



Magistrates' Court
Victoria

MAGISTRATES CASES 2003

INDEX

TABLE OF CASES REPORTED IN 2003

	Case No.
AB Oxford Cold Storage Co Pty Ltd and Anor v Arnott (Kellam J).....	36/03
Ahmed v Russell Kennedy (Balmford J)	19/03
Arachchi v Orlowski (Nettle J)	04/03
Caamano v Blackstone Legal Costing (Byrne J)	08/03
Cehner v Borg & Ors (Court of Appeal – Batt, Chernov and Eames JJ A)	03/03
Causovski v Delahunty & Anor (Smith J)	25/03
Chakera v Kuzamanovic & Anor (Nettle J)	06/03
Champion v Richardson & Anor (Kellam J).....	31/03
Dawson v Magistrates' Court of Victoria and Anor (Warren J).....	33/03
DPP v Bodoulloh & Anor (Warren CJ)	40/03
DPP v Moore (Court of Appeal – Batt, Chernov and Eames JJ A).....	20/03
DPP v Norman (Kellam J)	28/03
DPP v Olcer (Nathan J)	30/03
Elsegood v Gotts & Anor (Balmford J)	07/03
Garbett v Rosemen Investments Pty Ltd (Smith J)	10/03
Goldberg v Brown (Osborn J) 38 MVR 389	11/03
Guss v Magistrates' Court of Victoria & Anor (Osborn J)	37/03
Halepovic v Sangston (Bongiorno J)	29/03
Hickman v Smith & Anor (Ashley J)	14/03
Hoare Bros v Magistrates' Court & Gahan (Balmford J)	17/03
Impagnatiello v Campbell (Court of Appeal – Callaway, Buchanan and Eames JJ A).....	27/03
International Property Development P/L v Mevco International P/L (Osborn J).....	22/03
Kirby v Phelan (Bongiorno J).....	02/03
Lewandowski v Medrzycki (Ashley J)	12/03
Luff v DPP (Court of Appeal – Callaway, Vincent and Eames JJ A) 39 MVR 277	16/03
McPherson v County Court of Victoria & Anor (Kellam J) 38 MVR 362	01/03
Marks v Buick (Hansen J)	34/03
Miles v Barca and Anor (Byrne J)	24/03
Nadarajamoorthy v Moreton (Bongiorno J)	23/03
National Exchange Pty Ltd v Vane (Osborn J).....	38/03
Nelson v Mathieson (Nathan J).....	26/03
O'Sullivan v Freeman (Ashley J)	18/03
Oxford Cold Storage Co Pty Ltd and Anor v Arnott (Kellam J)	36/03
Paradise Constructors Pty Ltd and Strangio v Lofts Quarries Pty Ltd (Dodds-Streeton J) ..	35/03
Real Estate City Pty Ltd v Moustafa (Williams J).....	05/03
Rinaldi v Watts (Kellam J)	13/03
Smith v Chalmers (Ashley J)	15/03
Thomas v Campbell & Ors (Nettle J).....	32/03
Victoria Pre-Cast Pty Ltd v Papazis & Anor (Teague J)	09/03
Walters v Shire of Wakool (Smith J)	39/03
Wiegand v Tsolakkis (Balmford J).....	21/03

SUBJECT MATTER

CIVIL PROCEEDINGS

- Bills of Costs** – failure by solicitor to give requisite notices to client – failure to comply with statutory requirement does not mean that a contract is void and unenforceable – solicitor not precluded from recovering legal costs: 06/03
- Claim for work and labour done** – interlocutory steps taken – admissions deemed to be made – party not legally represented – application made to withdraw admissions – application refused – magistrate in error – party denied procedural fairness: 22/03
- Contract** – offer and acceptance – offer to buy shares – offeree required to return signed transfer form together with issuer sponsored statement – statement not returned with transfer form – no concluded contract between the parties: 38/03
- Contract for sale of motor car** – roadworthy certificate given to purchaser – both parties believed vehicle to be roadworthy – later claim for damages for rectification of faults with vehicle – finding by magistrate that an implied condition existed that vehicle be roadworthy – magistrate in error: 21/03
- Costs** – legal fees – debt paid after complaint filed but before service of it – magistrate not in error in awarding costs to plaintiff: 08/03
- Costs** – retainer terminated by solicitors – claim by client for documents held by solicitors – delay in providing documents – client entitled to costs associated with return of documents – claim by solicitors for costs upheld – order by magistrate that costs followed the event – sufficient reasons for decision – magistrate's order upheld: 19/03
- Costs** – criminal proceeding adjourned – application by witness for costs and expenses – application refused as being premature – no error: 25/03
- Damages** – alleged assault – claim by defendant he acted in self-defence – defence upheld by magistrate – principles relating to law of self-defence – magistrate in error in upholding defence: 12/03
- Estate Agent** – person engaged in a single transaction – no intention to engage in subsequent similar transactions – not an estate agent within s4 of *Estate Agents Act* 1980: 10/03
- Estate Agent's commission** – exclusive auction authority signed between vendor and estate agent – printed terms in authority – handwritten endorsement made on authority – “No sale no charge” – no sale effected – meaning of “sale” – magistrate not in error in finding that printed terms on the authority could be disregarded – rule in *Browne v Dunn*: 05/03
- Guarantee and Indemnity signed by company director** – guarantee that company would pay all monies due and payable – director given credit up to \$10,000 – company indebted for \$21,074.08 – magistrate not in error in making order for full amount of claim: 35/03
- Instalment order** – application refused by Registrar – appeal to magistrate – discretion of magistrate when hearing appeal – magistrate not bound by terms of original application for an instalment order: 09/03
- Negligence** – claim for damages – injuries sustained when person stepped into uncovered inspection pit – shaft on footpath outside business premises – business owners not liable as occupiers of the shaft – no breach of duty of care by occupiers: 03/03
- Negligence** – claim for damages – injury to child in playground controlled by municipality – standard of care – no warning sign – inadequate maintenance of area where child was injured – relevant principles – order for damages: 39/03
- Summary dismissal of claim** – jurisdiction of court to be sparingly invoked – summary dismissal should never be granted unless it is clear that there is no real question to be tried: 07/03

COSTS

- Bills of Costs** – failure by solicitor to give requisite notices – failure to comply with statutory requirement does not mean that a contract is void and unenforceable – solicitor not precluded from recovering legal costs: 06/03
- Costs** – criminal proceeding adjourned – application by witness for costs and expenses – application refused as being premature – no error: 25/03
- Costs** – legal fees – debt paid after complaint filed but before service of it – magistrate not in error in awarding costs to plaintiff: 08/03

CRIMINAL LAW

- Crimes Family Violence** – two criteria to be satisfied – threat made to cause damage and is likely to cause damage – “likely” – meaning of – no evidence that person was likely to cause damage – magistrate in error in making intervention order: 02/03
- Crimes Family Violence** – application for intervention order – applicant previously unsuccessful and ordered to pay costs – costs order not met when subsequent application came on for hearing – applicant's complaints struck out because of unpaid costs order – magistrate in error: 14/03
- Offensive behaviour** – defendant found to be inhaling paint (chroming) in a public place – meaning of “chroming” – meaning of “offensive behaviour” – not offensive behaviour: 26/03
- Order to undergo compulsory procedure** – magistrate not fully apprised of matters which ought to have been revealed to the magistrate – order made – no error: 18/03
- Order to undergo compulsory procedure** – test to be applied – must be reasonable grounds to believe that conduct of the procedure may tend to confirm or disprove person's involvement in the

SUBJECT MATTER

commission of the offence – magistrate not in error in making order: 34/03

Possession of firearms – reasonably suspected of being proceeds of crime – “Proceeds of crime”

- meaning of – “Directly or indirectly” – meaning of – property does not have to be transformed
- proceeds includes property derived from the commission of a criminal offence – magistrate not in error in finding charge proved: 13/03

Possession of property reasonably suspected of being the proceeds of crime – defendants found in possession of large quantity of cigarettes – recent burglary on supermarket involving large quantity of cigarettes – “May be reasonably suspected” – sufficient if informant forms reasonable suspicion – suspicion does not have to be formed at time property is seized: 40/03

Seizure of motor vehicle – order made for vehicle to be retained by police – application for return of vehicle – application refused – principles to consider when lawfulness of initial seizure in issue: 11/03

Stalking – course of conduct – meaning of – stalking whilst driving motor vehicle – loitering outside Hindu temple insufficient to found stalking charge conduct must be so protracted so as to constitute a course of conduct – not stalking: 23/03

Stalking – complaint served on defendant – dispute later settled – complaint withdrawn – later reinstated and intervention order made – no notice given to defendant – application for revocation refused – refusal by Registrar to accept rehearing application – magistrate and Registrar in error: 24/03

Stalking – elements of – not the same as elements of unlawful assault – must be a course of conduct and committed with a continuity of purpose – incidents relied upon nine months apart and did not involve premeditation – insufficient to establish a continuity of purpose – magistrate in error in finding stalking charge proved: 32/03

Theft (shoplifting) – defendant claimed no memory of events in store – taken medication prior to commission of offences – physician called to give evidence of effects of medication – charges dismissed – magistrate in error: 30/03

EVIDENCE

Summons to produce documents – Crown files of prosecutions of principal witness sought – such files likely to assist defendant in conduct of case – files not inspected by magistrate – sub-poena set aside – magistrate in error: 32/03

MOTOR TRAFFIC

- Drink-driving

- **Blood test taken at hospital** – driver agreed to provide blood sample – BAC .180% - driver not required by police officer for sample of blood to be taken – requirement not an essential pre-condition or an element of offence under s49(1)(g): 01/03
- **Blood sample taken at hospital** – subsequently lost or discarded – police sample destroyed – application for permanent stay of proceedings – magistrate in error in granting application: 31/03
- **Blood test sought from driver** – doctor or approved person not present when request made – no obligation for driver to give consent – conviction set aside: 29/03
- **Defendant advised by operator not to have blood test** – evidence relating to breath test excluded by magistrate public policy discretion – magistrate not in error – public policy discretion examined – Discretion in *Bunning v Cross* considered – general unfairness discretion considered: 20/03
- **Evidence given by operator** – operator not familiar with relevant regulations – unable to say whether regulations complied with in operating breath analysing instrument – charge dismissed by magistrate – prosecution not required to prove compliance – magistrate in error: 16/03
- **Offender found guilty of two drink/driving offences within ten years** – second offence to be dealt with as a subsequent offence – such offence to attract higher period of licence disqualification – magistrate in error in deciding otherwise: 28/03
- **Operator called to give evidence** – notice not specific as to the facts and matters in dispute - no evidence given by operator that instrument used complied with the Act – not open to magistrate to find that instrument used was within the Act – not open to apply presumption of regularity: 27/03

- Driving

- Careless driving – driving too closely and parallel – careless driving: 23/03

NATURAL JUSTICE

Application for order for compulsory procedure – failure by applicant to disclose a neutral circumstance – no evidence of bad faith on part of applicant – magistrate not in error in making order: 18/03

Application to withdraw deemed admissions – interlocutory steps taken – admissions deemed to be made – party not legally represented at the time admissions made – application made to withdraw admissions – application refused – magistrate in error – party denied procedural fairness: 22/03

Apprehended bias by magistrate – questioning of witness during examination in chief – leading

SUBJECT MATTER

questions asked by magistrate – such questions appeared to be calculated to remedy deficiencies in prosecution case – apprehended bias by reasonable lay observer – magistrate prohibited from further hearing and determination of charge: 17/03

Crimes Family Violence – application for intervention order – applicant previously unsuccessful and ordered to pay costs – costs order not met when subsequent application came on for hearing – applicant's complaints struck out because of unpaid costs order – irrelevant consideration by magistrate – magistrate in error: 14/03

OCCUPATIONAL HEALTH AND SAFETY

Employees injured by carbon monoxide fumes from forklift – employer to provide adequate facilities for the welfare of employees – no first-aid facilities available – ambulance or doctor not called – company in breach of Act – authorization to bring proceedings – sufficiently specific – company officer charged with offences in that he consented to their commission – meaning of “consent” – magistrate in error in finding charge proved: 36/03

PRACTICE AND PROCEDURE

Charge struck out – may be reinstated – application for reinstatement must be granted by magistrate: 20/03

Instalment order – application refused by Registrar – appeal to magistrate – discretion of magistrate when hearing appeal – magistrate not bound by terms of original application for an instalment order: 09/03

Order to undergo compulsory procedure – court not fully apprised of matters which should have been revealed – order made – magistrate not in error: 18/03

Permanent stay of proceedings – drink/driving charge – blood sample – lost or mislaid by hospital staff – police blood sample destroyed before hearing of charge – magistrate in error in granting permanent stay of proceedings: 31/03

Rule in *Browne v Dunn* – allegation that witness' evidence on one point may be false not put to witness – no request made for recall of witness – no procedural unfairness – no miscarriage of justice: 05/03

Seizure of motor vehicle – order made for vehicle to be retained by police – application for return of vehicle – application refused – principles to consider when lawfulness of initial seizure in issue: 11/03

Service of summons by leaving – left at a place where defendant worked but was not his usual place of business – summons given to defendant a few days later – evidence on the hearing that defendant received summons – defendant properly served: 37/03

Service of summons by post – affidavit of service defective – charge and summons not exhibited to affidavit of service – strict compliance required with statutory provisions – magistrate in error in hearing charge: 15/03

Summary dismissal of claim – jurisdiction of court to be sparingly invoked – summary dismissal should never be granted unless it is clear that there is no real question to be tried: 07/03

Summons on court file lost – informant's copy summons provided to court – check of computer records by magistrate – open to magistrate to find that statutory requirements as to service had been met: 33/03

SENTENCING

Drink/driving – Offender found guilty of two drink/driving offences within ten years – second offence to be dealt with as a subsequent offence – such offence to attract higher period of licence disqualification – magistrate in error in deciding otherwise: 28/03

Drug addiction – can be taken into account for a variety of sentencing purposes: p116/03

Lies advanced to court on hearing of plea – may be taken into account in sentencing offender: p88/03

Plea of guilty – to be taken as evidence of some remorse despite the fact that the accused has prior convictions: p255/03

TRANSPORT

Failing to produce ticket to travel on a tram – request made after journey completed “makes a journey” – meaning of – power of authorized officer – power to require production of a ticket ceases upon completion of a journey by a commuter: 04/03

TABLE OF CASES REFERRED TO, CONSIDERED, APPLIED etc.

ABC v Australasian Performing Right Association [1973] 129 CLR 99, applied: 05/03
Aslor Pty Ltd (In liq) & Anor v Springmount Pty Ltd [1998] VSC 108, followed: 22/03
Australian Gas Light Co v Valuer-General (1940) 40 SR (NSW) 126, referred to: 23/03
Benney v Dowling [1959] VR 237, referred to: 30/03
Berlyn v Brouskos MC27/02, applied: 23/03
Berwin v Donohue (1915) 21 CLR 1, applied: 36/03
Binting v Wilson MC14/90, referred to: 16/03

TABLE OF CASES REFERRED TO, CONSIDERED, APPLIED, etc.

Blair v Magistrates' Court of Victoria MC14/02, applied: 33/03
 Board of Education v Rice [1911] AC 179, applied: 22/03
 Bogdanovski v Buckingham [1989] VR 879, referred to: 27/03
 Boughey v R (1986) 161 CLR 10, applied: 02/03
 BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 52 ALJR 20, applied: 21/03
 Brittingham v Williams [1932] VLR 237, applied: 19/03
 Brodie v Singleton Shire Council (2001) 206 CLR 512, applied: 03/03
 Browne v Dunn (1894) 6 R 67, referred to: 05/03
 Bunning v Cross (1978) 141 CLR 54, considered: 20/03
 Cahill v Howe [1986] VR 630, referred to: 09/03
 Campbell v Sanders (1996) 86 A Crim R 378, referred to: 29/03
 Chappel v Hart (1998) 156 ALR 517, quoted: 39/03
 Coco v The Queen (1994) 179 CLR 427, referred to: 04/03
 Commissioner of Taxation v Citibank Ltd (1988) 20 FCR 403, cited: 04/03
 Commonwealth Service Delivery Agency v Bourke [1999] SASC 154, considered: 31/03
 Connell v Auckland City Council [1977] 1 NZLR 630, referred to: 19/03
 Coopers Brewery Ltd v Panfida Foods Ltd (1992) 26 NSWLR 738, distinguished: 22/03
 Cubillo v Commonwealth of Australia (1999) 163 ALR 395, referred to: 07/03
 Cunard v Antifyre Ltd [1933] 1 KB 551, distinguished: 03/03
 Damic, Re [1982] 2 NSWLR 750, applied: 17/03
 David Jones Ltd v Bates ([2001] NSW CA 233, applied: 39/03
 Davidson v McCarten [1953] VLR 697, followed: 37/03
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 Dey v Victorian Railways Commissioners (1949) 78 CLR 62, applied: 07/03
 Dillon v The Queen [1982] AC 484, followed: 27/03
 DPP Reference No 2 of 2000 (2001) 4 VR 55, referred to: 20/03
 DPP v Foster [1999] 2 VR 643, applied: 01, 28, 29/03; referred to: 27/03
 DPP v Greelish [2002] 4 VR 220, referred to: 29/03
 DPP v His Honour Judge Fricke [1993] 1VR 369, referred to: 01/03
 DPP v Sabransky [2002] VSC 143, p144/03, referred: 20/03,
 DPP v Webb [1993] 2 VR 403, distinguished: 04/03
 Edebone v Allen(1991) 2 VR 659, considered: 31/03
 Ellis v Stevenson MC25/96, referred to: 34/03
 Environmental Protection Authority v Aust Iron & Steel Pty Ltd (1992) 28 NSWLR 502, applied: 23/03
 French v Scarman (1979) 20 SASR 333 considered: 20/03
 Furze v Nixon MC04/01, approved: 16/03
 General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, applied: 07/03
 Gahan v Frahm MC37/99, distinguished: 15/03
 George v Rockett and Anor (1990) 170 CLR 104, referred to: 40/03
 GFT Australia Pty Ltd v Moore unrep, 2/11/92, referred to: 09/03
 Ghani & Ors v Jones [1969] 1 QB 693, applied: 11/03
 Ghantous v Hawkesbury City Council (2001) 206 CLR 512, applied: 03/03
 Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd [1959] SR NSW 122, applied: 39/03
 Goodey v Clarke MC05/02, referred to: 29/03
 Griffiths v Kirkmeyer (1977) 139 CLR 161, referred to: 39/03
 Gunes v Pearson (1996) 89 A Crim R 297, referred to: 14/03; applied: 23/03
 Hammond v Lavender (1976) 11 ALR 371, referred to: 29/03
 Hargrave v Goldman (1963) 110 CLR 40, distinguished: 03/03
 Harrison v Mansfield [1953] VLR 399, applied: 22/03
 Holmden v Bitar (1987) 47 SASR 509, distinguished: 31/03
 Hope v Bathurst CC (1980) 144 CLR 1, referred to: 23/03
 Hunter v Magistrates' Court & Aulich MC23/02: referred to: 09/03
 Impagnatiello v Campbell MC27/01, reversed: 27/03
 Intrac (Sales) Pty ltd v Riverside Plumbing & Gas Fitting Pty Ltd (1997) ATPR 41-572, referred to: 21/03
 Jago v District Court of NSW [1989] 168 CLR 23, applied: 31/03
 Johnson v Johnson (2000) 210 CLR 488, applied: 17/03
 Jones v Dunkel (1959) 101 CLR 298, referred to: 23, 27/03
 Kioa v West (1985) 159 CLR 550, referred to: 22/03
 Kitchen v Cox (1996) 85 A Crim R 328, considered: 40/03
 KRM v The Queen [2001] HCA 23, quoted: 32/03
 Lewis v Leslie MC43/01, referred to: 09/03
 McKellar v Container Terminal Management Services [1999] FCA 1101, applied: 07/03
 McLelland v Symons [1951] VLR 157, applied: 12/03
 McPherson v Gouldstone (1920) VLR 331, considered: 40/03
 Mallock v Tabak [1977] VR 78, distinguished: 27/03
 Mercer v Dalley (1934) VLR 14, followed: 10/03
 Miller xp; re Hamilton and Anor (1934) 51 NSW WN 23, considered: 40/03
 Moors v Burke (1919) 26 CLR 265, considered: 40/03
 Mounsey v Lafayette MC26/02; 37 MVR 256 considered: 04/03
 Nelson v Nelson (1995) 184 CLR 538, applied: 06/03
 Nicholls v Young [1992] 2 VR 209, quoted: 40/03
 Nitz v Evans (1993) 19 MVR 55, followed: 15/03; distinguished: 33/03; applied: 37/03
 Nolan v Rhodes (1982) 32 SASR 207, considered: 20/03
 O'Donnell v Chambers [1905] VLR 43, referred to: 37/03
 Olholm v Clink (1923) VLR 556, considered: 40/03

TABLE OF CASES REFERRED TO, CONSIDERED, APPLIED, etc.

O'Sullivan v Freeman MC18/03, referred to: 34/03
Owners Strata Plan 30889 v Perrine (2002) NSWCA 34, referred to: 39/03
Parisienne Basket Shoes Pty Ltd v Whyte (1937-8) 59 CLR 369, referred to: 37/03
Parker v Barnett (1889) 16 VLR 214, referred to: 07/03
Pearce v The Queen (1998) 194 CLR 378, referred to: 32/03
Pell v Council of the Trustees of the National Gallery (1998) 2 VR 391, referred to: 26/03
Pendlebury v Kakouris (1971) VR 177, considered: 40/03
Pino v Prosser and Anor [1967] VR 835, applied: 37/03
Prowse v Bartlett (1972) 3 SASR 472, applied: 26/03
Puntoriero v Water Corporation (2000) 199 CLR 575, referred to: 04/03
Question of Law Reserved (No 1 of 1998) (1998) 70 SASR 281, distinguished: 20/03
R v Carter (1959) VR 105, referred to: 30/03
R v Criminal Injuries Compensation Board ex p A [1999] 2 WLR 976, referred to: 18/03
R v Falconer (1990) 50 A Crim R 1, applied: 30/03
R v Giretti (1986) 24 A Crime R 112, applied: 32/03
R v GJB (2002) 4 VR 355, distinguished: 32/03
R v Ireland (1970) 126 CLR 321, applied: 20/03
R v Juric (2002) 4 VR 411, referred to: 20/03
R v Leonboyer [2001] VSCA 149, distinguished: 30/03
R v Lobban (2000) 77 SASR 281, not followed: 20/03
R v McGowan [1984] VR 1000, applied: 20/03
R v Madden [1992] 85 A Crim R 367, referred to: 40/03
R v Swaffield (1997) 192 CLR 159, referred to: 20/03
Re Damic [1982] 2 NSWLR 750, applied: 17/03
Re Griffin; ex parte Board of Trade (1890) 60 LJQB 235, referred to: 10/03
Richmond Valley Council v Standing [2002] NSWCA 359, referred to: 03/03
Rinaldi v Watts MC13/03, considered: 40/03
Ritter v Godfrey [1920] 2 KB 47, cited: 19/03
RTA v McGuinness [2002] NSWCA 210, followed: 03/03
Sammassino v Franich & Magistrates' Court of Victoria MC46/94 distinguished: 15/03; referred to: 37/03
Saunders v Herold (1991) 105 FLR 1, referred to: 26/03
Scott v Baker [1969] 1 QB 659, referred to: 27/03
Scott v Dunstone [1963] VR 579, applied: 29/03
Sher v DPP MC18/01, referred to: 27/03
Shire of Lachlan v Towers (1935) 52 WN (NSW) 164, referred to: 08/03
Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206, referred to: 21/03
Sinclair v Magistrates' Court at Ringwood MC03/99, applied: 15/03; distinguished: 33/03
Smith v Chalmers MC15/03, referred to: 37/03
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, applied: 19/03
Southern Equities Corp Ltd (in liq) v Bond (No 7) [2000] SASC 427, applied: 22/03
Spence v Loguch, unrep. NSWSC, 12/11/01, applied: 26/03
Sullivan v Moody (2001) 207 CLR 563, applied: 03/03
Tatchell v Lovett [1908] VLR 645, applied: 13/03; considered: 40/03
Taylor v Browning (1885) 11 VLR 158, distinguished: 03/03
Thiessen v Fielding (1890) 16 VLR 666, applied: 20/03
Toms v Powell (1806) 170 ER 824, referred to: 08/03
Walker v DPP 17 MVR 194, applied: 01/03
Walsh v Loughnan [1991] 2 VR 351, referred to: 40/03
Webster v Lampard (1993) 177 CLR 598, applied: 07/03
Whitehorn v R (1983) 152 CLR 657, referred to: 17/03
Williams & Humbert Ltd v W & H Trade Marks (jersey) Ltd [1986] 1 AC 368, applied: 07/03
Williams v Spautz [1991-92] 174 CLR 509, applied: 31/03
Willis v Burnes (1921) 29 CLR 511, applied: 40/03
Wong v Carter [2000] VSCA 53, referred to: 32/03
Wooster v Smith (1951) VLR 316, applied: 26/03
Wright v Australian Broadcasting Commission [1977] 1 NSWLR 697, referred to: 19/03
Wright v Bastin (No 2) [1979] VR 329, distinguished: 27/03
Wynne v Lockyer [1978] VR 279, referred to: 23/03
Wyong Shire Council v Shirt (1980) 146 CLR 40, applied: 39/03
Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410, applied: 06/03
Yendall v Smith Richmond & Co Ltd [1953] VLR 369, applied: 22/03
Yuill v Yuill (1945) 1 All ER 183, applied: 17/03
Zecevic v DPP (Vic) (1987) 162 CLR 645, applied: 12/03

WORDS AND PHRASES, CATCHWORDS, CONCEPTS etc.

[Note: Words and phrases judicially considered are in inverted commas. Ed]

Abuse of process: 14, 31/03
"Adequate facilities": 36/03
Adequacy of reasons for decision: 19/03
Admissions deemed to be made: 22/03
Affidavit of service defective: 15/03
Aiding and abetting: 36/03
Appearance under protest: 15, 33, 37/03
Apprehended bias: 17/03
Assault/onus of proof: 12/03

WORDS AND PHRASES, CATCHWORDS, CONCEPTS etc.

Authority to bring proceedings: 36/03
 Authorized officer's powers: 04/03
 Automatism: 30/03
 Bad faith: 18/03
 Bias, apprehended: 17/03
 Bill of costs: 06, 19/03
 Blood sample: 01, 29, 31/03
 Blood sample lost/destroyed: 31/03
 Breath analysing instrument: 16, 27/03
 Breath analysis, evidence excluded: 20/03
Browne v Dunn rule: 05/03
Bunning v Cross discretion: 20/03
 Careless driving: 23/03
 "Chroming": 26/03
 Claim, summary dismissal of: 07/03
 Closely, driving too: 23/03
 Commission for Estate Agent: 05/03
 Compulsory procedure order: 18, 34/03
 "Consent": 36/03
 "Consistently with the interests of justice": 11/03
 Continuity of purpose: 32/03
 Contract, breach of: 21, 38/03
 Costs: 08, 19, 25, 27/03
 Costs, bill of: 06/03
 Costs follow the event: 19/03
 Course of conduct: 23, 32/03
 Court file lost: 33/03
 Credit limit: 35/03
 Crimes (Family Violence): 02/03
 Decision, reasons for: 19/03
 Deemed admissions: 22/03
 Defence of self-defence: 12/03
 "Derive": 13/03
 "Directly or indirectly": 13/03
 Dismissal of claim summarily: 07/03
 Dissociative state: 30/03
 DNA sample: 18/03
 Documents, inspection of: 32/03
 Double jeopardy: 15, 32/03
 Drink/driving: 01, 16, 20, 27, 28, 29/03
 Driving parallel: 23/03
 Driving too closely: 23/03
 Drug addiction and sentencing: p116/03
 Duplicity: 23, 32/03
 Duty of care: 03, 39/03
 Element of drink/driving offence: 01, 16, 20, 27, 29/03
 Elements of stalking: 23, 32/03
 "Essential pre-condition": 01/03
 "Estate agent": 10/03
 Estate agent's commission: 05/03
 Exclusive Auction Authority: 05/03
 Explanation for possessing proceeds of crime: 13/03
 "Facility": 36/03
 Failure to comply with statutory requirement: 06/03
 Fair trial: 31/03
 First offence: 28/03
 "Forfeiture offence": 13/03
 Fragmentation of criminal proceedings: p55/03
 General unfairness discretion: 20/03
 Guarantee: 35/03
 Guilty plea: p255/03
 "Heat of the fight": 12/03
 Implied term: 05, 21/03
 Inferences: 23, 27/03
 Inspection of documents: 32/03
 Instalment order: 09/03
 Interference in case by magistrate: 17/03
 Interim intervention order: 14/03
 Intervention order: 02, 14, 23, 24/03
 Irregularity: 37/03
 Irrelevant consideration: 14, 22/03
 "it goes without saying": 21/03
Jones v Dunkel: 23/03
Judgment Debt Recovery Act application: 09/03
 Leading questions by magistrate: 17/03
 "Legal costs": 06/03
 Legal fees: 08/03
 Liability of occupiers: 03/03
 Licence disqualification period: 28/03
 Likelihood of damage: 02/03
 "Likely": 02/03
 Loitering: 23/03
 "Makes a journey": 03/04
 "May reasonably be suspected": 40/03
 "May tend to confirm or disprove": 34/03
 Mogadon: 30/03
 Natural justice: 14, 17, 18, 22/03
 Negligence: 03/03
 Noahhide laws: 26/03
 Non-insane automatism: 30/03
 Notice to admit: 22/03
 Notice to operator: 27/03
 Occupational Health and Safety: 36/03
 Occupiers liability: 03/03
 Offensive behaviour: 26/03
 Onus of proof in civil assaults: 12/03
 Operator not familiar with regulations: 16/03
 Operator, notice to: 27/03
 Order for instalments: 09/03
 Order to undergo compulsory procedure: 18, 34/03
 Paint sniffing: 26/03
 Panadeine forte: 30/03
 Parallel driving: 23/03
 Part performance: 07/03
 "Pattern of conduct evidencing a continuity of purpose": 23/03
 Permanent stay of proceedings: 14, 31/03
 Personal service of summons: 37/03
 Plea of guilty: p255/03
 Pleadings in Magistrates' Courts: 21/03
 "Possess": 13/03
 Post, service of summons by: 15/03
 Power of authorized officer: 04/03
 Presumption of regularity: 27/03
 Procedural fairness: 05, 18, 22, 38/03
 "Proceeds": 13, 40/03
 "Proceeds of crime": 13, 40/03
 Proof of service of summons: 15/03
 Protest, appearance under: 15, 33, 37/03
 Public policy discretion: 20/03
 "Realise": 13/03
 Reasons for decision: 19/03
 Rebirthed vehicle: 11/03
 Regularity, presumption of: 27/03
 Rehearing application: 24/03
 Re-identified vehicle: 11/03
 "Requirement": 01/03
 "Requires the person to furnish a sample of blood": 01, 29/03
 Revocation of intervention order: 24/03
 Roadworthy vehicle: 21/03
 Rule in *Browne v Dunn*: 05/03
 Rules of Court: 22/03
 "Sale": 05/03
 Search warrant: 11/03
 Seizure of motor vehicle: 11/03
 Self-defence: 12/03
 Sentencing: pp88, 116/03, 28/03
 Sentencing, lies told to court in: p88/03
 Service of summons effective: 33, 37/03
 Service of summons defective: 15/03
 Service of summons by post: 15/03
 Service, oral evidence of: 15/03
 Sewer inspection shaft: 03/03
 Shares, offer to buy: 38/03
 Shoplifting: 30/03
 Solicitor's claim for costs: 06/03
 Stalking: 23, 24, 32/03
 Stay of proceedings: 14, 31, 33/03
 Striking out charge: 20/03
 Sub-poena: 32/03
 "Subsequent offence": 28/03
 "Sufficiently or reasonably possible": 30/03
 Summary dismissal of claim: 07/03
 Summons to witness: 32/03
 Suspicion: 13, 40/03
 Theft from shop: 30/03
 "This charge and summons": 15/03
 Ticket for tram travel: 04/03
 Tram ticket: 04/03
 Uncovered sewer inspection shaft: 03/03
 Unfairness in trial: 20, 31/03
 Unlawful assault: 32/03
 Unlawful possession: 13, 40/03
 Unrepresented defendant: 22/03
 Waiver: 37/03
 Warrant, validity of: 11/03
 Witness' costs and expenses: 25/03
 Witness summons: 32/03

TABLE OF STATUTES AND REGULATIONS

<i>Agricultural and Veterinary Chemicals (Control of Use) Act 1992</i>	ss40, 53: 17/03
<i>Children and Young Persons Act 1989</i>	s200: 26/03
<i>Confiscation Act 1997</i>	ss3, 123: 13, 40/03
<i>Crimes Act 1958</i>	s21A: 14, 23, 24, 32/03
	s464T: 18, 34/03
	s4: 14/03
<i>Crimes (Family Violence) Act 1987</i>	s4(1)(b): 02/03
	ss12, 16: 24/03
	s4: 10/03
<i>Estate Agents Act 1980</i>	s126: 07/03
<i>Instruments Act 1958</i>	s6: 09/03
<i>Judgment Debt Recovery Act 1984</i>	ss86, 106, 107: 06/03
<i>Legal Practice Act 1996</i>	ss30(2)(a), 33: 33/03
<i>Magistrates' Court Act 1989</i>	ss34: 15, 37/03
	ss35, 36(2), (3): 15/03
	ss43, 45: 25/03
	s78: 11/03
	s110: 24/03
	s128: 14/03
	s131: 08, 19, 25/03
	s136: 14/03
<i>Magistrates' Court Civil Procedure Rules 1999</i>	O14.03: 22/03
	O30: 24/03
<i>MMBW Act 1958</i>	ss3, 129, 132: 03/03
<i>Occupational Health and Safety Act 1985</i>	ss21, 47, 48(2), 52(1): 36/03
<i>Road Safety Act 1986</i>	s3: 27/03
	s47: 27/03
	s48(2): 28/03
	s49(1)(e): 29/03
	ss49(1)(b), (f): 16, 20, 27, 28, 31/03
	s49(1)(g): 01, 31/03
	s49(5): 31/03
	ss50(1A), 50AA: 28/03
	s55(1): 01, 16, 27/03
	s55(9A): 01, 29/03
	s57(2), (4), (7), (7A): 31/03
	s58(2): 20, 27/03
	s58(4): 16, 27/03
	s65: 23/03
<i>Road Safety (General Regulations) 1999</i>	r205: 31/03
<i>Summary Offences Act 1966</i>	s26: 13, 40/03
<i>Transport Act 1983</i>	s221(4): 04/03
<i>Water Industry Act 1994</i>	ss3, 63: 03/03
<i>Wrongs Act 1958</i>	s14B: 03/03

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