to comply with a requirement under s55(1) that he remain at the bus.

5. At the conclusion of the prosecution case, counsel for the plaintiff submitted that it had not been proved that the plaintiff was required to remain at the booze bus and consequently that there was no case to answer. Counsel's argument was that although Constable Sadler may have required the plaintiff to accompany him to the bus, he had not required him to remain at the bus. At most he had signified that it was his intention to do so after carrying out the licence checks.

6. The judge rejected the argument and held that there was a case to answer. Her Honour ruled that:

> "Obviously, in this particular case, the informant did not say to the defendant, 'I now require you to accompany me to a breath-testing vehicle for the purpose of a breath test and remain there until you have furnished a sample of your breath and been given a certificate of analysis or until three hours after the time you were drinking or in charge of a motor vehicle, whichever is the sooner'. However, *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503 and *DPP v Blyth* (1992) 16 MVR 159 established that proof of a demand by precise recital of the words of the Act is not required. The test is whether the evidence as it stood was such to prove that the respondent was given reasonably sufficient information to know what was required of him and why. The question in

> this case is whether what the informant said was sufficient so the defendant realised that he was required to remain at the back of the bus until he had furnished a sample of his breath, that is, until he had completed the breath test. ... If you look at all the circumstances surrounding the event, the fact that the vehicle was intercepted for the purpose of a preliminary breath test, the fact that the defendant had the preliminary breath test and his preliminary result showed alcohol in the breath, the fact that a card was read to him requiring him to attend the booze bus for the purposes of a breath test, the fact that his keys were taken away from him and his car was removed to a safe place and the fact that his licence was taken away from him, all these factors, together with the conversation which took place between the informant and the defendant, on the evidence as it stands, lead to the conclusion that the defendant should have been aware that he was required to remain at the back of the bus until the breath sample was taken. The defendant's attention was drawn to the fact that there would be a delay before he went on board the bus. He was informed that after the informant completed the checks, he was required to accompany the officer onto the bus for the breath test. If he refused to accompany the officer onto the bus for the test, he could be charged with an offence. The defendant replied that he was prepared to accompany the police officer onto the bus, he replied: 'Yes, I understand, I will come with you'. As a matter of logic he would have to remain at the scene in order to honour this response. He had an opportunity to refuse to remain, as he could have said no, he was not prepared to wait for the checks to take place and to accompany the police officer onto the bus for the tests. He gave no indication, on the evidence as it stands, that he would not stay at the rear of the bus until the officer had completed the checks...After his conversation with the informant, on the evidence as it stands, the defendant should have been aware that he was required to wait until the informant could accompany him on board the vehicle for the purpose of the breath test... I find on the evidence as it stands that there was a requirement that he remain to furnish a sample of breath. Alternatively, the fact that the defendant indicated a willingness to wait for the checks to be completed before he was to enter the bus, to provide a sample of breath, makes a request, demand or order to remain unnecessary. As in *Walker v DPP* (1993) 17 MVR 194, the motorist by agreeing to the test dispensed with the necessity for a formal requirement to remain..."

7. The plaintiff then went into the witness box and gave the following answers to questions put to him by his own counsel:

> "Just hang on. When you were at the door of the police station (sic), what did this policeman, Constable Sadler say to you?---He said to wait here with the other people because there was lot of people here. For why? Did he tell you why?---To have a blood test. A blood test. A blood test?---A blood test. What about your licence?---Well, he says, he give me my licence as well (sic). ... So can you tell the court exactly what he told you?---Yeah, he say, you know, you've got to remain here to have a blood test. You heard him give evidence, you heard him tell the court he said to you that he wanted to do some licence checks and he asked you to remain there while he carried out the tests, do you agree with that?---I did, yes. I did it. Do you agree he said that?---Yeah. Did you tell him you would?---Yes, yes. You heard him give evidence yesterday, if you don't understand let me know, but yesterday he gave evidence that he said to you after he completed the checks, the licence checks, he would require you to accompany him on board the vehicle for the purpose of a breath test and he told you if you refused to accompany him then when he came back after he asked you, if you refused to accompany him, you might be found guilty and lose your licence and suffer the fine. Did he say that ?---Yes, yes. So that's the reason I wait there."

8. The plaintiff also gave evidence, which the judge rejected, that after he had been waiting for some time, he was told by another police officer that he might leave, and that is why he did leave.

9. In her reasons for judgment, the judge held that:

> "...I accept the evidence of the informant in this case and reject the evidence of the defendant (scil. the plaintiff in this proceeding). I am satisfied beyond reasonable doubt that the words used by the informant made it clear that it was a requirement that the defendant accompany him on board the vehicle as soon as he had completed the licence checks and that the defendant was informed that if he refused he may be charged with an offence. The defendant has been in this country since 1957. I am satisfied that he understood the requirement that he remained (sic) until the breath sample was taken. I do not accept his evidence that he was told by another police officer that he could go..."

The plaintiff's contentions

10. In this proceeding the plaintiff advances five contentions that the judge was guilty of error of law on the face of the record:

> (1) The first contention is that it was one of the essential elements of the offence with which the

plaintiff was charged that he had been required to remain at the bus, and that it is evident from so much of the evidence as was incorporated in her Honour's reasons for judgment that it was not open on the evidence to find that there had been a requirement that the plaintiff remain at the bus. In the plaintiff's submission the words spoken by Constable Sadler to the plaintiff amounted to no more than a requirement to accompany Constable Sadler to the bus and an indication of a future intention to require the plaintiff to accompany Constable Sadler into the bus after the licence checks had been carried out.

(2) Secondly, it is said that the judge was in error in resorting to what she supposed was the plaintiff's understanding of the words which were spoken to him, and the plaintiff invokes the decision of Ashley J in *Dalzotto v Lowell*[2] as authority for the proposition that it is not open to resort to inference in order to conclude relevant compliance with s55(1) of the Act if there is direct evidence to the contrary. Thus it is submitted that whatever may have been the plaintiff's understanding of what Constable Sadler said about waiting, it could not stand in substitution for the necessity for the prosecution to prove a requirement under s55(1).

(3) Thirdly, the plaintiff contends that a requirement to remain at the bus was an essential element of the offence of failing to comply with such a requirement, and therefore, that the judge's reliance upon *Rankin v O'Brien* and *DPP v Blyth* was misplaced. In the plaintiff's submission, those cases were concerned with the question of whether a requirement may be formulated in informal terms; not with the issue of whether a requirement is unnecessary when all the surrounding circumstances should indicate to a person what is required of him.

(4) Fourthly, it is said that the judge erred in treating *DPP v Walker* as authority that in the case of a prosecution for an offence under s49(1)(e) the need for requirement may be waived.

(5) Finally, the plaintiff contends that the test of whether there was a requirement to remain at the bus is whether the plaintiff could have been charged with the offence if he had answered "no" to the words that were spoken to him, and, in the plaintiff's contention, it is plain that he could not have been.

The need to prove a requirement

11. The plaintiff is no doubt right that the existence of a requirement under s55 is an essential element of an offence under s49(1)(e) of failing to comply with a requirement under s55(1)[3]. It may also be accepted that it would not be open to infer the existence of such a requirement in the face of direct evidence that none was ever issued[4]. But it is not necessary to use a particular form of words in order to constitute a valid requirement and it does not necessarily follow from the fact that a requirement is couched in the future simple tense, in the way in which Constable Sadler spoke to the plaintiff, that it is not a valid requirement. As the judge rightly said, the test is whether the evidence as it stood was such as to prove that the plaintiff was given reasonably sufficient information to know what was required of him and why?[5] Consequently, a requirement need not take the form of a demand in imperative terms. A request in precatory or polite terms by a person clothed with apparent authority will ordinarily be sufficient[6]. And indeed it is to be hoped, and in most cases may be expected, that a requirement will be made in terms of a polite request[7]. In any event, whatever terms may or may not be used in any given case, it will be enough that the intent of the police officer and the obligation of the person required to comply have been made clear[8].

12. Like the judge, I consider that Constable Sadler did make plain his intent that the plaintiff should remain at the rear of the bus and that the plaintiff was left in no doubt that he was obligated to remain there. In my view it was probably enough to have constituted the requirement that Constable Sadler said to the plaintiff that he would require the plaintiff to accompany him on board the vehicle for the purpose of a breath test, and that if the plaintiff refused to accompany him the plaintiff may be charged. As Ormiston JA observed in *Foster*, these days most people understand the working of the system and are likely to be fully aware of the stages of the process. But even if that were not so, once there is added that Constable Sadler's words to the plaintiff were spoken against the immediate background of the preliminary breath test, and Constable Sadler's requirement, imposed only moments before, that the plaintiff accompany the constable to the bus for the purpose of the breath test, it passes beyond reasonable doubt that the plaintiff must have understood that he was being required to remain at the bus in order to undergo the breath test for the purpose of which he had been required to attend at the bus. In so far as it may be permissible to have regard to the plaintiff's own testimony, it confirms that it was so.

13. Of course I do not overlook that s49(1)(e) is a penal provision and therefore, as Southwell

J put it in *Rankin v O'Brien*[9], that the Court must be beware of taking a "near enough is good enough" approach. I also bear in mind that the courts do not presume the existence of facts which are central to an offence[10]. As already stated, I accept too that in a prosecution for an offence under s49(1)(e) it is not open to infer that there has been relevant compliance with s55(1) if there is direct evidence to the contrary[11]; although it may be otherwise in the case of an offence under s49(1)(f) [12]. But once it is understood that the terms in which a requirement is stated need not follow any precise formula of words, and that all that is required is that the driver be told sufficient to know what it is that is being required of him or her[13], I see no relevant problem. Given that spoken words are an inherently imprecise means of communication, the effect of which depends as much upon the persons between whom and the context in which they are spoken as upon the words themselves, the question of whether what is spoken constitutes a requirement for the purposes of the section is necessarily a question of fact and degree. Such a question is to be decided upon the whole of the evidence, including such inferences, not inconsistent with the direct evidence, as it may be appropriate to draw.

14. In my opinion it was open to the judge to decide that question as she did.

The drawing of inferences

15. I have referred already to the inferences that the judge was entitled to draw. I do not accept that her Honour was in error in posing for herself the question of what the plaintiff would have understood Constable Sadler's words to mean in the context in which they were spoken. To formulate the question in those terms was to do no more than restate in a fashion adapted to the context the test of whether the plaintiff had been told sufficient to know what it was that was being required of him.

16. Putting aside that the plaintiff gave direct evidence in chief that he did understand what was required of him, it was inevitable that the question would have to be decided on the basis of inference. Logically that would have been so even if Constable Sadler had read out the words of the section. One cannot conclude that the words of the section were adequate to convey the requirement to remain without drawing an inference that that is what they did convey. So much the more so was that the case when the words which were used were not the words of the statute. One had to look at what was said, in the context in which it was said, and draw an inference as to the meaning which it conveyed.

17. That is not to say that an inference may be drawn which is contrary to the direct evidence, or that in the absence of evidence sufficient on which to base an inference that it is permissible to presume the existence of a requirement. It is not. Here, however, there was evidence sufficient on which to base an inference and there was no direct evidence to the contrary. And as has been seen, the plaintiff's own evidence was wholly consistent with it.

***Rankin v O'Brien* (and *DPP v Blyth*)**

18. I find no error in the reliance which the judge placed upon *Rankin v O'Brien.* That case was concerned with s80F(6)(b)(ii) of the *Motor Car Act* 1958, which was different in some respects to s55(1) of the *Road Safety Act* 1986. But the principle with which it was concerned is directly in point. There, as in this case, the question was whether the defendant had refused to comply with a requirement, and the point of Southwell J's decision is that a requirement may be proved by evidence sufficient to prove that the defendant was given reasonably sufficient information to know what was required of him and why.

19. Equally, I see no error in the reliance which the judge placed upon *DPP v Blyth*. That case was concerned with an offence under s49(1)(f) of the *Road Safety Act,* and as has already been stated, that section may not require proof of a requirement in the way which is required under s49(1)(e). But the significance of the case for present purposes was Coldrey J's approval of what had been said in *Rankin v O' Brien* and his Honour's observation that an informal explanation of what is required of a putative defendant may well constitute a fairer approach to informing such a person of the legislative requirements than simply reading out the section.

20. I am also unable to see in the judge's reasons any suggestion that *Rankin v O'Brien* or *DPP v Blyth* stood as authority for a proposition that a requirement need not be proved when all the surrounding circumstances should indicate to a person what was required of him. To the contrary, the whole tenor of her Honour's analysis was that it was necessary for the prosecution

to prove the requirement and that she was satisfied upon the whole of the evidence that it had done so.

Walker v DPP

21. I accept that the judge was in error in the significance which she attributed to *Walker v DPP*. The error is apparent in the final part of her Honour's ruling on the no case submission:

> "Alternatively, the fact that the defendant indicated a willingness to wait for the checks to be completed before he was to enter the bus, to provide a sample of breath, makes a request, demand or order to remain unnecessary. As in *Walker v DPP* (1993) 17 MVR 194, the motorist by agreeing to test dispensed with the necessity for a formal requirement to remain..."

22. The point about *Walker v DPP*, and now *DPP v Foster,* is that in the case of a prosecution for an offence under s49(1)(f) (*scil.* furnishing a sample of breath which upon measurement shows a blood alcohol concentration greater than the prescribed limit) the requirements to which s55(1) refers may be taken to have been waived where the defendant has provided the sample. Thus as it was explained by Ormiston JA in *Foster*[14]:

> "74. In my opinion, therefore, the appropriate interpretation of s49(1)(f), which explicitly makes reference only to sub-s(1) of s55, is to treat the furnishing of a sample under s55(1) as one furnished in compliance with a requirement made under that sub-section. Indeed the expression 'furnish a sample of breath for analysis by a breath analysing instrument' appears immediately after the words 'any member of the police force ... may require the person'. Thus it seems to me that compliance with such a requirement identifies the condition or the circumstance under which a person has furnished a sample of breath for analysis, so as to characterise it as having been furnished 'under s55(1)'. It follows that it is only where such a requirement has been made, that one can identify an analysis consequential upon the furnishing of a sample of breath which satisfies the paragraph. 75. On the other hand, however, there is nothing either in para (f) s49(1) or in s55(1) which would compel a conclusion that a requirement under the latter subsection must be expressed in precise or unvarying terms, so long as the intent of the police officer and the obligation of the person required have been made clear. The requirement, as the learned President has pointed out, need only be sufficient to ensure that the person furnishes such a sample. It would be unusual if some request were not made, but it is not unknown for persons anxious to clear their names to seek such an analysis. But most people understand the working of the system these days and it is obvious that the police will seek this analysis if the result of the preliminary test is unfavourable to the person tested, so that that person will be fully aware what is likely to be the next stage in the process. It seems to me to be of little consequence how the requirement is expressed or whether as a formal requirement it may be waived. In either case it will be assumed that what is being done is being done in accordance with the statutory procedure but the only basis upon which an analysis of a sample of breath may commence is upon satisfaction with the requirements of sub-s(1) of s55. 76. Nevertheless the powers given to the police under that paragraph are permissive. They do not have to require a person to furnish a sample of breath nor do they have to require the person to go to the police station or to stay there for three hours if that is not desired or if that is not necessary. I see nothing in the section which would require a recitation on all occasions of all requirements. To that extent each of the decisions to which the President has referred which suggest to the contrary ought not to be followed."

23. But that reasoning is not applicable to a prosecution for an offence under s49(1)(e) – of failing to comply with a requirement – for as Ormiston JA was at pains to point out:

> "54. It should not be forgotten that the issue which his Honour had to determine in these cases did not depend upon the proposition that the prosecution had failed to prove that the motorist had been required to accompany the police to the police station, or that the motorist had not been informed of the reason for that requirement, or that the motorist had not been required to furnish a sample of his breath for analysis. The major issue was whether the charges against each respondent were correctly dismissed by the respective magistrates because of a failure by the informant to tell the respondent 'at the outset' not only that he was required to accompany police to the police station but that he was required *to remain at the police station until the sample of breath for analysis had been furnished or until 3 hours had elapsed from the time of driving, whichever was the sooner* (emphasis added)."[15]

24. In the case of a prosecution for an offence under s49(1)(e), of failing to comply with a requirement under s55(1), the requirement is an essential element of the offence and must be proved and waiver is irrelevant. Consequently, if upon the whole of the evidence, including any permissible inferences, the court is not satisfied that the accused was given reasonably sufficient information to know what was required of him and why, the prosecution will fail.

Refusal to comply with a requirement

25. It is enough to dispose of the plaintiff's final contention to repeat that the test of whether the prosecution has proved a requirement is whether the accused was given reasonably sufficient information to know what was required of him and why. For the reasons more than once already given, such may be achieved in a number of ways, by terms formal or informal, imperative or precatory, and officious or polite. Whether there has been a refusal to comply with the requirement may also be proved in a number of ways: either by direct evidence, as, for example, when a defendant has said "I refuse" or "No"; or by inference drawn from circumstantial evidence, as, for example, when a defendant has turned and run or even later left the scene. Each case will depend on its own circumstances and it must be remembered that a failure to comply must always be shown to be such that implicitly the driver is refusing to comply with the relevant requirement. But it is plainly not the case that the only way in which that can be established is by direct refusal[16].

Refusal of *certiorari*

26. For the reasons earlier given, I am persuaded that the judge was in error in her observation that the plaintiff waived the requirement to remain. Otherwise, however, I do not accept that her Honour erred in any of the respects contended for by the plaintiff.

27. In the circumstances, I do not consider that it is appropriate to make an order in the nature of *certiorari*. The authorities are clear that it is not every error of law that affects a decision. Hence if one be confident that error would have had no bearing on the outcome of the case, *certiorari* may be refused[17]. In this case I think it plain that the judge's reference to waiver could not have made any difference. As appears in her Honour's final reasons for judgment, the basis of her judgment was that she was satisfied on all the evidence, beyond reasonable doubt, that the requirement had been imposed. Consequently, the fact that her Honour may have earlier suggested an alternative basis for reaching the same conclusion in the end proved immaterial.

Conclusion

28. The application for an order in the nature of *certiorari* will be refused. I shall hear counsel on the question of costs.

---

[1] The plaintiff's claims for other forms of relief were abandoned in the course of argument.
[2] Unreported, 18 December 1992.
[3] *DPP v Greelish* [2002] VSCA 49; (2002) 4 VR 220, at 225 [23] - [30]; (2002) 128 A Crim R 144; (2002) 35 MVR 466, per O'Bryan AJA; *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643 at 661 [66]; (1999) 104 A Crim R 426; (1999) 29 MVR 365, per Winneke P, and at 663 [73] per Ormiston JA; *Hrysikos v Mansfield* [2002] VSCA 175 at [13]; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408 per Eames JA.
[4] *Dalzotto v Lowell*, *supra*.
[5] *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67 at 73; (1985) 2 MVR 503,per Southwell J.
[6] *DPP v Foster*, *supra* at [47].
[7] cf. *DPP v Blyth* (1992) 16 MVR 159 at 161.37.
[8] *DPP v Foster*, ibid at [73].
[9] [1986] VR 67 at 72.
[10] *Dillon v R* [1982] AC 484 at 487 (PC); *Impagnatiello v Campbell* [2003] VSCA 154 at [1] and [30]; (2003) 6 VR 416; (2003) 39 MVR 486.
[11] *Dalzotto v Lowell supra*, but cf *DPP v Foster*, *supra* at 658 [52].
[12] *DPP v Foster*, *supra* at 659 [56] and 664 [79]; and see *DPP Reference No 2 of 2001* [2001] VSCA 114; (2001) 4 VR 55 at 68 [37]; (2001) 122 A Crim R 251; (2001) 34 MVR 164, per Charles JA.
[13] *McCardy v McCormack* [1994] VicRp 73; [1994] 2 VR 517 at 521; (1994) 20 MVR 275.
[14] *DPP v Foster*, *supra* at 655 [74]-[76].
[15] ibid. at 659 [54].
[16] *Hrysikos v Mansfield*, *supra* at [4].
[17] *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141 at 145; (1986) 67 ALR 21; (1986) 60 ALJR 662; [1986] Aust Torts Reports 80-054; (1986) 4 MVR 542; (1986) 11 ALN N80; *Re Refugee Tribunal; ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at 122 [104]; (2000) 176 ALR 219; (2000) 75 ALJR 52; (2000) 62 ALD 285; (2000) 21 Leg Rep 6.

APPEARANCES: For the plaintiff Sanzaro: Mr PJ Lawrie, counsel. Walter Timms Pty, solicitors. For the second defendant Sadler: Mr BM Dennis, counsel. Victorian Government Solicitor.
