**16/77**

## SUPREME COURT OF VICTORIA

# *LOVEDAY v COIBASIC*

**Murray J**

**25 February 1977**

**MOTOR TRAFFIC – DRINK/DRIVING – EXCEED .05% – ADMISSIBILITY OF BOTH CERTIFICATE OF TAKING OF BLOOD SAMPLE AND SAFEKEEPER'S CERTIFICATE – ONE CERTIFICATE MUTILATED – NO EVIDENCE TO PROVE DOCTOR WAS A PRESCRIBED PERSON – CHARGE DISMISSED BY JUSTICES – WHETHER JUSTICES IN ERROR: *MOTOR CAR ACT* 1958, S81A(1).**

Driver injured in car accident – sample of blood taken at hospital by Dr Salmon; handed to Dr Henton for safekeeping. Argued that neither certificate was valid: Schedule 6 Certificate, because it was mutilated and incomplete because certain printed words were missing; Schedule 6A Certificate, because the person prescribed in the rules was the Director of Medical Services and Dr Henton signed as casualty supervisor – that the certificate was thus not signed by a person purporting to be a person of the Class prescribed in s80D(3a) (as distinct from s80D(3) and (4) where the words used are "purporting to be signed by a person purporting to be ..."). Charge dismissed by the Justices. Upon Order Nisi to review—

**HELD: Order absolute. Order of the Justices quashed. Remitted to the Magistrates' Court to be dealt with in accordance with the law.**

**1. Having regard to the provisions of s80D(3a) of the *Motor Car Act* 1958 ('Act'), by parity of reasoning it followed that the expression, "A certificate purporting to be signed by a person of the class prescribed as being responsible for the safekeeping of samples of blood taken under s80(d)(a)" may be regarded as a composite one. The certificate itself must be examined to see whether it does purport to be signed by a person of the class prescribed. If it does it is admissible as *prima facie* proof of the facts and matters it contains.**

**2. An examination of the certificate in the present case showed clearly that it did so purport. It was headed, "Certificate of prescribed person as to safekeeping of blood sample" and its body contained the statement that the person signing it was a person of the class prescribed as being responsible for the safekeeping of samples of blood taken under s80DA of the Act.**

**3. Accordingly, the Certificate of Dr Henton was admissible to prove the facts and matters it contained.**

**4. In relation to the mutilation of the Certificate, the effect of mutilation was one of degree. Mutilation may be to such an extent it cannot fairly be said the document tendered is a document in or to the effect of schedule 6. But in the present case the small amount of mutilation, involving as it did none of the handwritten words and only a small number of printed words was not of such a degree to justify the conclusion that the document tendered was not a certificate falling within the provisions of s-s3.**

**5. Accordingly, the certificate proved the taking of a blood sample by Dr Salmon and the manner in which it was labelled sufficient to link it up with the certificate of Dr Henton, the evidence of Constable Vagg and the certificate of Mr Brown, the analyst.**

**MURRAY J:** This is the return of an order nisi to review the decision of two honorary justices sitting at Geelong on the 6th of April 1976 whereby an information laid by the applicant against the respondent was dismissed. The respondent was charged with committing an offence under s81A(1) of the *Motor Car Act*, namely, driving a motor car while the percentage of alcohol in his blood was more than .05 per cent.

The evidence showed that at about 5.00 p.m. on the 8th August 1975, the respondent was the driver of a motor car which was involved in a collision. He was taken to the Geelong Hospital, where it was sought to prove that a sample of his blood was taken by Dr JR Salmon, apparently acting in accordance with the provisions of s80DA of the *Motor Car Act*. It was further sought to prove that the sample was handed to Dr RV Renton for safekeeping, and that Dr Renton was a

prescribed person as to the safekeeping of blood samples. Constable Vagg gave evidence of collecting the sample from Dr Henton on the 20th August 1975 and delivering it to the Forensic Science Laboratory, and a certificate of Mr Robert Gordon Brown, an approved analyst, was tendered to prove that the sample upon analysis was found to contain .148 per cent of alcohol.

At the close of the applicant's case, the solicitor appearing for the respondent submitted that there was no case for the respondent to answer, and after hearing argument the justices dismissed the information.

It appears from the affidavit in support of the order nisi that the justices dismissed the information upon the grounds —

(a) that one of the certificates tendered was mutilated and incomplete; and

(b) there was no evidence to prove that Dr Henton was a prescribed person as to the safekeeping of a blood sample.

It appears that the respondent's submissions extended to other matters in addition to those referred to by the justices, but it is not clear whether these other submissions were accepted or rejected by the court. However, Dr Buchanan, who appeared for the respondent to show cause, did not seek to rely upon any grounds other than those arising from the mutilation of the certificate of Dr Henton and the proper construction of s80D(3)(a) of the *Motor Car Act*.

The case made against the respondent was sought to be proved by evidence that he was the driver of a car involved in an accident at about 5.00 p.m. on the 8th of August 1975, his subsequent admission to the Geelong Hospital, evidence of the collection of a blood sample by Constable Vagg and its delivery to the Forensic Science laboratory and service of the necessary documents in compliance with the various provisions of the *Motor Car Act*.

A certificate purporting to be signed by Dr JR Salmon in the form of the sixth schedule of the *Motor Car Act* as to the taking of the blood sample was tendered under the provisions of s80D(3). A certificate purporting to be signed by Dr NV Henton in the form of schedule 6A of the *Motor Car Act* to prove the safekeeping of the sample and its delivery to Constable Vagg was tendered under the provisions of s80D(3A) and a certificate purporting to be signed by RG Brown, an approved analyst, to prove the percentage of alcohol found upon analysis of the sample was tendered under the provisions of s80D(4).

No attack was made upon the analyst's certificate, but argument was submitted attacking the validity of the certificate of Dr Salmon, due to its mutilated state, and the admissibility of the certificate of Dr Henton, the latter argument being based on the proper construction of sub-s3A.

As the question of the construction of sub-s3A may be of general importance, I propose to deal with it first. Sub-s3A reads as follows:

"A certificate purporting to be signed by a person of the class prescribed as being responsible for the safekeeping of samples of blood taken under s80DA in or to the effect of Schedule Six A shall be admitted in evidence in any proceeding referred to in sub-s.(1) as *prima facie* proof of the facts and matters therein contained."

Pursuant to sub.s(14)1(A) Statutory Rule No. 112 of 1974 lists the various persons at the hospitals set out in the schedule to the Rules who are prescribed persons for the safekeeping of blood samples, but regulation 223C provides that not only those persons but also any person for the time being performing the duties of those persons are prescribed persons. The person prescribed in the case of the Geelong Hospital is the Director of Medical Services.

The certificate in question is a printed form, the heading of which reads, "Certificate of prescribed person as to safekeeping of blood samples". It reads. "I, Edwin Victor Henton of Geelong Hospital, being the holder of the office of Casualty Supervisor in the Geelong Hospital and a person of the class prescribed as being responsible for the safekeeping of samples of blood taken under s80DA of the *Motor Car Act* 1958 hereby certify that at 1810 hours on the 8th August 1975, I received a container labelled "Peter Coibesis, 8.8.'75, 1800, J. Salmon' containing portion of a

sample of blood and caused the container to be kept safely so that the contents were preserved in good condition until 11.45 on the 20th August, 1975, when the container was delivered to David Vagg, a member of the police force and that all regulations relating to the safekeeping and storage of this container and its contents were complied with". It is signed "E.V. Henton" and dated the 20th August, 1975.

Dr Buchanan relied upon the decision of the Full Court in *Hanlon v Lynch* [1968] VicRp 80; [1968] VR 613 and pointed to the curious discrepancy of language between s80D(3) and (4) on the one hand, and s80D(3A) on the other. Sub-s 3 provides that: "A certificate purporting to be signed by a person who purports to be a legally qualified medical practitioner, etc.". Sub-s.4 provides that "A certificate purporting to be signed by a person who purports to be an approved analyst, etc." While sub-s3(a) merely provides, "A certificate purporting to be signed by a person of the class prescribed as being responsible for the safekeeping of the samples of blood, etc.".

Dr Buchanan submitted that the wording of sub-s3(a) resulted in a situation equivalent to that which arose in *Hanlon v Lynch* (*supra*) and further submitted that the contrary view would inevitably lead to the conclusion that the word "purporting" appearing the second time in sub-sections 3 and 4 was otiose. He submitted that for the certificate to be admissible sub-s3A should read, "A certificate purporting to be signed by a person who purports to be a person of the class prescribed as being responsible for the safekeeping of blood samples, etc.".

I have not found the problem to be an easy one, but after a careful study of the reasons for judgment in *Hanlon v Lynch* (*supra*) I have come to the clear conclusion that Dr Buchanan's submissions should be rejected.

It is necessary to analyse carefully the basis upon which the Full Court reached its conclusions in that case. The court was dealing with s408A(1) and (2) of the *Crimes Act* and the provision for the admission of a certificate by an authorised operator of a breath-analysing instrument as evidence of its contents was subject to a condition precedent that a copy of the certificate should have been delivered to the person whose breath had been analysed as soon as practicable after the analysis. Hence, the certificate did not enter through the threshold of admissibility until the condition precedent was proved by oral evidence. Following upon this decision, the legislation was amended.

There were various ways in which it could have been amended to meet the difficulty, perhaps the most obvious being to abolish the condition precedent itself and replace it with a simple requirement that a copy of the certificate should be given to the person whose breath had been analysed as soon as practicable after the analysis. Instead, the draftsman chose an equally effective, but perhaps confusing method and introduced a double use of the word "purporting". The sub-section as amended read, "A document purporting to be a copy of any certificate given in accordance with the provisions of sub-s2 and purporting to be signed by a person authorised by the Chief Commissioner to operate breath-analysing instruments shall be *prima facie* evidence of the matters stated therein".

In *White v Moloney* [1969] VicRp 91; (1969) VR 705, the Full Court held that the expression, "Copy of any certificate given in accordance with the provisions of sub-s2" was a composite one and that the word "purporting" governed the whole phrase. It is necessarily implicit in this decision that the contents of the certificate tendered in evidence may be examined in order to determine its admissibility. In this sense it may truly be said that the certificate tends to lift itself up by its own bootlaces.

Turning now to the provisions of s80D(3a), by parity of reasoning it follows that the expression, "A certificate purporting to be signed by a person of the class prescribed as being responsible for the safekeeping of samples of blood taken under s80(d)(a)" may be regarded as a composite one. The certificate itself must be examined to see whether it does purport to be signed by a person of the class prescribed. If it does it is admissible as *prima facie* proof of the facts and matters it contains. An examination of the certificate shows clearly that it does so purport. It is headed, "Certificate of prescribed person as to safekeeping of blood sample" and its body contains the statement that the person signing it is a person of the class prescribed as being responsible for the safekeeping of samples of blood taken under s80DA of the *Motor Car Act*. This view does

not lead to the conclusion that the word "purporting" where it secondly appeared in s408(a) as amended after the decision in *Hanlon v Lynch* was otiose. The draftsman had two matters to deal with – the fulfilment of the condition precedent and the admissibility of the certificate itself.

In the case of s80(D)(3) and (4), there is no condition precedent to dispose of first and hence the one use of the word purporting is sufficient if the phrase following it is treated as a composite adjectival one. I am, however, inclined to the view that when the later provisions s-s80(3) and (4) were drafted the draftsman followed the wording that had been successfully used is the amendment to meet the decision in *Hanlon v Lynch* without analysing the real problem. Consequently, it appears, probably, that s(3) could have been effectively and more neatly drafted to read "A certificate purporting to be signed by a legally qualified medical practitioner etc.", and s.s.(4) "A certificate purporting to be signed by an approved analyst etc.". To that extent it might be said the wording of (3) and (4) is longer than necessary.

For these reasons, in my opinion, the certificate of Dr Henton was admissible to prove the facts and matters it contained.

I turn now to the second matter, namely, the mutilation of the certificate of Dr Salmon. The material discloses that the certificate tendered in evidence by the applicant was compared with the copy served upon the respondent and the mutilation of each was identical. It therefore seems likely that the certificate and copy were torn out of the book together and that in the process the paper did not tear cleanly along the perforation. A small strip along the left-hand margin, varying in width, presumably remained in the book and was torn off the two documents.

In the result small portions of the printed words of the certificate do not appear. The only omission of any significance whatever in my opinion is that the words "relating to" are missing between the words "all the regulations" and "the collection of such sample was complied with" and the words "containers labelled" are missing or obscured between the words "such sample was placed in two" and the respondent's name. But both sets of words missing relate to compliance with the regulations and, as was conceded in argument by Dr Buchanan, there is nothing in the Act which makes proof of compliance with the regulations a condition precedent. The question, therefore, in my opinion, amounts to this: is the document a document which purports to be signed by a person who purports to be a legally qualified medical practitioner in or to the effect of schedule 6?

The document itself is headed, "Sixth schedule *Motor Car Act* 1958", and in the next line in bold type "Certificate of Medical Practitioner of the taking of a blood sample".

The effect of mutilation is, obviously, one of degree. Mutilation may be to such an extent it cannot fairly be said the document tendered is a document in or to the effect of schedule 6. But in the present case I am clearly of the view that the small amount of mutilation, involving as it does none of the handwritten words and only a small number of printed words is not of such a degree to justify the conclusion that the document tendered was not a certificate falling within the provisions of s-s3. See *Wesson v Jennings* [1971] VicRp 9; [1971] VR 83. I, therefore, am of the opinion that the certificate did prove the taking of a blood sample by Dr Salmon and the manner in which it was labelled sufficient to link it up with the certificate of Dr Henton, the evidence of Constable Vagg and the certificate of Mr Brown, the analyst.

I therefore have come to the conclusion that the justices were in error in dismissing the information. The order nisi will he made absolute and the order of the court below quashed. The matter will be remitted to the Magistrates' Court at Geelong to be dealt with in accordance with this judgment. The respondent is to pay the applicant's costs to be taxed not exceeding $200. I grant the respondent a certificate under the *Appeals Costs Fund Act*.

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