38/04; [2004] VSCA 192

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v HORE & ASKWITH

Ormiston and Charles JJ A, Hansen AJA

16, 17 August, 4 November 2004 — (2004) 10 VR 179; (2004) 42 MVR 520

MOTOR TRAFFIC – DRINK/DRIVING – EXPERT EVIDENCE LED BY DEFENDANTS TO SHOW THAT DRIVERS WERE NOT IN EXCESS OF THE LIMIT AT THE TIME OF TESTS – EVIDENCE ACCEPTED BY COURT – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(f), (4), (6).

Section 49(6) of the *Road Safety Act* 1986 ('Act') provides:

> "In any proceedings for an offence under paragraph (f) or (g) of sub-section (1) evidence as to the effect of the consumption of alcohol on the defendant is admissible for the purpose of rebutting the presumption created by section 48(1A) but is otherwise inadmissible."

On the hearing of drink/driving charges against two defendants, expert evidence was called by the defence to show that at the time of the test, the blood/alcohol concentration of each person was lower than the result recorded by the breath analysing instrument. The magistrate overruled an objection by the prosecution that such evidence was inadmissible and dismissed the charges. Upon appeal—

HELD: Appeals upheld. Remitted to the Magistrates' Court for hearing and determination according to law.
The Court is required to give effect to Parliament's intention as expressed in the clear and unambiguous terms of s49(6) of the Act. The so-called "re-enactment rule", even if it were applicable to these circumstances, is at best a guide in ascertaining Parliament's intention and its use should not be permitted to strain or alter the plain and ordinary meaning of the language in s49(6). Sub-s(6), on its plain and ordinary meaning, operates to exclude evidence of the type given in these cases. Sub-ss(4) and (6) can operate together, although the effect of sub-s (6) will be to preclude a defendant, seeking to establish a defence under sub-s(4) from relying on evidence rendered inadmissible by sub-s(6).
***Campbell v Renton* MC39A/1988;**
***DPP v Phung* [1993] VicRp 75; [1993] 2 VR 337; (1993) 17 MVR 157, and**
***DPP v Hore and Anor* [2004] VSC 20; (2004) 41 MVR 278; MC10/04 overruled.**

ORMISTON JA:
1. I agree with the conclusions reached by Hansen AJA in the judgment he is about to deliver and with his clearly expressed reasons for reaching them.

CHARLES JA:
2. I have had the advantage of reading the reasons for judgment prepared by Hansen AJA in these appeals, and agree with his Honour that the appeals should be allowed and the proceedings dealt with in the manner proposed.

HANSEN AJA:
Introduction
3. These appeals are brought by leave from a judgment in the Common Law Division on 23 February 2004 which upheld the decision of a magistrate on 8 August 2003 to dismiss a charge against each appellant under s49(1)(f) of the *Road Safety Act* 1986 ("the Act"). That is the offence of driving while the concentration of alcohol in the blood is more than 0.05% as shown by analysis of a sample of breath by a breath analysis instrument. In each case the appellant is the Director of Public Prosecutions on behalf of the informants in the Magistrates' Court. The respondents are Russell Geoffrey Hore and Simon Askwith. The appeals raise an identical issue for determination, namely, the admissibility of the evidence of an expert witness in proceedings for an offence under s49(1)(f).

4. The facts in both cases are very similar and may be briefly stated. Both the respondents were intercepted by the police while driving a motor vehicle (Hore on 2 August 2002; Askwith on 24 October 2002) and, after a preliminary breath test indicated the presence of alcohol in the blood, were required to submit to a breath test. The results of these breath tests indicated that Hore and Askwith had a blood alcohol content ("BAC") of 0.07 gms of alcohol per 100 mls of blood (0.07%) and 0.052 gms of alcohol per 100 mls of blood (0.052%) respectively. Both were charged with an offence under s49(1)(b) and s49(1)(f) of the Act. Pursuant to s58(2) of the Act, the respondents each served a notice which required the attendance of the operator of the breath analysing instrument at the hearing for the purpose of giving evidence, and gave notice that they took issue with the reading on the basis that the instrument was not in proper working order or properly operated, and that they would seek to adduce expert evidence to demonstrate that the instrument was not on that occasion in proper working order or properly operated.

5. At the hearing the magistrate first heard the case of Hore, followed by the case of Askwith. Each pleaded not guilty. For convenience, in Askwith's case the parties relied on the submissions which had been made in Hore's case, and the magistrate determined Askwith's case on his reasoning in Hore's case. Hence, in the following summary, I refer to the cases as though they were one. In their cases the respondents gave evidence as to their consumption of alcohol on the day in question. In addition, Hore called several witnesses who corroborated his evidence. Mr Graeme Young, a consulting analytical chemist, gave evidence for each respondent; he gave evidence that he had conducted tests on both respondents based on the type and quantity of alcohol each had said they had consumed on the day in question. Young also gave evidence as to the rate at which the respondents absorbed and eliminated alcohol from their blood. Based on these tests, Young stated that he would have expected a BAC of 0.034% for Hore and less than 0.03% for Askwith at the time of testing. When asked to explain the discrepancy between the results of the tests he had carried out and the results of the breath analysing instrument, Young provided two explanations. First, that more alcohol was consumed, or consumed over a different period, or alternatively the instrument was not giving a correct indication of the actual concentration of alcohol in the blood. The prosecutor objected to the admissibility of Young's evidence in relation to the charges under s49(1)(f); he conceded admissibility in relation to the charges under s49(1)(b). The magistrate overruled the objection. He accepted the evidence of the respondents, of Young, and of the witnesses called by Hore. He accepted that the machine had been operated correctly, however a doubt had been raised that the reading of the breath analysing instrument was not an accurate indicator of the respondents' BAC at the time of testing. Accordingly, the magistrate dismissed both charges in relation to each respondent.

6. An appeal was instituted in each proceeding by the appellant. On 25 September 2003 Master Wheeler stated the question of law raised by the appeal as being:

> "Did the Magistrate err in law in admitting and acting upon the evidence of Graeme Barry Young in considering the charge brought pursuant to s49(1)(f) of the *Road Safety Act* 1986?"

7. There is no appeal in respect of the dismissal of the charges under s49(1)(b).

Relevant legislative provisions

8. The relevant provisions of the Act are:

> "3. Definitions (1) In this Act—
> ... "prescribed concentration of alcohol" means—
> (a) in the case of a person to whom section 52 applies, the concentration of alcohol specified in that section; and
> (b) in the case of any other person, a concentration of alcohol present in the blood of that person of 0.05 grams per 100 millilitres of blood; ...
>
> 47. Purposes of this Part
> The purposes of this Part are to—
> (a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and
> (b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and
> (c) provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol.
>
> 48. Interpretative provisions ...

(1A) For the purposes of an alleged offence against paragraph (f) or (g) of section 49(1) it must be presumed that the concentration of alcohol indicated by an analysis to be present in the blood of the person charged or found by an analyst to be present in the sample of blood taken from the person charged (as the case requires) was not due solely to the consumption of alcohol after driving or being in charge of a motor vehicle unless the contrary is proved by the person charged on the balance of probabilities by sworn evidence given by him or her which is corroborated by the material evidence of another person. ...

49. Offences involving alcohol or other drugs
(1) A person is guilty of an offence if he or she— ...
(b) drives a motor vehicle or is in charge of a motor vehicle while the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood; or ...
(f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55(1) or (2AA) and—
(i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood; and
(ii) the concentration of alcohol indicated by the analysis to be present in his or her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle; ...

(4) It is a defence to a charge under paragraph (f) of sub-section (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated. ...

(6) In any proceedings for an offence under paragraph (f) or (g) of sub-section (1) evidence as to the effect of the consumption of alcohol on the defendant is admissible for the purpose of rebutting the presumption created by section 48(1A) but is otherwise inadmissible."

Decision of trial judge

9. The judge noted that the question whether Young's evidence was admissible in respect of the charge under s49(1)(f) in each case depends on the proper construction of sub-ss(4) and (6).[1] The judge noted that, based on sub-s(4) alone, Young's evidence would be not only relevant and admissible, but of fundamental importance in establishing the defence in sub-s(4). However, the judge immediately conceded that such evidence, if sub-s (6) is given its ordinary meaning, would be inadmissible as being "evidence as to the effect of the consumption of alcohol on the defendant". Thus the question was whether sub-s(6) should be given its plain and ordinary meaning so as to basically render the defence under sub-s(4) ineffective, or whether sub-s(6) should be construed otherwise so as to accommodate the type of evidence adduced in this case in support of the defence under sub-s(4).

10. After reviewing a number of authorities, the judge expressed the following conclusions[2]. First, the evidence adduced from Young as to the tests he had conducted on the respondents and the results of the tests, was relevant to establish a defence on behalf of the respondents under sub-s(4). Secondly, if sub-s(6) were to be given its literal meaning, such evidence would be rendered inadmissible. Thirdly, if sub-s(6) were not accorded its literal meaning, it would have little or no work to do. Fourthly, there was consequently a tension or conflict between sub-ss(4) and (6). This tension was to be resolved by according sub-s(4) precedence over sub-s(6). This conclusion found support in the decisions in *Campbell v Renton*[3] and *DPP v Phung*.[4]

11. The judge also stated that this conclusion was supported by general principles of statutory interpretation, namely that in respect of penal statutes, any ambiguity in the language is to be resolved in favour of the subject.[5] His Honour considered that the defence under sub-s(4) would be illusory if sub-s(6) were construed literally so as to exclude evidence of the type adduced from Young. Parliament could not have intended that the defence under sub-s(4) would be no more than a "Clayton's" defence. Accordingly, he held that sub-s(6) did not render inadmissible evidence which would otherwise be relevant and admissible to establish a defence under sub-s(4).

12. For these reasons, on 23 February 2004 the judge ordered that both appeals be dismissed with costs. The appellant sought, and on 2 April 2004 was granted, leave to appeal from the judge's orders in respect of both matters.

Grounds of appeal

13. The appellant alleges that the judge erred in finding that the evidence of Young was not

"evidence as to the effect of the consumption of alcohol on the defendant" and consequently inadmissible under s49(6) of the Act. The orders sought are that the judgment and orders of the judge and magistrate be set aside with costs and that the proceedings be remitted to the Magistrates' Court for hearing and determination according to law.

Appellant's submissions

14. The appellant submitted that the judge erred for five reasons in holding that Young's evidence was not "evidence as to the effect of the consumption of alcohol on the defendant" under s49(6) of the Act and that it was thus admissible. First, giving the language of sub-s(6) its ordinary meaning, Young's evidence was plainly "evidence as to the effect of the consumption of alcohol on the defendant". Secondly, the defences under s49(4) are not rendered "Clayton's defences" if the words in sub-s(6) are given their ordinary meaning; sub-s(6) merely restricts the scope of the defences available under sub-s(4). Thirdly, s49(6) is not the only legislative restriction placed on defences to a charge under s49(1)(f), which supports the conclusion that sub-s(6) should be given its ordinary meaning. Fourthly, the judge's interpretation of sub-s(6) effectively abrogates the sub-section which cannot have been Parliament's intention. Fifthly, given the two limbs to s49(6), if the words "effect of the consumption of alcohol on the defendant" are to be given their ordinary meaning under the first limb, those words should have the same meaning under the second limb.

15. The appellant also submitted that the decision in *Phung*, on which the judge relied in arriving at his conclusions, should be overruled in so far as it sanctions evidence of the kind given by Young in these two cases.

16. As to the first reason, the appellant noted that the judge had agreed that giving the words in s49(6) their ordinary meaning, Young's evidence was "evidence as to the effect of the consumption of alcohol on the defendant".[6] In accordance with the majority decision in *Thompson v Judge Byrne*,[7] the judge ought to have given effect to those clear terms. In *Thompson*, it was argued that the offence in s49(1)(f) should be read as confined to cases where the motor vehicle in question had been involved in an accident. In the course of their judgment rejecting the argument the majority said that:

> "Having omitted to confine the exercise of the power to post-accident situations, it is impermissible for a court to read such a condition into the requirements of the offence provided in par (f). The language of the Act is clear and unambiguous. The duty of a court is to give effect to the purpose of Parliament as expressed in that language. That obligation is not altered because the Act is penal in character."[8]

17. As to the second reason, the appellant submitted that the defences set out in s49(4) would not be rendered "Clayton's defences" if s49(6) were to be accorded its ordinary meaning. The appellant referred to s55(10) of the Act and noted that if a motorist doubts the validity of a breath test, he or she may, immediately after receiving the breath analysing instrument certificate, request the taking of a blood sample. The appellant submitted that if the subsequent blood test analysis provides a blood alcohol reading incompatible with the reading given by the breath analysing instrument, a defendant may thereby demonstrate that the machine was not in proper working order or operated properly. In *Thompson*, the majority said that:

> "That does not leave s55(10) without work to do in the case of a charge brought under par (f) of s49(1). The facility of blood analysis is available in such a case, as indeed it was used in this case, to tender an issue relevant to the defence provided by s49(4). That defence is confined to the question whether the breath analysing instrument used 'was not on that occasion in proper working order or properly operated'. Clearly, an analysis of blood which is seriously inconsistent with the analysis of breath conducted by the breath analysing instrument could, in a given case, cast doubt on the working order or proper operation of the breath analysing instrument."[9]

18. The appellant submitted that to prove the incompatibility of the two readings, evidence as to absorption and elimination rates generally would need to be relied upon. However, such evidence is not "evidence as to the effect of the consumption of alcohol on the defendant", but evidence as to the effect of the consumption of alcohol on human beings in general, and therefore admissible.

19. The appellant referred to *Campbell v Renton*[10] where a motorist charged with an offence under s49(1)(f) had provided two samples of breath twenty-two minutes apart with readings of 0.09% and 0.095% respectively. The motorist stated that he had not consumed any alcohol since waking up that day. He called expert evidence about the rise and fall of the alcohol content in the blood of human beings after cessation of consumption of alcohol to establish a defence under s49(4) of the Act by referring to the disparate readings and the expert's opinion as to what that meant. The magistrate ruled the evidence inadmissible on the basis of sub-s(6) which at that time was in the following terms:

> "In any proceedings for an offence under paragraph (f) or (g) of sub-section (1) evidence as to the effect of the consumption of alcohol on the defendant is inadmissible for the purpose of establishing a defence to the charge".

Marks J held that the evidence was admissible stating:

> "It must be assumed for present purposes that the time when the peak level of alcohol in the applicant's blood would have been reached after drinking stopped plus the period of non-consumption prior to the tests were essential to the expert opinion about any significance in the disparity between the readings. It must also be assumed that the applicant proposed to adduce evidence that given these facts the only proper inference was that the instrument was defective or not properly operated. It is not to the point for present purposes what precisely was still to be given in evidence, what its weight or how persuasive the Court was to find it. The question here is solely one of admissibility. I think the evidence on which the applicant sought to rely, if conforming to the above assumptions, was admissible. It is not precluded in my opinion by s49(6) as going to the effect of the consumption of alcohol on the applicant. It was evidence of what the breath analysing instrument might be expected to record if properly operated and in proper working order given certain facts about the rise and fall of alcohol content in the human being. The magistrate was undoubtedly right in concluding that any evidence about human beings in general included the applicant. But the observation was not to the point."[11]

20. The appellant submitted that, in view of s55(10) and consistent with the decision in Campbell, Parliament has expressly provided a mechanism for utilising the defence under s49(4), but by reference to objective, verifiable data, namely a blood sample. Further, even in the absence of a blood sample, a defendant could still show through cross-examination of the operator, that the breath analysing instrument was not properly operated according to the *Road Safety (General) Regulation*s 1999 or according to the manufacturer's specifications.

21. The appellant submitted that notwithstanding the restrictions upon the defences in s49(4) imposed by sub-s (6), the defences remain viable defences. Further, if one examines the relevant provisions, ss48(1A), 49(1)(f), 49(4) and 49(6), it is apparent that each of these provisions has a distinct purpose and sphere of operation. Section 49(1)(f) prescribes the elements of the offence; s49(4) provides a defence to the offence; s49(6) deals with the admissibility of evidence in relation to the offence; and s48(1A) contains a rebuttable presumption in relation to the offence.

22. As to the third reason, the appellant noted that s49(6) is not the only legislative restriction on the defences to a charge under s49(1)(f). Under s58(2) of the Act, a certificate containing the prescribed particulars produced by a breath analysing instrument is conclusive proof of the facts and matters contained in it, including that the instrument was in proper working order and properly operated unless the defendant gives notice in writing at least 28 days before the hearing to the informant that the defendant requires the attendance of the person who issued the certificate or intends to adduce evidence in rebuttal of any such fact or matter. Further, notwithstanding the issue of a notice by the defendant, the certificate will be conclusive proof of the matters contained therein if the person who issued the certificate is dead, unfit to testify, has ceased to be a member of the police or is out of Victoria and it is not reasonably practicable to secure his or her attendance, or cannot with reasonable diligence be found.[12] In these circumstances, the defendant is precluded from running a defence under s49(4). The Act may operate in a potentially draconian way but the placing of restrictions on defences is part of the scheme of the Act.

23. The appellant noted that a defendant may also argue the defence that he or she has not infringed s49(1)(f) because his or her breath analysing instrument reading was due solely to post driving consumption of alcohol. However, to succeed with this defence, the defendant is required to establish this on the balance of probabilities by his or her own sworn evidence which

is corroborated by another witness[13]. In light of this provision, the appellant submitted that it was incongruous if a defendant such as Askwith could defeat a charge under s49(1)(f) by relying on expert "reconstruction evidence" which is based on the uncorroborated evidence of the defendant as to his consumption of alcohol.

24. As to the fourth reason, the appellant referred to the judge's decision at [34] where his Honour found that "if s49(6) were not accorded its literal meaning, it would have little or no work to do" and submitted that sub-s(6) would, in fact, have no work to do. Such a result could not accord with Parliament's intention. The appellant submitted that if there is a choice between an interpretation of sub-ss(4) and (6) which leaves work for both sub-sections, and an interpretation which abrogates one or the other sub-section, the former interpretation is to be preferred.

25. As to the fifth reason, the appellant submitted that the defendant may lead evidence of the type sought to be adduced from Young for the purpose of rebutting the presumption under s48(1A). Evidence of this type is expressly permitted under the first limb of s49(6) which permits "evidence as to the effect of the consumption of alcohol on the defendant". However, such words cannot mean one thing under the permissive first limb of s49(6) and a different thing under the second limb of s49(6) which prohibits such evidence for any other purpose. As the presumption under the permissive first limb of s49(6) was irrelevant, the evidence was inadmissible by virtue of the second prohibitive limb.

26. In relation to the authorities relied upon by the judge for not according s49(6) its ordinary meaning, the appellant submitted that *Campbell* is authority for the proposition that evidence as to the effect of the consumption of alcohol on persons generally is not prohibited by s49(6). The appellant submitted that this decision is correct, and indeed desirable, given a motorist's right to request the taking of a blood sample when the motorist disputes the reading from a breath analysing instrument. However, *Phung* goes a step further in allowing evidence of a more particular nature to be led. It was submitted that *Phung* should be overruled.

Respondents' submissions

27. The respondents summarised their position as follows. First, the magistrate was entitled to reject the accuracy of the certificate indicating the breath analysis result with or without the evidence of Young. Secondly, the evidence of Young was not evidence as to the effect of consumption. Thirdly, the evidence of Young was not evidence as to that effect upon the defendant. Fourthly, and alternatively if the second and third propositions are incorrect, sub-s(4) takes precedence over sub-s(6) and affords a defence. Fifthly, when interpreting sub-s(6), the Court should be cognisant of Parliament's intention, which was to prevent the use of smart expert evidence to challenge the result obtained on a machine which was not said to be operated improperly or other than in proper working order but that a malfunctioning machine should found a defence. Sixthly, the observations of Marks J in *Campbell* are pertinent to the current proceeding where his Honour stated that:

> "It cannot be supposed that Parliament intended, particularly in a penal statute, to give with one hand and take away with the other. ... This is because Parliament must have intended by providing the defence under s49(4) to entitle an accused to adduce all evidence going to its establishment."[14]

Finally, given that the interpretations of Marks J in *Campbell* in 1988 and *Harper* J in *Phung* in 1993 have remained unaltered by Parliament, it can be assumed that Parliament accepts the propositions contained in those decisions.

28. Turning to the circumstances of the current appeals, counsel for the respondents noted that the magistrate could have made the following findings in relation to Hore based on the evidence before him. First, that apart from his vehicle taking a short cut at the rear of the shops, there was nothing noticeable about his driving. Secondly, that apart from the smell of alcohol on his breath, there was no other observation about his sobriety. Thirdly, having observed his eyes, speech, demeanour, appearance and actions, the operator made no note about his sobriety other than the presence of liquor on his breath. Based on these findings, and because he accepted the evidence of what Hore had to drink and its corroboration, the magistrate could have refused to accept that the machine was in proper working order and thereby rejected the evidence of the reading.

29. In relation to Askwith, counsel for the respondents submitted that the magistrate was entitled to draw a similar conclusion relying on Askwith's evidence and the evidence of police that it was a random stop, there was no problem with his driving, the only observation was that his breath smelt of liquor and that otherwise he was very cooperative, well spoken and compliant.

30. The respondents submitted that the magistrate would have been entitled to arrive at each of the above conclusions which were liable to dispel the evidence of the operators and the facts and matters contained within the certificates. Such an approach is in accordance with the decision in *Saxe v Kellett*[15] that a breathalyser certificate complying with s408A(2A) of the *Crimes Act* 1958 was only *prima facie* evidence of the facts and matters stated therein and could be rebutted by other evidence before the court, namely the evidence of the constable who was surprised at the high reading, the reason why he was surprised and the evidence of the defendant and his witness.

31. The respondents acknowledged that it was always the case that in respect of a charge under the *Motor Car Act* 1958 of driving in excess of the prescribed limit of alcohol, the prosecution, if put to the test, was required to prove that the instrument was in proper working order and properly operated. With the introduction of the Act, that situation remains in respect of the old offence which is now s49(1)(b). However, in respect of the new offence in s49(1)(f), the provisions of s49(4) provide for the defence to such a charge.

32. The respondents submitted that in assessing the correctness of the judge's decision, regard should be had to the *Hansard* debates concerning the *Road Safety Bill* in 1986 ("the Bill") and the series of amendments to the Act itself since 1986 to ascertain Parliament's intention. During the second reading speech in the Legislative Assembly the Minister for Transport noted that the Bill contained provisions "designed to prevent technical defences against drink-driving charges" and referred to a comment by the Premier that "smart esoteric points of law that lead to a diminution in the capacity of the police to see that out [sic] roads are free of motorists who are affected by drink".[16] The Minister acknowledged that it was essential for Victorian drink-driving legislation to adopt the approach taken by other States where the relevant legislation provides for breathalysers in general to be taken to give accurate readings and for such readings not to be changed by subsequent evidence.[17] It follows from this, the respondents submitted, that Parliament's intention was motivated by a desire to preclude attempts to reduce or eliminate readings obtained by breath tests conducted on machines which were in proper working order and properly operated. Indeed, the Minister expressly stated that:

> "The only grounds on which a breath analysis reading may be challenged will be that the particular instrument was operated improperly or was defective. Motorists will need to be aware that the offence is being over the legal limit at the time of being tested".[18]

33. The respondents then referred to the series of amendments and debates surrounding cl. 49(6) in the Bill. In its original form, subsequently amended, cl49(6) of the Bill rendered inadmissible for the purpose of establishing a defence to a charge under s49(1)(f) or (g) the following evidence:

> (a) the consumption or non-consumption of alcohol by the defendant at any time before furnishing the sample of breath for analysis or having the sample of blood taken from him or her; or
> (b) the effect of the consumption of alcohol on the defendant; or
> (c) the general inaccuracy of breath analysing instruments of the type used.

The Bill was sent containing s49(6) in this form to the Legislative Council where, on 18 November 1986, the Attorney-General gave the second reading speech.[19]

34. As noted by the respondents, the Opposition generally supported the Bill but during debate on the second reading of the Bill in the Legislative Council, the spokesman stated that it required "major amendment to make it practicable and acceptable to the people of Victoria".[20] The Bill was read a second time and committed.[21] Clause 49(6) was subsequently amended in the Committee stage in the Legislative Council and the amended clause was adopted.[22] The amendment deleted the three categories of inadmissible evidence set out at [33] and provided that evidence as to "the effect of the consumption of alcohol on the defendant" was inadmissible for the purpose of establishing a defence to the charge under s49(1)(f) or (g). This amended s49(6) was the provision later examined in Campbell.

35. The Bill was reported to the Legislative Assembly with amendments and passed through its remaining stages[23].

36. Important amendments to s49(1)(f) and associated sub-sections were made by the *Road Safety (Miscellaneous Amendments) Act* 1989. This Act amended, among other things, ss48 and 49 of the Act by ensuring that a person who has a blood alcohol reading solely as a result of drinking after driving is able to lead evidence of that fact when charged with failing a breath or blood test within 3 hours after an accident.[24] During the second reading speech on the Bill in the Legislative Assembly, the Minister for Transport stated that:

> "Evidence of drinking alcohol after an accident will be admissible in cases where the court is satisfied there was no blood alcohol present at the time of driving. However, the onus will be on the defendant to satisfy the court of this".[25]

37. This resulted in the Legislative Assembly inserting the rebuttable presumption into the Act as s48(1A), sub-para.(ii) into s49(1)(f) and altering the language of s49(6) to allow evidence as to "the effect of the consumption of alcohol on the defendant" to rebut the presumption under s48(1A).

38. The *Miscellaneous Amendment Bill* was then sent to the Legislative Council where it was read a second time[26] and subsequently passed through the remaining stages[27]. The above provisions, as amended, are in identical terms to the current provisions now under examination. For the sake of completeness, I note that the language of s49(4) remains unaltered since its introduction in the Act.

39. In respect of the interrelationship between sub-ss (4) and (6) of the Act, the respondents made a number of submissions. At the outset, the respondents submitted that sub-s(4) provides a specific defence to a charge under s49(1)(f) whereas sub-s(6) is a general provision which operates in those proceedings. Following the established principle of statutory construction that where there is a conflict between general and specific provisions, the specific provision prevails, sub-s(4) should accordingly prevail over sub-s(6). In *Smith v The Queen*,[28] in the judgment of the majority in the High Court, it was observed that:

> "That principle is based upon the presumed intention of Parliament and has, we think, a particular application where the conflict arises from different sections in the same Act. ... It is but common sense that Parliament having before it two apparently conflicting sections at the same time cannot have intended the general provision to have deprived the specific provision of effect".[29]

40. The respondent noted that the appellant's submissions allege that Young's evidence principally dealt with the effect of consumption. The respondents denied that this is so, contending that the evidence of Young did not concentrate either on the consumption of alcohol or the effect of alcohol on the respondents. Rather, the evidence of Young considered whether the results obtained from the breath analysing instrument were consistent with other facts accepted by the magistrate. Ultimately it was for the magistrate to determine whether the result of the instrument was reliable, and in rejecting the proposition that more alcohol had been consumed or over a different period, and accepting that the instrument was not giving a correct indication of the actual blood alcohol, the magistrate made a valid factual determination within his jurisdiction. Thus, having concluded that a defence was established under sub-s(4), sub-s(6) must be read down accordingly.

41. The respondents submitted that *Phung* and *Campbell* correctly interpret the parliamentary intention and properly determine the tension between sub-ss(4) and (6). In *Phung* an expert gave evidence that, based on the defendant's account, all alcohol would have been eliminated from the defendant's blood by the time of the test.[30] The Director of Public Prosecutions submitted that such evidence was inadmissible as being "evidence as to the effect of the consumption of alcohol on the defendant".[31] Harper J rejected this submission, stating that:

> "If accepted, it will result in the conviction of persons for an offence against s49(1)(f) although the tribunal of fact is satisfied that those charged had nowhere near the prescribed concentration of alcohol in their blood. In this case it will, if accepted, result in the conviction of Mr. Phung although the magistrate was ... satisfied not only that the breath analysing instrument used to analyse his

> blood was either not in proper working order or was not properly operated, but also that the relevant defect resulted in an inaccurate analysis"[32].

42. Harper J noted that an injustice would occur if a person were to be convicted on the basis of a breath analysis where the analysis was performed by a malfunctioning machine. By enacting s49(4), the legislature wished to avoid such an injustice.[33] His Honour commented that there were two means by which a machine might be demonstrated to be not in proper working order or not properly operated:

> "One, of course, is the direct approach: a defendant might demonstrate that the operating procedure was flawed, or might establish that the machine itself was defective. But it would not necessarily follow that the fault thus revealed had resulted in an inaccurate analysis: *Ozbinay v Crowley* ... Before one can properly reach that conclusion, it is, as his Honour there pointed out, necessary to show not merely a fault in procedure or in the instrument itself, but also that the result of the analysis was unreliable. It is also possible to demonstrate fault in the operation of a breath analysing instrument, or a fault in the instrument itself, by examining the results of an analysis against the known or established facts concerning the consumption of alcohol by the person whose breath is analysed. Such an approach will not, of course, accord with strict scientific method. As a check on the accuracy of the analysis performed by the instrument, it would only be of use where the divergence between the results of the analysis and the evidence of consumption is so marked that either the defendant is an abnormal human being in relation to the absorption and elimination of alcohol, or the machine must have produced a wrong result."[34]

43. In *Ozbinay v Crowley*[35] Byrne J stated that a defendant may show that the machine was not properly operated at the time of testing by demonstrating that the operator did not comply with the regulations or by showing that some act or omission in operating the machine occurred which would affect its proper function so as to impair its reliability.

44. In *Phung* Harper J relied on *Campbell* in support of his conclusions and refused to distinguish *Campbell* notwithstanding that sub-s(6) had since been amended (to its present terms). His Honour stated that:

> "... whatever purpose Parliament had in making these amendments, it was not intended to, nor did it, alter the Act in any way material to the decision in *Campbell's Case*. The fact is that, far from altering the law in this respect when it had the opportunity to do so, Parliament chose to allow a further defence."[36]

45. The respondents submitted that the evidence adduced by Young is very similar to that adduced by the expert in *Phung*. Further, the decision in *Campbell* is of considerable relevance since "the courts adopt the general approach that whenever any legislation is re-enacted after being judicially interpreted, the legislature is to be assumed to have approved that interpretation". [37] The High Court has also considered the effect of Parliament using identical or similar words in re-enacted legislation, stating that:

> "...Parliament re-enacted, in s 4(1) of the Act, words which are almost identical with those considered in *R v Portus*. There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]', although the validity of that proposition has been questioned".[38]

46. Here, Parliament, although amending sub-s(6) since *Campbell*, has amended the sub-section without overriding the effect of that decision, a point noted by Harper J in *Phung*.[39]

47. The respondents referred to the legislative history of the Act, noting that 41 amending Acts have modified the Act since the decision in *Phung* with five of those Acts amending s49, namely: Act no.17 of 1994; Act no.14 of 2000; Act no.23 of 2001; Act no.94 of 2003; and Act no.49 of 2004. In light of these amendments and their proximity to judicial decisions,[40] the respondents submitted that Parliament has been swift to legislate in this area, particularly concerning Part 5 of the Act, in which the subject provisions are to be found, to override any judicial interpretation which it considers inappropriate and therefore warranting amendment. Its failure to legislate to overturn the effect of *Phung* and *Campbell* is consequently significant.

48. The respondents emphasised the practical difficulties of establishing a defence under s49(4). Young had given evidence before the Magistrate stating that he had not had an opportunity to examine the breath analysing instrument as it had not been made available. Indeed the judge at [17] outlined the difficulties of establishing a defence under sub-s(4), noting that:

> "It is unlikely that, save in the rarest of cases, an accused person would be in the position to give evidence himself or herself that the instrument was not in proper working order or was not properly operated".

49. The difficulties in establishing machine error were also referred to in *Phung* whereby not only fault in the procedure or in the instrument itself must be established, but that the result of the analysis was unreliable.[41] The respondents submitted that it is logically impossible for a defendant to prove that the result of the analysis is unreliable unless the defendant can do so by reference to other known and proven facts. In other words, there must be some nexus between the defendant and the objective evidence sought to be adduced, for example that the defendant would fall within the normal category or would eliminate alcohol at a normal rate, otherwise the objective evidence which relates to persons generally is of limited assistance.

50. In response to the appellant's submission that the respondents could have established a defence under sub-s(4) by means of a timely blood test, the respondents submitted that this attributes to the average driver a wisdom usually far beyond his ability and ignores the fact that the Victorian legislation no longer requires that a driver be offered a breath test or that police inform him of his entitlement to a blood test. This is unlike the legislation in South Australia which requires the operator of the breath analysing instrument to do so after a motorist has provided a breath analysis and the result of the analysis is that the concentration of alcohol is the prescribed concentration of alcohol.[42]

51. In conclusion, the respondents submitted that no significant doubt has been cast by the appellant upon the correctness of the decisions appealed from and in these circumstances the appeals should be dismissed.

Conclusion

52. The issue which requires determination concerns the relationship between s49(4) and (6) in connection with a charge under s49(1)(f).

53. During the course of the proceeding, the Court asked counsel for the respondents to provide the Court with *Hansard* extracts in respect of the Act and amending Acts, in particular the *Road Safety (Miscellaneous Amendments) Act* 1989, in an attempt to ascertain Parliament's intention behind the existing legislative regime. In response counsel provided a binder of extracts, which supplement the references in their submissions Having considered the parliamentary debates, I find them of limited assistance in resolving this matter. In particular, I note that the debates surrounding the *Road Safety (Miscellaneous Amendments) Act*, which introduced the presumption in s48(1A), sub-para (ii) of s49(1)(f) and amended s49(6) to its current form, provide no enlightenment as to how s49(6) and s49(4) would operate in relation to a charge under s49(1)(f). Whether this oversight was deliberate or inadvertent I cannot speculate, suffice to note that the broad policy statements do not provide any assistance in determining this issue.

54. I turn then to the decisions in *Campbell* and *Phung*.

55. In *Campbell*, the applicant was charged under s49(1)(f) of the Act and sought to rely on the defence under s49(4). The applicant had provided two samples of his breath twenty-two minutes apart. The first sample resulted in a reading of 0.09% and the second sample gave a reading of 0.095%. Before the magistrate, the applicant gave evidence, which was corroborated by four other witnesses, that he had not consumed any alcohol since waking up that day. The applicant then sought to call Mr Young, an expert in the use of breath analysing instruments, to comment on the significance of the two readings taken twenty-two minutes apart. Young gave evidence to the effect that an ascending blood alcohol would indicate that the person had consumed something to affect the reading within the last hour or so. He stated that most people obtain their maximum reading within 40 to 45 minutes and thereafter it decreases by 0.012% per hour. He said that a rise showed something was amiss or that something had been consumed. However he had

experience of people reaching their maximum reading after two hours, which was the longest he had come across. Young was then asked as to what reading might be expected when a person had been in the company of police for 60 minutes prior to the first breathalyser test. An objection was taken at this point to Young's evidence under s49(6). The magistrate ruled that the evidence was inadmissible by virtue of s49(6) on the basis "that while s49(4) of the Act provides a defence, s49(6) of the Act precludes certain evidence, and that where the evidence given is as to the time taken for the blood alcohol level to reach its peak after consumption, that is evidence of consumption and is inadmissible under s49(6)." To repeat, at that time s49(6) provided that:

> "In any proceedings for an offence under paragraph (f) or (g) of sub-section (1) evidence as to the effect of the consumption of alcohol on the defendant is inadmissible for the purpose of establishing a defence to the charge."

56. Affidavit material indicated that the magistrate had ruled on the basis that evidence led as to any person must necessarily include the defendant and was inadmissible. He also said that s49(4) only applied so long as s49(6) was not contravened. Thus, Young's evidence about peak levels of alcohol content in the blood after cessation of alcohol consumption was excluded.

57. I have set out at [19] the reasoning of his Honour in reaching his conclusion that "Evidence about the time taken for alcohol to reach a peak level in the blood is not in my opinion evidence of the effect of consumption of alcohol on the applicant within the meaning of s49(6)."[43]

58. The appellant did not question the correctness of *Campbell*. Rather, it relies on this decision as an example of how Parliament intended the defence under sub-s(4) to operate. However, the respondents rely on the concluding observation of his Honour, namely that if Young's evidence was "evidence as to the effect of the consumption of alcohol on the defendant", his Honour "would read down s49(6) as not precluding the establishment of facts relevant to a defence under s49(4). This is because Parliament must have intended by providing the defence under s49(4) to entitle an accused to adduce all evidence going to its establishment."[44]

59. The evidence adduced from Young in the present cases differs from that adduced in *Campbell* in significant aspects. Rather than provide general evidence about the peak levels of alcohol in the blood after cessation of alcohol consumption (as in *Campbell*), Young provided evidence in relation to the rate of absorption and elimination of alcohol from the respondents' blood based on tests carried out on the respondents. The admissibility of this type of evidence was dealt with in *Phung*.

60. In *Phung* the defendant was charged under s49(1)(f) of the Act. The defendant provided two samples of breath twenty-six minutes apart with the results showing a blood alcohol content of 0.12% and 0.135%. An expert called on behalf of the defendant was asked, assuming that the defendant's stated consumption of alcohol was true, whether any alcohol would remain in the blood three and a half hours after ceasing drinking and whether, at the time of the first test, the defendant's blood alcohol content should be rising or falling. The expert gave evidence that, in the circumstances, all the alcohol would have been eliminated from the defendant's blood, and that at the time of the first breath test the defendant's blood alcohol content would have been falling. The expert added that, in general, the percentage of alcohol in the blood reaches its maximum forty minutes after cessation of drinking, the longest period he had known was slightly under two hours.

61. The magistrate accepted the expert's evidence and held that a defence was made out under s49(4) of the Act. The issue on appeal was whether the magistrate was prevented by virtue of s49(6) from receiving the expert's evidence. Section 49(6) was at that time framed in identical terms to the current provision. Given that the expert's evidence was not tendered to rebut the presumption in s48(1A), the prosecutor submitted that it was inadmissible as "evidence as to the effect of the consumption of alcohol on the defendant". The prosecutor submitted that even if the expert's evidence had concerned the effect of the consumption of alcohol on the concentration of alcohol in the blood of the generality of consumers, unless the defendant were in that class, then the evidence would have no point.

62. This submission was rejected by Harper J who was concerned that it would result in the conviction of persons under s49(1)(f) even though the judge or magistrate was satisfied that the

breath analysing instrument was not in proper working order or properly operated and that the defect resulted in an inaccurate analysis. The enactment of s49(4) was clearly intended to avoid this injustice. Harper J was also concerned that the construction of s49(6) contended for by the prosecutor would deprive s49(4) of any practical effect as a defendant would otherwise be rarely in a position to demonstrate that the machine was not in proper working order or properly operated if such evidence could not be led.

63. However, Harper J also relied upon the decision in *Campbell* to support his conclusions and rejected the prosecutor's submission that *Campbell* could be distinguished on the basis of different facts and the fact that s49(6) was subsequently amended. His Honour held that the facts were not relevantly different and that Parliament, in amending sub-s(6) since *Campbell*, had not intended to, nor did it, alter the Act in any material way. On the contrary, Parliament decided to allow a further defence. Thus, it appears from the decision of Harper J that he accepted as admissible both types of evidence.

64. There is much to be said for the respondents' submission that sub-s(4) should be accorded precedence over sub-s(6) in order to permit the admission of any evidence which is relevant to establishing a defence under sub-s(4). Indeed, the decisions of *Campbell*, *Phung* and the judge in this instance concur with this view. There are also general principles of statutory interpretation to consider, namely that any ambiguity in a penal statute is to be resolved in favour of the subject. [45] That principle is applicable if, after applying the ordinary rules of construction, there remains a relevant ambiguity. Ambiguity can arise in the case of a penal statute, as to which Gibbs J in *Beckwith v R* stated that:

> "The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences ... The rule is perhaps one of last resort."[46]

65. Against the respondents' argument are the clear words of s49(6) and the well-established principle that a court should give effect to the purpose of Parliament as expressed. The difficulty which arises here does so, not by reason of a patent ambiguity between the provisions, but rather a potential for tension in operation between them. Whether there will be such tension will depend on the defence to be run. If the defence seeks to rely on evidence such as that given by Young, a tension will arise because it is precluded by sub-s(6) on its plain and ordinary meaning. It is in that circumstance that it is said that sub-s(6), literally interpreted, would render practically nugatory any defence under sub-s(4). Further, in addition to the words being clear, on their face the provisions appear to be capable of standing together side by side. There is not, on the face of the provisions, an ambiguity between them, or in context such an absurdity or unreasonableness of result that seemingly could not have been intended by Parliament.

66. In my view the assertion of rendering nugatory both overstates the position under sub-s(4), and tends to mask an insufficient analysis of the provisions As to sub-s(4), one possible way of establishing a defence without having to rely on "evidence as to the effect of the consumption of alcohol on the defendant" was referred to in *Thompson*. In the judgment of the majority it was noted that it would be possible for a motorist, whose breath analysis was at or exceeded the prescribed concentration of alcohol, to request that a blood test be carried out.[47] A blood test incompatible with the breath test result, either by being inconsistently higher or lower, could provide a foundation for a defence under s49(4) that the breath analysing instrument was not in proper working order or was not properly operated. These results could then be examined against the known or established facts of the motorist's alcohol consumption and expert evidence of the type adduced in *Campbell*. This is one way in which such a defence may be made out under s49(4). Another possibility is that the defence may be established on the examination of prosecution witnesses. It is to be noted that in the present cases counsel for the defendants cross-examined the police witnesses as to the test, but did not subpoena or otherwise require the production of the instrument or such other information as appropriately may have aided the inquiry and establishment of the defence. To attempt to go beyond mentioning these matters runs into the danger of engaging in speculation as to exactly how a defendant might come to seek to establish a defence under sub-s(4). Experience of litigation under Part 5 of the Act indicates that it is very hard to anticipate that which the wit and ingenuity of defendants might produce as a defence under sub-s(4).

67. It is also significant that, prior to the amendments introduced by the *Road Safety (Miscellaneous Amendments) Act*, s49(6) provided that "evidence as to the effect of the consumption of alcohol on the defendant is inadmissible for the purpose of establishing a defence to the charge" under s49(1)(f). This total prohibition on such evidence was slightly relaxed by the amendments which allowed such evidence for a specific purpose, namely to rebut the presumption in s48(1A) but for no other purpose. It is significant that at no stage, either in passing the Act or any subsequent amending Acts, did Parliament ever expressly provide that such evidence could be admitted in relation to the defence under sub-s(4). It seems clear that Parliament has always intended to exclude such evidence to the greatest extent possible.

68. The respondents submitted that the Court, in interpreting sub-ss(4) and (6) should consider the significance of Parliament's failure to amend the Act since the decision in Phung to override its effect given its speed in overturning the effect of several previous decisions of the courts by passing amending legislation. Pearce & Geddes in *Statutory Interpretation in Australia* summarise the general principle as follows:[48]

> "The result is that the courts adopt the general approach that whenever any legislation is re-enacted after being judicially interpreted, the legislature is to be assumed to have approved that interpretation."

However, in the present circumstances there has been no re-enactment of the Act. Rather the respondents seek to rely on and apply the above principle in circumstances where Parliament has omitted to amend the Act in response to judicial decisions.

69. The decision in *Re Alcan Australia* referred to by the respondents concerned the interpretation of s4(1) of the *Industrial Relations Act* 1988 which contained words largely identical to those in s4(1) of the *Conciliation and Arbitration Act* 1904. The court applied the re-enactment presumption. However, the High Court also noted that the validity of that presumption had been questioned and relied additionally on the legislative history of the *Industrial Relations Act*, in particular the report of a Committee of Review and the second reading speech to support their conclusion.[49]

70. In *Flaherty v Girgis*,[50] the High Court considered whether there was any inconsistency between Part 10 rule 1 of the *New South Wales Supreme Court Rules* 1970 and s4 of Part 2 of the *Service and Execution of Process Act* 1901 which both dealt with the service of originating process outside New South Wales. Mason ACJ, Wilson and Dawson JJ stated that:[51]

> "It was submitted on behalf of the respondent that the amendment of the *Service and Execution of Process Act* a number of times over the years during which it has consistently been interpreted as having no exclusive operation with respect to the service of process, indicates the tacit approval of the Commonwealth Parliament and provides a guide to its intent. That is to overstate the position somewhat. Whilst it is true that, where an inference can be drawn from the terms in which subsequent legislation has been passed that Parliament itself has approved of a particular judicial interpretation of words in an earlier statute, a court should adhere to that interpretation, the difficulty is in discerning the existence of parliamentary approval: see *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* [1974] HCA 2; (1974) 129 CLR 576 at 584 ... Mere amendment of a statute not involving any re-enactment of the words in question could seldom if ever constitute approval of an interpretation of those words. Even re-enactment of the words in circumstances not involving any reconsideration of their meaning, as for example, in a consolidating statute, does not do so: *Williams v Dunn's Assignee* [1908] HCA 27; (1908) 6 CLR 425 at 441 ... At most the principle affords a presumption of no great weight concerning the meaning of the words used and cannot be relied upon to perpetuate an erroneous construction: *Salvation Army (Vic) Property Trust v Fern Tree Gully Corp* [1952] HCA 4; (1952) 85 CLR 159 at 174, 182; [1952] ALR 85."

The majority also referred to the statement of Dixon CJ in *R v Reynhoudt* that:[52]

> "In any case the view that in modern legislation the repetition of a provision which has been dealt with by the courts means that a judicial interpretation has been legislatively approved is, I think, quite artificial. To repeat what I have said before, the mechanics of law-making no longer provide it with the foundation in probability which the doctrine was supposed once to have possessed."

The majority concluded that the rule nowadays provides little use as a guide and should not prevail over an interpretation which otherwise appears to be correct.[53]

71. I approach the interpretation of sub-ss(4) and (6) in the way indicated by the High Court.

The Court is required to give effect to Parliament's intention as expressed in the clear and unambiguous terms of s49(6). The so-called "re-enactment rule", even if it were applicable to these circumstances, is at best a guide in ascertaining Parliament's intention and its use should not be permitted to strain or alter the plain and ordinary meaning of the language in s49(6). Allowing the greatest respect for the decision in *Phung*, I am of the view that sub-s(6), on its plain and ordinary meaning, operates to exclude evidence of the type given in these cases by Young. In this respect therefore I am of the view that *Phung* was wrongly decided. I would hold the same view in respect of the *obiter* observation of Marks J in *Campbell* referred to at [58]. As submitted by the appellant, sub-ss(4) and (6) can operate together, although the effect of sub-s (6) will be to preclude a defendant, seeking to establish a defence under sub-s(4) from relying on evidence rendered inadmissible by sub-s(6).

72. I also note that the respondents referred to the established principle of statutory construction that, in the event of a conflict between two provisions, the specific provision prevails over the general provision. The general principle was stated succinctly by O'Connor J in *Goodwin v Phillips*:[54]

> "Where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply."

Citing this principle and the statements of Marks J in *Campbell*[55] and Harper J in *Phung*, the respondents contended that sub-s(6) should be read down so as not to preclude the establishment of facts relevant to a defence under s49(4).

73. With respect, I cannot agree for the following reasons. First, there is no indication in the Act that sub-s(6) should be read subject to sub-s(4). Further, there is nothing, as previously noted, in the parliamentary debates which indicates Parliament intended to confer precedence on sub-s(4) over sub-s(6). Secondly, the principle applies in relation to two provisions which deal with the same subject matter. Sub-sections (4) and (6) do not deal with the same subject matter or have the same field of operation. Sub-section (4) provides for a specific defence in relation to a charge under s49(1)(f) while sub-s(6) deals with the admissibility of evidence in relation to a charge under s49(1)(f) or (g). Thirdly, reading sub-ss 4) and (6) according to their plain and ordinary meaning, there is no ambiguity or absurdity which requires the application of this principle. As noted at [66] it is possible for both sub-sections to operate together without one provision neutralising or rendering nugatory the other provision.

74. For these reasons I conclude that the evidence of Young in both matters was inadmissible by virtue of sub-s(6) and should not have been received by the magistrate as such evidence was "evidence as to the effect of the consumption of alcohol on the defendant". I would allow the appeals, set aside the judgment and orders of the judge and the magistrate and in lieu order that the proceedings be remitted to the Magistrates' Court for hearing and determination according to law.

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[1] *DPP v Hore & Anor* [2004] VSC 20 at [16]; (2004) 41 MVR 278.
[2] At [34].
[3] Unreported, 18 August 1988, BC 8800454.
[4] [1993] VicRp 75; [1993] 2 VR 337; (1993) 17 MVR 157.
[5] At [36].
[6] At [18].
[7] [1999] HCA 16; (1999) 196 CLR 141; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.
[8] At [19] per Gleeson CJ, Gummow, Kirby and Callinan JJ. See also *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214 at 223; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257.
[9] At [31].
[10] Unreported, 18 August 1988.
[11] At 8.
[12] See s58(2C).
[13] See s48(1A).
[14] At 10.
[15] [1970] VicRp 79; [1970] VR 600.

[16] *Hansard*, Legislative Assembly, 11 September 1986 at 230.
[17] At 230.
[18] At 230.
[19] *Hansard*, Legislative Council, 18 November 1986 at 1021.
[20] *Hansard*, Legislative Council, 5 December 1986 at 1673.
[21] *Hansard*, Legislative Council, 5 December 1986 at 1674.
[22] *Hansard*, Legislative Council, 5 December 1986 at 1678.
[23] *Hansard*, Legislative Council, 5 December 1986 at 1684.
[24] *Road Safety (Miscellaneous Amendments) Bill*, Explanatory Memorandum.
[25] *Hansard*, Legislative Assembly, 3 November 1988 at 508.
[26] *Hansard*, Legislative Council, 10 May 1989 at 751.
[27] *Hansard*, Legislative Council, 23 May 1989 at 871-2.
[28] [1994] HCA 60; (1994) 181 CLR 338; (1994) 125 ALR 385; 69 ALJR 24; 76 A Crim R 32.
[29] At 348 per Mason CJ, Dawson, Gaudron and McHugh JJ. See also the comments of Deane J in *Refrigerated Express Lines (A/Asia) Pty Ltd v Australia Meat and Live-Stock Corporation* [1980] FCA 38; (1980) 29 ALR 333 at 347; (1980) 44 FLR 455.
[30] [1993] VicRp 75; [1993] 2 VR 337 at 338; (1993) 17 MVR 157.
[31] At 339.
[32] At 340.
[33] At 340.
[34] At 340.
[35] (1993) 17 MVR 176 at 183.
[36] At 342.
[37] D C Pearce & R S Geddes, *Statutory Interpretation in Australia*, 5th edition, Butterworths 2001 at [3.39].
[38] *Re Alcan Australia Ltd* [1994] HCA 34; (1994) 181 CLR 96 at 106; (1994) 123 ALR 193; (1994) 68 ALJR 626.
[39] At 342.
[40] The respondents cited four examples of legislation introduced shortly after a judicial decision to reverse the effect of that decision.
[41] At 340.
[42] See s47G(2a) of the *Road Traffic Act* 1961 (SA).
[43] At 9.
[44] At 10.
[45] See *Beckwith v R* [1976] HCA 55; (1976) 135 CLR 569 at 576 cited by the judge at [36]; (1976) 12 ALR 333; 51 ALJR 247; 28 ALT 39.
[46] [1976] HCA 55; (1976) 135 CLR 569 at 576; (1976) 12 ALR 333; 51 ALJR 247; 28 ALT 39. See also *Deming No 456 Pty Ltd v Brisbane Unit Development Corp Pty Ltd* [1983] HCA 44; (1983) 155 CLR 129 at 145; (1983) 50 ALR 1; 58 ALJR 1 per Mason, Deane & Dawson JJ.; *Waugh v Kippen* [1986] HCA 12; (1986) 160 CLR 156 at 164; (1986) 64 ALR 195; 60 ALJR 250; [1986] Aust Torts Reports 80-004 per Gibbs CJ, Mason, Wilson & Dawson JJ.
[47] See s55(10).
[48] (5th edition) Butterworths 2001 at 82.
[49] At 106-107.
[50] [1987] HCA 17; (1987) 162 CLR 574; (1987) 71 ALR 1; (1987) 61 ALJR 255; (1987) 5 MVR 185.
[51] At 594.
[52] [1962] HCA 23; (1962) 107 CLR 381 at 388; [1962] ALR 483; (1962) 36 ALJR 26.
[53] At 594. Cited in *Barns v Barns* [2003] HCA 9; (2003) 214 CLR 169 at 207 per Gummow and Hayne JJ; 196 ALR 65; 77 ALJR 734. See also *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; (1996) 187 CLR 310 at 328-329; (1996) 140 ALR 156; (1996) 71 ALJR 32; (1996) 19 Leg Rep 2 per Toohey, McHugh and Gummow JJ.
[54] [1908] HCA 55; (1908) 7 CLR 1 at 14.
[55] At 10.

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