29/02; [2002] VSC 426

SUPREME COURT OF VICTORIA

DAY v COUNTY COURT of VICTORIA and HANSON

Smith J

17 June, 9 October 2002 — (2002) 37 MVR 319

MOTOR TRAFFIC – DRINK-DRIVING – DATE OF OFFENCE – PLACE OF OFFENCE – CAPABLE OF AMENDMENT WHERE VARIANCE – BLOOD TEST TAKEN FROM DRIVER – TEST TAKEN MORE THAN THREE HOURS AFTER DRIVING – "EXPRESSED CONSENT" TO BLOOD TEST – MEANING OF – DRIVER TOLD BY DOCTOR THAT HE WILL TAKE HIS BLOOD AND ASKED: "WILL YOU LET ME?" – FINDING BY COURT THAT DRIVER "EXPRESSED CONSENT" – WHETHER COURT IN ERROR: *ROAD SAFETY ACT* 1986, SS55(9A), 57(9).

On 27 August 1999 shortly after 11.30pm, D. drove his motor vehicle into a service station situated on the corner of Frankston-Flinders Road and Moorooduc Road. The service station operator called the police who arrived at about 12.45am on 28 August 1999. As the breath analysis instrument was unable to analyse a sample of D.'s breath, D. was required to remain for a blood test pursuant to s55(9A) of the *Road Safety Act* 1986 ('Act') and indicated his willingness to do so. The doctor who attended to take a blood sample said to D.: "I am going to take your blood will you let me?" to which D. answered: "Yes". D. returned a blood/alcohol reading of 0.107% and was charged with an offence under s49(1)(b) of the Act and also a charge of driving a motor vehicle on a highway namely Moorooduc Road whilst disqualified. At the hearing, D. was convicted and appealed to the County Court which also imposed convictions. Upon an originating motion to quash—

HELD: Conviction and sentence on charge under s49(1)(b) quashed. No error in relation to charge of driving whilst disqualified.

1. Each charge could just have easily stated that the offences occurred on or about 27 August 1999. The situation was one where the precise date was something that could have been amended without altering the offence. The amendment to the date of offence was of something not essential or material to the charge and it addressed a variance as provided by s50 of the *Magistrates' Court Act* 1989.

2. The identity of the street where the driving allegedly occurred was not material. Whilst there was no evidence that D. was observed to be actually driving on either the Frankston-Flinders Road or Moorooduc Road, the evidence that D. was observed driving into the service station led to the inescapable conclusion that D. must have been driving on one or other of those two highways.

3. In view of the fact that the blood sample was taken more than three hours after the relevant driving, the prosecution had to rely on s57(9) to prove that D. had "expressed consent to the collection of blood". Whilst D. expressed his willingness to undergo a blood test, the question was whether the assent amounted to "expressed consent". There was no evidence that D. was aware of his right not to consent at the time he was asked to consent. D. remained under the impression that he had no choice so that, when asked by the doctor, D.'s assent amounted to no more than an allowing of the doctor to take the sample and not the giving of consent. Anything short of an informed consent will not suffice to enable a blood sample to be taken. In the circumstances, it was not open to the court to find that a consent was made following the exercise of a choice. It would reduce the "expressed consent" requirement to a mere formality if permission given in the circumstances of the present case could be regarded as a consent which satisfied the legislation.

SMITH J:

Background to Proceedings

1. Barry Thomas Day was convicted in the Magistrates' Court at Frankston on 1 March 2000 of charges under s49(1)(b) and s30 *Road Safety Act* 1986. He had pleaded guilty to both charges. Mr Day appealed to the County Court.

2. The hearing of the appeal began late on Monday, 10 December 2001 and continued on 11, 12, 13, 17 and 18 December 2001. On 19 December 2001 his Honour found the charges proved and imposed the following penalties:

(a) In respect of the offence of driving with a blood alcohol level in excess of the prescribed concentration

(s49(1)(b)), he was sentenced to a term of imprisonment of two months and he was disqualified from obtaining any driving licence for a period of three years.

(b) In respect of the offence of driving whilst disqualified (s30), he was convicted and sentenced to a term of imprisonment of six months such sentence being suspended as to four months for two years.

Relief sought

3. Mr Day seeks relief pursuant to Order 56 challenging the decision of the County Court.

4. I would normally set out a statement of the relief sought and the grounds of that relief as set out in the originating motion. In this case, however, it is more helpful to identify the issues raised in argument, the ambit of the originating motion being far wider and the expression less clear.

5. It has also been necessary to refine the issues further because of the attempt by counsel for the plaintiff from time to time to go beyond the ambit of an Order 56 review and to seek to re-visit factual findings on which the conviction was based and on which the sentencing was based.

6. The following arguable issues may be said to have been raised in these proceedings:

(a) Whether the County Court had jurisdiction to consider the appeal in relation to both charges in that it was asked to consider charges different from those originally charged.

(b) Whether there was error on the face of the record in relation to the s30 charge on the basis that there was no evidence that the driving occurred on Moorooduc Road.

(c) Whether there was error on the face of the record in relation to the s49(1)(b) charge on the basis that
(i) there was no evidence to support a finding that the breathalyser officer Millar was authorised to carry out a breathalyser test;
(ii) his Honour found that a demand for the plaintiff to submit to a breath test had been made;
(iii) his Honour found that consent to the taking of a blood test did not have to be proved;
(iv) his Honour found that expressed consent to a blood test, within the meaning of the Act, had been established.

7. The plaintiff relied upon the foregoing to challenge one or both of the convictions. He also sought to challenge the sentence decision. As to the latter, it is sufficient to say that the arguments advanced effectively sought a revisiting of the sentencing task. They included an argument that the imposition of a crushing sentence involved a denial of natural justice. That is indicative of the difficulty facing counsel in trying to bring the challenge to the sentence within the parameters permitted in Order 56 proceedings. I return to the matters identified above relating to the convictions.

The Offences Charged

8. Two offences were charged. The Charges and Summonses filed gave the following details of the offences.

(a) section 49(1)(b);
"that at Frankston on 28 August 1999 [he] did drive a motor vehicle while more than the prescribed concentration of alcohol being .00 grams per 100 millilitres of blood was present in his blood (0.107%)."

(b) section 30(1);
"that at Frankston on 28 August 1999 [he] did drive a motor vehicle on a highway namely Moorooduc Road during a period of disqualification from obtaining an authorisation to drive a motor vehicle."

Lack of Jurisdiction (both charges)

9. His Honour noted in his reasons that he allowed the respondent to the appeal to amend both charges so as to allege that the offences took place on 27 August 1999 and not 28 August 1999 as set out in the stated charges. He noted that he allowed the amendment pursuant to s50 *Magistrates' Court Act* 1989.

10. His Honour accepted that Mr Day drove a motor vehicle into a service station at the intersection of the Frankston-Flinders Road and Moorooduc Road shortly after 11.30pm on 27 August 1999. As a result of Mr Day's appearance and conduct, the service station attendant, Mr

McKinnon, called the police. They arrived at the service station at about 12.45am on 28 August 1999.

11. In essence, counsel for Mr Day has submitted that his client was convicted of two charges relating to events on 28 August 1999 before the Magistrates' Court and that on appeal it was for the prosecution to establish that the offence occurred on the day alleged. He further submitted that to amend the date was to change the offence to a different offence.

12. In my view the reality was, and it was not submitted otherwise, that the events relied upon on the appeal were the same events as those relied upon in the Magistrates' Court. The situation was one where the precise date was something that could be amended without altering the offence. Each charge could just as easily have stated that the offences occurred on or about 27 August 1999. The amendment made was of something not essential or material to the charge under either section. It addressed a variance.[1]

Error when no evidence of driving in Moorooduc Road (s30 charge)

13. Counsel submitted that it is clear from his Honour's reasons that there was no evidence that Mr Day had been driving on Moorooduc Road, the highway named in the charge. The only direct evidence revealed in the reasons was that of the service station operator, Mr McKinnon, who observed Mr Day arriving. Counsel submitted that Mr McKinnon's evidence was that he saw the car arriving in fact from the direction of the Frankston-Flinders Road.

14. The reasons for judgment record the fact that this argument was put as part of a no case submission before his Honour. His Honour ruled that it was not necessary for the prosecution to prove driving on Moorooduc Road. He stated that what was essential was proof of driving on a highway and if necessary he would allow an appropriate amendment to the charge under s50 *Magistrates' Court Act*. In reaching that conclusion he relied on the judgment of Batt JA in *Gigante v Nickson*[2]. His Honour quoted the following passage from Batt JA's reasons for judgment[3]—

> "But the place of offending ordinarily at least is not, and in the present case in particular was not, an essential element of the offence under paragraph (f) and so ordinarily is not, and here was not, a material allegation. Offences where the place of offending is an essential element or a material allegation are exemplified by that of dangerous driving on a public street and that of conducting a noxious business, say, in a town or on land zoned for residential use or within so many kilometres of the principal post office in the City of Melbourne. But as *Parmeter v Proctor* shows, even the identity of the street where the dangerous driving allegedly occurred is not material."

15. His Honour, referring back to the matter before him, said that there could be no doubt that the appellant had been provided with sufficient details or particulars of the case sought to be made against him. As to counsel's submission that there was no direct evidence of driving on any highway, his Honour said he accepted there was no evidence from any witness stating that Mr Day was observed to be actually driving on either the Moorooduc Road or the Frankston-Flinders Road. He stated, however, that the evidence of Mr McKinnon that he observed Mr Day driving into the service station area led to the inescapable conclusion that he must have been driving on one or other of those two highways.

16. I agree with his Honour's analysis. It is, therefore, unnecessary to consider whether the service station driving areas were also highways.

Error in finding Millar authorised (s49(1)(b) charge)

17. His Honour in his reasons sets out the basis upon which he reached the conclusion that the breathalyser operator, Mr Millar, was duly authorised. No error can be shown in his Honour's reasons.

Error in finding that a demand for a blood test was made (s49(1)(b) charge)

18. In relation to the charge under s49(1)(b), the informant's case relied upon evidence of the result of the testing of a blood sample taken from Mr Day in the purported exercise of the statutory power to require a sample given by s55(9A) of the Act. Counsel for Mr Day argued before his Honour that the statutory prerequisites had not been established in that a demand satisfying the section had not been made. He argued that, as a result, the evidence of the blood sample was not admissible.

19. The blood test section in the *Road Safety Act* 1986 relied upon primarily by the prosecution was s55(9A). It provides:

> "(9A) The person who required a sample of breath under sub-section (1) or (2) from a person may require that person to allow a registered medical practitioner nominated by the person requiring the sample to take from him or her a sample of that person's blood for analysis if it appears to him or her that—
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> (a) that person is unable to furnish the required sample of breath on medical grounds or because of some physical disability; or
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> (b) the breath analysing instrument is incapable of measuring in grams per 100 millilitres of blood the concentration of alcohol present in any sample of breath furnished by that person for any reason whatsoever."

20. His Honour set out his reasons for finding that Senior Constable Hanson had made the demand that Mr Day remain for the purpose of a blood test. The following may be noted.

(a) His Honour considered an argument by counsel for the appellant that compliance with sub-s55(9A) had not been established because the prosecution evidence presented two inconsistent versions of what was said to Mr Day prior to taking the blood sample. His Honour noted –

> "On the one hand he (counsel) said that there was the evidence of the informant, which was expressed in terms of a requirement to remain at the Frankston Police Station for a blood test, rather than as specified in the sub-section, a requirement to allow a registered medical practitioner, nominated by the member of police who had required the breath sample, to take a blood sample. On the other hand, he said the evidence of Senior Constable Millar was to the effect that Senior Constable Hanson had made the requirement in formal terms apparently complying with the sub-section, requiring Mr Day to allow the taking of a sample."

His Honour's view was that there was no serious discrepancy between the two versions.

(b) He said that he considered that although Senior Constable Hanson's version could have more closely followed the wording of the section it sufficiently conveyed to Mr Day that he was being required to allow a medical practitioner to take the blood sample and that, therefore, there was compliance with the sub-section. His Honour quoted, apparently with acceptance, the evidence of Mrs Hanson that she said to Mr Day –

> "As you are unable to provide a sufficient sample of your breath for analysis and the breath analysis instrument is not able to analyse a sample of your breath, I require you to remain here for a blood test, pursuant to s55(9A) of the *Road Safety Act* 1986."

She said that Mr Day then replied, "Okay". She then said that she said,

> "If you fail to remain here for the purpose of a blood test you will be committing an offence and you will incur a loss of licence and monetary fine. Are you willing to remain here?"

She said that Mr Day answered, "Yes".

(c) His Honour expressed the view, in light of the above evidence, that s55(9A) had been complied with and that all necessary steps required by the Act had been taken before a blood sample could lawfully be taken.

21. On the material set out in the reasons there was a proper basis for his Honour's finding and no error can be shown.

Was proof required of consent to the taking of the blood sample (s49(1)(b) charge)?

22. The prosecution relied before his Honour on –

> (a) the powers conferred by the Act which enabled blood samples to be taken and
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> (b) the provisions of the Act which permit the giving of evidence of the result of the testing of such blood samples.

23. Section 55(9A) and s.56 set out the circumstances in which blood samples may be lawfully taken without consent. Section 57(9) otherwise forbade the taking of a blood sample except with consent. Section 57 also dealt with the evidentiary aspects.

24. The sections of particular relevance were s57(2), s57(9) and (10).[4] They provided –

> "57(2) If the question whether any person was or was not at any time under the influence of intoxicating liquor or any other drug or if the question as to the presence of alcohol or any other drug or the concentration of alcohol in the blood of any person at any time or if a finding on the analysis of a blood sample is relevant—
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> (a) on a trial for murder or manslaughter or for negligently causing serious injury arising out of the driving of a motor vehicle, or
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> (ab) on a trial or hearing for an offence against Subdivision (4) of Division 1 of Part 1 of the Crimes Act 1958 arising out of the driving of a motor vehicle; or
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> (b) on a trial or hearing for an offence against section 318(1) of the *Crimes Act* 1958; or
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> (c) on a hearing for an offence against section 49(1) of this Act; or
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> (d) in any proceedings conducted by a coroner—
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> then without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the taking, within 3 hours after that person drove or was in charge of a motor vehicle, of a sample of blood from that person by a registered medical practitioner, of the analysis of that sample of blood by a properly qualified analyst within twelve months after it was taken, of the presence of alcohol or any other drug and, if alcohol is present, of the concentration of alcohol expressed in grams per 100 millilitres of blood found by that analyst to be present in that sample of blood at the time of analysis.
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> (3) to (8) .....
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> (9) Except as provided in section 55(9A) and 56, a blood sample must not be taken and evidence of the result of an analysis of a blood sample must not be tendered unless the person from whom the blood has been collected has expressed consent to the collection of the blood and the onus of proving that expression of consent is on the prosecution.
>
> (10) The mere failure or refusal of a person to express consent must not be used in evidence against that person or referred to in any way against that person's interests in any proceedings."

25. An issue raised by Mr Day was whether s55(9A) could be relied upon by the prosecution where the blood sample was taken more than three hours after the relevant driving. If not, the prosecution had to rely on s57(9) and prove consent.

26. His Honour accepted that the blood sample was taken outside the three-hour period provided for in s57(2) but he took the view that there was nothing in s55(9A) that required the sample to be taken within that time limit. Counsel for Mr Day submitted that this interpretation was incorrect.

27. It is true that there was nothing in the then s55(9A) expressly imposing a three-hour limit, but the compulsive powers of the police were so limited in relation to breath tests[5] and sub-s55(9A) is ancillary to those provisions and is drafted on the assumption of the continued existence of the entitlement of the police officer to require a breath test and of the obligation to submit to a breath test. This construction is also consistent with the legislative scheme.[6] I did not understand counsel for the second defendant to dispute this construction.

28. I note that by *Road Safety (Amendment) Act* 2000 s18, s55(9A) was amended to confer a power on the police to require a person to go to a place for the taking of a blood sample. The amendment also expressly included a three-hour limit in respect of the taking of a blood sample either in that way or generally. The Explanatory Memorandum mentions only the conferral of the power as the purpose of the provision.[7] The explanation for the inclusion of the reference to three hours lies, I suggest, in a drafting decision to employ wording otherwise similar to that in conferring the power in s55(2). That decision having been taken, it was necessary to expressly refer to the three-hour period. The failure to do so would have given rise to a strong argument that there was no three-hour limit based on a comparison of the provisions.

29. In my view, the prosecution could not rely on s55(9A) to authorise the taking of the sample, the three hours having elapsed. It had to rely, therefore, on s57(9) which required "expressed consent" to justify the taking of the sample and to be able to tender evidence of the result.

Was "expressed consent" established (s49(1)(b) charge)

30. His Honour accepted that if he was wrong in his conclusion as to compliance with s55(9A), it followed that the only basis on which the evidence of the result of the analysis of the blood sample could be admitted was upon proof, in accordance with s57(9), that Mr Day had "expressed consent" to the taking of the sample.

31. On the issue of "expressed consent" his Honour said –

> "So far as the issue of expressed consent is concerned, I am quite satisfied on the evidence given by Dr Barkley ... that Mr Day did express consent to the taking of the blood sample. I am unable to accept the argument that it was necessary for the police to inform Mr Day that he was free to leave the Frankston Police Station after three hours from driving and that he could not be compelled to provide the sample. Nor can I accept the argument that evidence that Mr Day expressly allowed Dr Barkley to take the sample falls short of amounting to expressed consent."

32. Earlier in his reasons, his Honour had stated that Senior Constable Hanson had given evidence that Dr Barkley attended and took a blood sample from Mr Day at about 3.05am on 28 August. He also recorded his findings that

> "Dr Barkley gave evidence of the taking of the blood sample. His evidence included evidence that before he proceeded to take the sample, he said to Mr Day, this: 'I asked him, I am going to take your blood will you let me?' and that Mr Day answered 'Yes' and that Mr Day then allowed him to take the sample."

33. While, as his Honour noted, the prosecution was unable to rely upon the certificate provisions because it could not prove service of them within the prescribed 10 days[8] it nonetheless appeared to rely upon s57 as the basis for tendering its evidence.

34. I note that s57(2) also imposed a three-hour limit. I question, therefore, whether the prosecution was entitled to use the s57 evidentiary provisions, as it purported to do, assuming consent was given. The issue raised in these proceedings, however, is whether his Honour was in error in finding that the requirement of expressed consent was satisfied.

35. Section 57(9) provided that where s55(9A) and s56 did not apply, "a blood sample *must*[9] not be taken" unless the driver had "expressed consent to the collection of the blood". It also provided that, in the absence of "expressed consent", the evidence of the blood test "*must*[10] not be tendered". The section places the onus of proof on the prosecution. Plainly Mr Day expressed his willingness to undergo a blood test and his Honour so found. The critical question then becomes whether the assent he gave amounted to consent within the meaning of the provision.

36. There was no evidence before his Honour that Mr Day was aware of his right not to consent at that time he was asked to consent. There was evidence, however, that he had been told that he had to submit to a blood test. On the evidence, he had not been told that he did not remain under that obligation. In those circumstances, I have difficulty with the proposition that a consent was given by Mr Day to the taking of the blood sample. Plainly, Parliament attached significance to the requirement that consent be given. In my view, it would reduce the "expressed consent" requirement to a mere formality if permission given in the circumstances of the present case could be regarded as a consent which satisfied the legislation.

37. The Parliament has enacted, with frequent fine-tuning, a set of provisions designed to facilitate the proof of various drink-driving offences and, in doing so, has removed and limited rights of citizens. It seems reasonable to assume that provisions such as s57(9) and (10) are intended to mark out, in part, the boundary of that removal and limitation and seek to protect the rights of citizens where it was intended that those rights should not be affected. In those circumstances, I do not accept that it would have been the intention of the Parliament that anything short of an informed consent would suffice to enable a blood sample to be taken and given in evidence under the Act where those provisions apply.

38. In considering this question, it is instructive to note the approach that has been taken in England in dealing with provisions which give to a driver an option of having a blood test or urine test to determine blood alcohol level in circumstances where the breathalyser records a reading within a particular range. It has long been established that the driver in question must be adequately informed of his or her rights and a substantial body of case law has developed from the original House of Lords decision of *DPP v Warren*[11]. It appears to have been accepted that the relevant legislation was intended to give the driver a choice and the choice must be a real choice. It is said that the option must be fairly, properly and effectively put to the driver to enable an informed decision to be made.

39. The Victorian provision, of course, was not drafted in express terms conferring an option. Nonetheless, it is clear that Parliament intended that the driver have a choice[12] and that, if the driver was agreeable to having a blood sample taken, the driver should express his or her consent before any blood sample was taken or evidence of the result could be tendered. In the present case I am persuaded, on the basis of the facts found and referred to in his Honour's reasons, that it was not open to find that a consent was made following the exercise of a choice. On the facts as found by his Honour, the driver remained under the impression that he had no choice so that, when asked by the doctor, his assent amounted to no more than an allowing of the doctor to take the sample and not the giving of consent. That distinction is a real distinction and is used in the Act itself. For example, s56 which obliges injured persons to provide blood samples states "The person must *allow*[13] a doctor to take from that person ... a sample of that person's blood".[14]

40. This issue does not appear to have been argued to date before this Court in the ongoing saga of challenges to convictions in this area. On occasions, judicial interpretation of the Act has created results seen as unsatisfactory and which have been addressed by amendments to the legislation. That, it seems to me, is a price that has to be paid for the creation of what is a highly detailed and technical set of very difficult provisions, designed to facilitate the enforcement of the law, and so address the very serious problem of drink driving, by removing and limiting common law rights and protections, including those to be found in the common law rules of evidence. Another price that has to be paid is the taking of points by counsel for the accused which appear to be technical and, on proper examination without merit. The consent issue, however, is not in that category.

41. I note that in his Honour's sentencing reasons his Honour commented on statements that had been made in the Court of Appeal[15] critical of the taking of what were seen to be technical points in cases of persons charged with drink driving offences. His Honour made the following important statement with which I agree –

> "Now, I am bound to say that with great respect I agree with much of what the Court said in those cases. Let me say, however, that there can be no question whatsoever that every citizen in our community who is charged with a criminal offence, especially one where his or her liberty is at stake, has the inalienable and fundamental right to put the prosecution to its proof, and there can be no criticism of any lawyer who undertakes that task in representing a person charged with any offence, including offences of the kind of which I have had to deal in this case."

His Honour then went on to comment on the arguments raised in the case before him stating that it was an example of a case in which some points were raised which could not be described as fairly arguable although a number of points were properly raised and arguable in his view. A similar comment may be made of the matters raised on this appeal. This application also demonstrates the difficulty facing counsel in forming a view before argument about whether a point that can be raised is technical or without merit.

42. I was informed by counsel for the plaintiff, and the issue was not disputed by counsel for the second defendant, that Police Standing Orders state that a person in the position of Mr Day does not have to be informed of his rights. If that is so, the issue could be addressed by appropriate directions in the Standing Orders.

Another Issue

43. Before finalising my decision, I invited counsel to make further submissions on the following question:

> "Assuming error has been shown in the admission of the evidence of the blood test, is it relevant in deciding whether to quash the conviction to have regard to:
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> (a) the evidence of Mr McKinnon, and the findings of His Honour Judge Smith in relation to such evidence, about the appearance and condition of Mr Day shortly after leaving his motor vehicle at the Petrol Station; and
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> (b) Mr Day's admissions to the police and his evidence as to his drinking on the night in question, his alleged blackout and the lack of any evidence to explain the blackout?"

44. The issues arose because the prescribed limit for Mr Day was .00% and there was strong evidence that he was under the influence of alcohol and, therefore, must have been over his prescribed limit at the relevant time.

45. Counsel for the plaintiff submitted that notwithstanding the generality of the language in s49(1)(b), there could be no conviction unless a finding could be made of a specific blood alcohol level. He referred to s49(7)(a) which requires that the level of concentration of alcohol found must be recorded in the records of the court. He argued that it was no answer that an entry could be made "more than .00%". He also referred to the provisions which specify licence disqualification periods by reference to the level of concentration of alcohol. He argued that it was no answer that the provisions spelt out minimum periods of disqualification and that, in a case such as the present, a disqualification at or above the lowest minimum could be applied.

46. Counsel for the second defendant supported this construction. In those circumstances, it would be inappropriate to take the issue further. I also bear in mind Lush J's caution to all judges, "Beware the judge's point – it is probably wrong."

Conclusion

47. In light of the foregoing, it follows that error has been demonstrated on the face of the record in respect of the decision on the charge of breach of s49(1)(b). The evidence of the blood test was not admissible. The plaintiff, however, has failed to establish error in respect of the charge brought under s30 of the Act.

48. Accordingly, the orders convicting and sentencing the plaintiff on the charge under s49(1)(b) *Road Safety Act* 1986 should be quashed. I will invite submissions on the orders that should be made.

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[1] s50 *Magistrates' Court Act* 1989; *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403 at 417; (1992) 16 MVR 367; *Gigante v Nickson* [2001] VSCA 4; (2001) 3 VR 296; (2001) 120 A Crim R 483; (2001) 33 MVR 51.
[2] Above.
[3] at 54
[4] The relevant legislation was that in the form last amended by Act 17 of 1994 s11.
[5] S55(2).
[6] See, in particular, s55(1), (2), s55(6), 56(6) and s57(2).
[7] An issue flagged in *DPP v Sanders* (1995-6) 23 MVR 515, 519; (1996) 86 A Crim R 378.
[8] Section 57(5).
[9] Italics added.
[10] Italics added.
[11] (1993) AC 319; [1992] 4 All ER 865; [1992] 3 WLR 884; see for more recent discussion *Gorman v Director of Public Prosecutions* [1997] RTR 409.
[12] Except, under the then legislation, where s55 (9A) or s56 operated.
[13] Italics added.
[14] See also s56(5). Consent is a different concept.
[15] *Sher v DPP* [2001] VSCA 110; (2001) 34 MVR 153; (2001) 120 A Crim R 585 2 August 2001 and *Venezia v Marshall* [2001] VSCA 160; (2001) 120 A Crim R 596; (2001) 34 MVR 445, 17 September 2001.

APPEARANCES: For the Plaintiff Day: Mr P Billings, counsel. Jack Sher & Associates, solicitors. For the second Defendant (Hanson): Mr P D'Arcy, counsel. Solicitor for Public Prosecutions.
