26/96

SUPREME COURT OF VICTORIA

WRIGHT v MORTON

Batt J

7, 8, 12 March, 26 June 1996 — (1996) 87 A Crim R 468; (1996) 24 MVR 497

MOTOR TRAFFIC – DRINK/DRIVING – CERTIFICATE SIGNED BY "LEGALLY QUALIFIED MEDICAL PRACTITIONER" – ACT AMENDED – CERTIFICATE TO BE SIGNED BY "REGISTERED MEDICAL PRACTITIONER" – WHETHER CERTIFICATE ADMISSIBLE – EVIDENCE OF POST-DRIVING CONSUMPTION OF ALCOHOL - NOT SUPPORTED BY SWORN EVIDENCE – WHETHER FINDING OF FACT REASONABLY OPEN – PRESUMPTION OF CONTINUANCE – WHETHER OPEN AS TO BLOOD/ALCOHOL LEVEL – ADMISSIBILITY OF ANALYST'S CERTIFICATE: *ROAD SAFETY ACT* 1986, SS48(1A), 49(1)(b), 57(3) and (4); *MEDICAL PRACTICE ACT* 1994, S104.

W. was the driver of a motor vehicle which ran off the road. There were three passengers in the vehicle. On attending the scene, M., a police officer, found an empty beer bottle on the floor of the vehicle in the driver's position. W. was conveyed to hospital where a sample of blood was taken from him and later analysed to show a reading of 0.140% BAC. When interviewed some four months after the accident, W. mentioned that after the accident he had consumed a quantity of bourbon on the side of the road. W. was subsequently charged, *inter alia*, with offences under s49(1)(b) and (g) of the *Road Safety Act* 1986 ('Act'). At the hearing on 9 August 1995, a certificate of a medical practitioner was tendered in evidence which described the doctor (as at 9 April 1994) as a "legally qualified medical practitioner". The analyst's certificate was also tendered in evidence. The defence called no evidence. The magistrate dismissed the charge under s49(1)(g) of the Act as not being satisfied that the blood sample was taken within 3 hours of driving. However, in applying the presumption of continuance, the magistrate found the charge under s49(1)(b) proved and convicted W. Upon appeal it was submitted—

(a) that the doctor's certificate was not admissible in evidence due to the fact that s57(3) of the Act provided only for the case where a certificate purported to be signed by a "registered medical practitioner".

(b) that given the evidence as to post-driving consumption of alcohol, it was not reasonably open to the magistrate to find the charge proved

(c) without expert evidence it was not open to the magistrate to apply the presumption of continuance in order to determine the blood/alcohol concentration level at the time of driving.

HELD: Appeal dismissed on all questions.
(1) Section 57(3) of the Act is an evidentiary or procedural provision. Therefore, the amended form of s57(3), although enacted after the date of the offence, was applicable to the hearing of the charge. The certificate of the doctor was admissible under s57(3) in its amended form by virtue of s104 of the *Medical Practice Act* 1994. Accordingly, the reference in the certificate to a "legally qualified medical practitioner" must be taken to be a reference to a "registered medical practitioner" within the meaning of the *Medical Practice Act* 1994.

(2) Whilst there was some evidence of post-driving drinking in the form of W.'s exculpatory statements, it would not have been reasonably open to the magistrate to find that the presumption of continuance did not apply. In coming to this conclusion it is noted that none of the witnesses called gave direct evidence of any post-driving drinking; no bourbon bottle was located in or around the vehicle; the topic was first mentioned by W. some four months after the accident; and the consideration that W. did not give sworn evidence of post-accident drinking.
***R v Neilan* [1992] VicRp 5; [1992] 1 VR 57; (1991) 52 A Crim R 303; and**
***Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395, referred to.**

(3) Section 57(4) of the Act makes admissible a certificate as to the blood/alcohol concentration if it purports to be signed by an approved analyst. It dispenses with the need for the certifier to show that he or she is a person who would be accepted as a "properly qualified analyst".
***Wright v Bastin (No.2)* [1979] VicRp 35; [1979] VR 329;**
***R v Cheer* [1979] VicRp 53; [1979] VR 541, followed.**

(4) A magistrate is entitled, though not bound, to rely on the common law evidentiary presumption of continuance operating retroactively where the breath test or blood sample was taken outside

the 3-hour period. It is open to a magistrate (without trespassing into the province of an expert) to take the view that the blood/alcohol level will peak a relative short time after drinking ceases and will thereafter decline. Accordingly, it was open to the magistrate in the present case, to apply the presumption or use inference and judicial notice to be satisfied beyond reasonable doubt that W.'s blood/alcohol concentration at the time of driving not only exceeded the prescribed concentration but was 0.140%.

Smith v Maddison **[1967] VicRp 34; [1967] VR 307;**

Heywood v Robinson **[1975] VicRp 55; [1975] VR 562; and**

Pippos v Craig **[1993] VicRp 44; [1993] 1 VR 603; (1992) 16 MVR 327; [1992] Aust Torts Reports 81-196, followed.**

R v Olejarnik **(1994) 72 A Crim R 542; (1994) 33 NSWLR 567; (1994) 19 MVR 125, not followed.**

BATT J: *[After referring to the charges and results before the Magistrate, the questions of law raised by the appeal, relevant provisions of the Act, the* Road Safety (Procedures) Regulations 1988*, the* Medical Practice Act 1994 *and the certificate of medical practitioner, His Honour continued]*...**[9]** Seizing upon the adventitious change in the statutory description of medical practitioners that occurred between the date of the signing of the certificate and the date of the hearing, counsel argued that, as the certificate did not purport to be signed by a registered medical practitioner, as required as s57(3) of the Act as in force at the date of the hearing, it was not admissible and that as a consequence there was no evidence of the taking by a person entitled to do so or indeed any person of a sample of blood of the appellant at any time, so that the analyst's certificate as to the concentration of alcohol in the sample of blood analysed by the analyst could not be shown to relate to the blood of **[10]** the appellant nor could the three-hour and twelve-month time limits in s57(2) be shown to be satisfied.

(There was in fact evidence of – but of no more than – the taking of a sample of the appellant's blood in the form of an admission by him to the respondent informant at the Swan Hill Hospital after the accident, as set out in para. 50 of the affidavit of Mr Cassidy, the appellant's solicitor, sworn 18 August 1995, but that sample cannot, without the certificate, be identified with the blood analysed.) This argument is without merit, but counsel justified it by reference to views expressed in *Entwistle v Parkes* (1992) 16 MVR 349 at 352-353 and *Jones v Purcell* (unreported, Hansen, J, 19 July, 1995) at p25. I am not sure that those views apply to the present argument. Be that as it may, I consider that it fails, for either of two reasons.

A number of preliminary steps in the appellant's argument may be accepted. First, s57(3) is an evidentiary, and thus a procedural, provision. Therefore it is not within the presumption against the so-called retrospective application of amending legislation. For, as stated in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 at 69, in a passage cited by Dixon CJ in *Maxwell . Murphy* [1957] HCA 7; (1957) 96 CLR 261 at 267; [1957] ALR 231; (1957) 31 ALJR 143, no litigant has any vested interest in the course of procedure. *Zollner Ltd v Municipal Council of Sydney* (1917) 17 SR (NSW) 164 at 168; 34 WN (NSW) 65, citing *Gardner v Lucas* (1878) 3 AC 582 at 603, is indeed directly in point as regards evidentiary provisions. The present case is all the more so because on 1 July 1994 the charge was not pending, for it was not filed until 15 September 1994. In the absence, therefore, of a contrary intention, the amended form of s57(3), although enacted after the date of the alleged offence, was applicable to the hearing of the charge: *Maxwell v Murphy* at 267-268.

Secondly, the certificate which the amended s57(3) rendered admissible and, in the absence of evidence to the contrary, probative of the facts and matters contained in it was a certificate "purporting to be signed by a registered medical practitioner". It is immaterial whether the signatory, Dr Lau, was on 9 August, 1995 a registered medical practitioner in fact, for the statutory requirement for admissibility is the *purport or tenor* of the certificate with regard to the qualification of its signatory, not the actual qualification of the signatory: *Jones v Purcell*, *supra*, at pp23 and 25; cf. *R v Williams* [1992] VicRp 24; [1992] 1 VR 374 at 381; (1991) 13 MVR 271; (1991) 52 A Crim R 267.

[11] Thirdly, subject to a possible argument discussed at the end of my reasons on question (a), considered by itself the certificate tendered before the Magistrate on its face purported to be signed by a legally qualified medical practitioner and did not purport to be signed by a registered medical practitioner, for it professed by its tenor (to adopt meaning 1b of the verb "purport" in *The Oxford English Dictionary*, 2nd edn., which is the meaning adopted in *White v Moloney* [1969] VicRp 91; [1969] VR 705 at 710 and substantially that adopted in *Wiggins v Tainsh* [1973] VicRp

23; [1973] VR 245 at 248) to be the certificate of a signatory who stated his name and described himself merely as a legally qualified practitioner.

Fourthly, as the exposition by the majority of the Full Court in *Sutton v Bradshaw* [1988] VicRp 83; [1988] VR 920; (1987) 6 MVR 257 cf *Yrttiaho v Public Curator (Qld)* [1971] HCA 29; (1971) 125 CLR 228; [1972] ALR 63; 45 ALJR 417 makes clear, the latter case establishes that the provisions paras. (e), (f) and (g) of s14(2) of the *Interpretation of Legislation Act* 1984, providing that amendment of an Act shall not, unless to the contrary intention expressly appears, affect any right or privilege acquired or accrued under the Act amended or any penalty, forfeiture or punishment incurred in respect of an offence committed against the Act amended or any legal proceeding in respect of any such right, privilege, penalty, forfeiture or punishment, do not preserve the procedure to be followed in the course of such a legal proceeding, but only the availability of such a legal proceeding itself. In my view, therefore, the respondent cannot successfully invoke s14(2) of that Act.

I should add that, whilst it may be accepted, as was argued for the appellant, that the certificate tendered was not signed pursuant to any statutory or regulatory *obligation* to do so, I do not consider that s14(2) is inapplicable on that ground. *[After discussing the decision of the High Court in River Sand & Gravel Pty Ltd v The Milk Board [1972] HCA 2; 126 CLR 471; 46 ALJR 101, His Honour continued]*...**[12]** In my judgment, the certificate tendered was admissible under s57(3) of the Act in its amended form by virtue of s104 of the *Medical Practice Act* 1994**.** I say this notwithstanding the particularly infelicitous expression of s104. It is necessary to catalogue the infelicities in the section, or some of them, because they bear in varying degrees upon the construction and interpretation of the section. *[After dealing with these matters, His Honour continued]*...**[15]** Applying that interpretation and construction to the certificate tendered, I consider that, unless there is an inconsistency with context or subject matter, the reference in it to a legally qualified medical practitioner must in respect of the date 9 August 1995 be taken to be a reference to a registered medical practitioner within the meaning of the *Medical Practice Act* 1994.

[After dealing with the appellant's arguments against this conclusion, the evidence of post-driving consumption and the magistrate's reasons, His Honour continued]...**[24]** [I]n the circumstances revealed by the evidence **[25]** before the Magistrate, whilst there was some evidence of post-driving drinking in the form of the appellant's exculpatory statements, a favourable finding based on that evidence would be set aside on an appeal by the informant on the ground that the Magistrate could not reasonably have reached that conclusion or, to put it another way, that it was not open to the Magistrate, as a reasonable person, to come to the conclusion within the principle adopted in *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301; *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232; *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19; and *Hardy v Gillette* [1976] VicRp 36; [1976] VR 392 at 395. That seems a question of law: *Transport Accident Commission v Hoffman* [1989] VicRp 18; [1989] VR 197 at 200; (1988) 7 MVR 193; cf *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 356; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1. As *Allied Interstate (Qld) Pty Ltd v Barnes* [1968] HCA 76; (1968) 118 CLR 581; 42 ALJR 348 indicates, the weight to be given to a self-serving statement is a matter for scrutiny.

The aspects of the evidence before the Magistrate on which I rely for my view include the following. First, none of the witnesses called gave direct evidence of any post-driving drinking. In particular Bamford and Talmage said they did not see the appellant drinking after the accident. Next, on the evidence of Bamford, Talmage, Gadsden, Alexander, and the informant the appellant had no opportunity to drink after the accident, for he was rendered unconscious by the accident and, when he regained consciousness, got out of the car and lay on the ground where he appears to have remained until the arrival of the informant. Further, notwithstanding that the appellant told Senior Constable Spanic that the bourbon was in the car, the informant did not locate any other alcohol bottles in or around the vehicle than an open and empty beer bottle in the front driver's side of the car. In the absence of any evidence from the appellant as to the disposal of the putative bourbon bottle, the informant's evidence of itself would render the self-serving answers about bourbon highly suspect. I think that the answer that "after the accident I consumed some on the side of the road" does, as a matter of interpretation, mean that the appellant said that after the accident he also consumed some *beer*. However, the unacceptability of his answers about bourbon has the consequence of affecting the credibility of his sole statement suggesting post-accident consumption of beer. Finally, the appellant made no mention of post-driving drinking

when interviewed at the Swan Hill Hospital shortly after the accident. It is true that he **[26]** was distressed and apparently terminated the interview. But he did answer two questions which were quite wide enough to cover post-accident drinking, namely, "How much alcohol did you consume?" and "Are you sure that's all?". It was only when interviewed some 4 months later that he mentioned the topic.

To be added to the foregoing evidential items is the powerful consideration that the appellant did not give sworn evidence of post-accident drinking. By the time the Magistrate first referred to the evidence (in the form of exculpatory answers) about post-accident drinking the defence had elected to call no evidence. I do not accept the appellant's submission that nothing in *R v Neilan* [1992] VicRp 5; [1992] 1 VR 57; (1991) 52 A Crim R 303 [1992] 1 VR 57 allowed his election to be used as a make-weight. The rule in *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395 applies to criminal cases as it does to civil, save that it gives way to rules restricting or prohibiting comment on the silence of the accused in court and that it must not be suggested that any onus rests on the accused. The rule has been applied (though not by reference to its name) in several criminal appeals by the High Court, such as *Morgan v Babcock & Wilcox Ltd* [1929] HCA 25; (1929) 43 CLR 163 at 178; [1929] ALR 313, *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at 658-659; [1955] ALR 671, *Bridge v R* [1964] HCA 73; (1964) 118 CLR 600 at 615; [1965] ALR 815; (1964) 38 ALJR 280 and, most recently, *Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23. In the latter case Mason CJ and Deane and Dawson JJ at CLR 227-228 said:

> "In particular, in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused".

In *Neilan* the Court of Criminal Appeal, by reference to earlier well-known authorities, held that the silence of an accused will be of greater weight where it appears that the accused alone is able to explain the true facts surrounding a relevant incident. Such is the case here. It is true that there was sworn evidence that the appellant had said *out of court* that he had consumed alcohol after the accident. But, in my view, the failure to give sworn evidence to the same effect entitles the Magistrate, as a reasonable person, to conclude that it is not reasonable or rational to find the explanation for the blood alcohol reading of .14% in post-accident consumption of alcohol. Moreover, the appellant's **[27]** failure to give sworn evidence enables the other evidence to be accepted more readily and inferences from it to be drawn more confidently. In short, I consider that a reasonable Magistrate is bound to be sceptical of the out of court answers when the appellant neither confirmed them on oath nor allowed their truth to be tested by cross-examination.

Question (c): Presumption of continuance and Certificate of Analysis

In my judgment, the correct answer to each part of this question is affirmative. (cf. as to such questions the observations of Tadgell JA in *Frugtniet v Secretary to the Department of Justice* ([1996] VSC 32; (1996) 10 VAR 314, Court of Appeal, 24 April, 1996) at pp 6-7 of the transcript of his Honour's reasons, which seem applicable also to Rule 58.09(1)(a) of Chapter 1 of the Rules of Court.) I am of the view expressed because of the terms of the legislation in relation to certificates and because I consider that I should follow five earlier decisions of single judges of this court. In what follows I elaborate my reasons.

(i) Certificates

It was said, correctly in my view, that, whilst an approved analyst within para(b) of s57(1) was a "properly qualified analyst" for the purpose of that phrase where appearing in sub-s(2), an approved analyst could not be qualified as an expert at common law without evidence being given of the person's scientific qualifications, training and experience, which would bring the person within sub-para(ii) of the definition of "properly qualified analyst". A detailed argument was then advanced for the appellant that, as the sample could not be shown beyond reasonable doubt to have been taken within the 3 hour period, the certificate of medical practitioner and the certificate of analysis purporting to be signed by an approved analyst under s57 that on analysis the sample was found "to contain 0.140 grams of alcohol per 100 millilitres of blood (0.140 per cent)", whilst admissible, "lacked relevance" without other evidence from a person who qualified as an expert on analysis at common law. It was said that, once one went beyond the 3 hours, the prosecution lost the admissibility of the evidence of an approved analyst; that the certificates

did not have relevance outside the 3 hour **[28]** period for the purposes of s57(2); and that the certificates could not be used with the statutory presumption when the sample was taken outside the 3 hour period.

Although, as deposed to in para 70 of the appellant's solicitor's affidavit, the solicitor did submit to the Magistrate that s57(2) enabled certificates as to the taking of a sample within 3 hours and of the analysis of that sample to be given in evidence, he did not take the precise point taken before me. His submission was that the certificate of medical practitioner was not admissible because it did not purport to be signed by a registered medical practitioner and that the certificate of analysis was linked with it and fell with it. The point now taken was a curable defect, for the analyst could, if available, have been called, after an adjournment, to give evidence of her qualifications and experience. It was said for the appellant, by reference to *R v Olejarnik* (1994) 72 A Crim R 542; (1994) 33 NSWLR 567 at 573; (1994) 19 MVR 125, that it was for the prosecution to indicate that it proposed to call expert evidence. But the statement made in that case was made in a context where objection was taken to the reception of a certificate of breath analysis when the analysis had been conducted unlawfully and the court's discretion as to admitting the certificate fell to be exercised. There was no question of unlawfulness here in view of s56(2). Further, the prosecution was not bound to indicate that it proposed to call expert evidence where objection to the reception of the certificate of analysis was not taken on the ground of absence of proof of expertise of the certifying analyst.

If I considered that the present submission was correct I would have to consider whether it should be entertained and, if so, whether the charge should be remitted for further hearing in order to enable the informant to call the analyst. However, I am not faced with those questions as I consider that the submission is ill-founded. It is, I think, preferable to say why I am of that view than to consider whether the submissions should be entertained at all.

In my opinion, this submission is inconsistent both with the statutory provisions and with previous authority, including that of the Full Court. Both sub-ss(3) and (4) of s57 make certificates satisfying (as, in my opinion, did the certificates here) the respective descriptions in them "admissible in evidence in any proceedings referred to in sub-section (2)". When one goes to sub-s(2), one finds a number of kinds of **[29]** proceedings enumerated in its lettered paragraphs. One kind is specified in para(c), namely, "a hearing for an offence against section 49(1)". Sub-sections (3) and (4), do not make certificates they describe admissible merely for the purpose of the part of sub-s(2) that commences after the lettered paragraphs, as the appellant's submission repeatedly implied. That part of sub-s(2), by the words "without affecting the admissibility of any evidence which might be given apart from the provisions of this section", makes it clear that common law means of proof are preserved. But certificates of the requisite description are admissible by virtue of succeeding provisions of the section. Sub-section (4) makes admissible a certificate as to the concentration if it purports to be signed by an approved analyst. It dispenses with the need for the certifier to show that he or she is a person who would be accepted as a "properly qualified analyst" within sub para(ii) of the definition of that phrase. (Sub-section (4) unlike sub-s(3) is limited as to the matters which may be certified to and I therefore doubt, contrary to the suggestion for the appellant, that an approved analyst could effectively certify as to his or her qualifications, training and experience.)

As regards authority, it was acknowledged for the appellant that the submission was inconsistent with the decision and reasoning of Menhennitt, J in *Wright v Bastin (No 2)* [1979] VicRp 35; [1979] VR 329. More importantly, it is an attempt to run before me the argument that was firmly rejected by the Full Court in *R v Cheer* [1979] VicRp 53; [1979] VR 541 at 547, where the reasoning of Menhennitt, J on this point was approved.

(ii) Presumption of Continuance

I turn to the second aspect of Question (c), namely the presumption of continuance. The appellant's argument proceeded on the assumption that I found under Question (b) that the Magistrate did not, and was not bound to, find that, or have a reasonable doubt whether, there had been post-driving drinking. In 6 cases on the present or earlier corresponding legislation single judges of this court have held Magistrates entitled (though not bound) to rely on that presumption, operating retroactively, where the breath test or blood sample was taken outside the 2 hour or 3 hour period necessary to be satisfied for there to be a statutory presumption: *Smith v Maddison*

[1967] VicRp 34; [1967] VR **[30]** 307; *Turner v Bunworth* (unreported, Menhennitt J, 10 June 1970) *De Kruiff v Smith [1971] VicRp 94;* [1971] VR 761; *Heywood v Robinson* [1975] VicRp 55; [1975] VR 562; *Wright v Bastin* (No 2), *supra;* and *Nutting v Ryder* (1994) 20 MVR 294. I do not propose to rehearse the reasons in those judgments. But a powerful argument was presented that those decisions were wrong and should not be followed by me because the presumption can play no part when one is dealing with an element as volatile as changing blood alcohol levels. It was said that the blood alcohol concentration of a person at a certain time is not a fact such that it is legitimate to infer from it that (or some other) blood alcohol concentration for the person at some earlier time, and that to prove the latter concentration expert pharmacological evidence was required as to the rates of absorption and elimination of alcohol from the blood, which it was asserted (without, it may be observed, expert evidence, although Tadgell J treated the fact as notorious in a case I discuss later) differed for each person. The forceful judgment of Carruthers J for the New South Wales Court of Criminal Appeal in *R v Olejarnik,* disapproving *Smith v Maddison* and *Heywood v Robinson*, was called in aid.

Single judge decisions in other Australian jurisdictions were cited in support of the appellant's attack on the Victorian decisions. In *Griffiths v Errington* (1981) 7 NTR 3; (1981) 50 FLR 370 Muirhead, J in the Supreme Court of the Northern Territory, after referring to *Heywood v Robinson* and *Smith v Maddison*, expressed at 377 his belief that great caution must be exercised in applying the presumption to matters such as a chemical content of blood when one initial presumption must be that change was occurring and when the factors causing change and the rate change were matters for experts, and at 373 he stated that the certificate of analysis of a breath sample which had been taken beyond the permitted time could not in the absence of other evidence be used to convict the appellant of driving with more than the prescribed blood alcohol level. But the principal basis of that decision was that the certificate should have been excluded from evidence in the exercise of the court's discretion because the police officer conducting the test had acted contrary to mandatory provisions of the Northern Territory legislation which are not found in the Victorian legislation.

In *Berry v Lowcock* (1980) 27 SASR 108, where the prosecution failed to prove that the driving took place within 2 **[31]** hours immediately before the breath test in question, Jacobs, J at 114 stated that, standing alone, the certificate was ineffective to prove the concentration of alcohol at the time of driving. He referred to certain earlier South Australian decisions concerning charges of driving under the influence of intoxicating liquor and pointed out that, whilst the South Australian legislation had changed since they were decided, it still contained "something of a mandatory direction". In *Ween v Higgins* (1990) 11 MVR 487, where the relevant charge was driving under the influence, Mullighan, J at 495 expressed the view that a blood alcohol level of 0.124 a little over 2 hours after the driving could not, in itself, prove that at the time of the driving the appellant was affected by alcohol in the relevant sense. Finally, *Kaye v Isbell* (1991) 15 QLR 11, a decision of a Queensland District Court Judge, was cited. In it the Judge expressed a similar view to that Mullighan, J but in relation to an offence of the kind in question here.

The appellant's argument in relation to the presumption raises what seems to me to be a very nice question of judicial precedent. Apart from a case which I shall shortly mention, only one decision of an intermediate court of appeal was cited, *Olejarnik*. Were it not for the later decision, I would have no hesitation in following the earlier Victorian decisions. But the existence of a decision from an intermediate appellate court puts a different complexion on the precedential question confronting me. I am fully conscious of the principle stated by the High Court in *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485 at 492; (1993) 112 ALR 627; (1993) 10 ACSR 230; (1993) 67 ALJR 517.

Moreover, notwithstanding my own earlier decision, I recognise the force of the views expressed by Carruthers J in the New South Wales Court of Criminal Appeal, though there are to be set against them the views of Brooking J in the Appeal Division in *Pippos v Craig* [1993] VicRp 44; [1993] 1 VR 603; (1992) 16 MVR 327; [1992] Aust Torts Reports 81-196. My problem might have been solved had the appeal from my decision in *Nutting v Ryder* proceeded, but I ascertained, after the conclusion of argument, that the appeal was discontinued by notice dated 21 September 1995. I may say that in that case *Olejarnik* was not cited to me, just as the views of Brooking J in *Pippos v Craig* were not cited in *Olejarnik*.

I have concluded that the principle in *Marlborough Gold Mines* is not applicable here. For the legislation in question before me is neither national legislation **[32]** nor uniform legislation, but rather legislation which is fairly similar. More importantly, however, the question now raised is not one of interpreting legislation, but rather is one of the application of the *common law* evidentiary presumption of continuance, for, as I said in *Nutting v Ryder* at 313, if the facts do not satisfy s48(1)(a), the statutory three-hour period is irrelevant. (I say this notwithstanding that it may be (as the appellant submitted was the case) that in *Wright v Bastin (No 2)* at 340 and 341 Menhennitt, J did start from the (then) two-hour period or, as it was also put, used the statutory presumption as a spring-board for applying the common law. In that I agree with the appellant's counsel that one cannot apply the common law presumption "at the point where the legislature left off.") In distinguishing *Marlborough Gold Mines* in the way I have done I am conscious that, as Brooking JA said at p3 of his reasons in *Ryan v Textile Clothing & Footwear Union Australia & Anor* ([1996] VicRp 67; [1996] 2 VR 235; (1996) 130 FLR 313; (1996) 66 IR 258; (1996) 14 ACLC 555, Court of Appeal, 13 March 1996), in Australia the common law cannot differ from State to State except as a result of statutory modification. But after close consideration I am of opinion that I should take the common law to be that laid down in the series of first instance judgments in the Court of which I am a member. I do this the more readily because two of the judgments are judgments of McInerney J an acknowledged expert on the law of evidence.

In addition to the foregoing considerations, I am considerably influenced in reaching my conclusion that I should follow the Victorian decisions by the judgment of Brooking J in *Pippos v Craig.* His Honour twice referred with approval to *Smith v Maddison* and *Heywood v Robinson.* Further, he stated at 608:

> "It is open to juries to take the view, in the light of their own experience of the effect of the consumption of alcohol, leaving aside the significance, as regards judicial notice, of the widespread public discussion in recent years of the effect of the consumption of alcohol on blood alcohol levels, that the blood alcohol level will peak a relatively short time after drinking ceases and that thereafter it will decline."

I see no reason why Magistrates may not take the same view. I refer to Brooking J's discussion at 608-810 of the progressive growth in the topics, particularly of a scientific **[33]** nature, that may be the subject of judicial notice. I would quote only the following sentence at 610:

> "I think the time has come in Victoria to reject the view that judges sitting alone and juries can never, in the absence of expert evidence concerning its effect on behaviour, treat evidence of a given blood alcohol concentration as showing anything more than that there was alcohol present in the bloodstream."

In that case the sample had been taken from the body of the deceased about two hours after the fatal accident. There was no applicable statutory presumption. Southwell J at 617 agreed with Brooking J substantially for the reasons given by the latter, that the blood sample evidence was relevant and admissible. But I am not sure that his Honour's agreement extends to concurrence in the passages I have quoted from the judgment of Brooking J The third member of the court, Tadgell J, agreed at 621 that the evidence had been properly admitted, but he differed from Brooking J as to its effect. However, on analysis his Honour's reasons at 622-623 are concerned with rejecting the view that a tribunal of fact could reach a rational conclusion as to a particular individual's likely behaviour by reference only to an analysis in terms of a concentration of grams of alcohol per 100 millilitres of blood. As I read his Honour's judgment, he does not deal with the presumption of continuance with respect to a later blood alcohol concentration.

It is true that the case was a civil case, but I do not consider that it is properly distinguishable on that ground. (The reference with approval at 607 to a decision of the Supreme Court of Illinois evidencing a less stringent attitude in civil cases is on the topic of identity.) Counsel for the appellant submitted the judgment in *Pippos v Craig* to close scrutiny and advanced various grounds for treating as inapplicable here either the whole case or the reasoning of Brooking J. It is sufficient to say that, insofar as I have not expressly mentioned some of those submissions, I have considered them all. Counsel for the appellant also subjected *Wright v Bastin (No.2)* to criticism additional to that which I have mentioned, including that his Honour at 341 did in fact take judicial notice of the alcohol content of a bottle of beer. Beyond saying that in *Nutting v Ryder* at 311 I **[34]** expressed disagreement with the proposition at 342, I do not find it necessary to deal with the various criticisms, all of which I have considered.

If, as Brooking J stated at 608, it is open to a tribunal of fact to take the view that the blood alcohol level will peak a relative short time after drinking ceases and will thereafter decline, it was, in my view, open to the Magistrate, without trespassing into the province of an expert (as the appellant contended he did), but applying the presumption or using inference and judicial notice to be satisfied beyond reasonable doubt that the concentration of alcohol present in the blood of the appellant at the time of driving not only exceeded the prescribed concentration but was 0.140%. The appellant's written outline of argument included a submission that, if he was wrong in that the Magistrate could find the offence proved, without expert evidence the Magistrate could do no more than make a bare finding that the appellant was "over" the prescribed limit and could not find upon the appropriate standard that he was "any particular amount over the limit".

However, in response to a direct question from me counsel stated that it was a case of "all or nothing", that the submission, which "went the whole distance on expertise", was either wholly right or wholly wrong. I think that this must be so, for, if the logic of *Olejarnik* is correct, it entirely precludes the application of the presumption or the drawing of an inference without expert evidence. In other words, the mere blood alcohol reading is "legally meaningless information" (per Bray CJ in *Cavanett v Chambers* ([1968] SASR 97 at 105), leading to no conclusion. On the other hand, if the logic is incorrect, the application of the presumption of continuance would require the same reading to be presumed as at the earlier time or, if the matter be treated as one of inference and judicial notice of the fact referred to by Brooking J in *Pippos v Craig* at 608, an inference is warranted of a blood alcohol content of at least 0.14% at the last moment of driving.

Conclusion: Orders

For the foregoing reasons, this appeal fails on all questions. Accordingly I make orders in accordance with the following minutes: **[35]**

1. This proceeding be dismissed.

2. The appellant pay the respondent's costs of this proceeding, including any reserved costs.

APPEARANCES: For the plaintiff: Mr GA Hardy, counsel. Solicitors: Lamb, Cassidy. For the defendant: Mr CJ Hillman, counsel. Solicitor for Public Prosecutions.
