33/13; [2013] VSC 369

SUPREME COURT OF VICTORIA

WILSON v COUNTY COURT of VICTORIA & ANOR (No 2)

Emerton J

4 February, 19 July 2013

MOTOR TRAFFIC – DRINK/DRIVING – ALLEGATION THAT BREATH ANALYSING INSTRUMENT NOT IN PROPER WORKING ORDER – ACCUSED SUFFERED FROM GASTRIC REFLUX – ACCUSED DID NOT TELL THE INFORMANT ABOUT BELCHING INTO THE BREATH ANALYSING INSTRUMENT – RIGHT TO SILENCE – WHETHER JUDGE DREW AN IMPERMISSIBLE INFERENCE FROM LACK OF EXPLANATION OR COMPLAINT BY THE ACCUSED – WHETHER SILENCE WAS USED TO IMPERMISSIBLY IMPUGN THE CREDIBILITY OF THE ACCUSED – WHETHER ERROR OF LAW ON THE FACE OF THE RECORD – WHETHER ERROR HAD A MATERIAL EFFECT ON THE OUTCOME OF THE CASE: *ROAD SAFETY ACT* 1986, SS49(1)(f), 49(4).

W. was intercepted driving his motor vehicle and later underwent a breath test which returned a reading of 0.147%. W. was subsequently charged and convicted in the Magistrates' Court. On appeal to the County Court W. was again convicted. At the hearing on appeal, W. claimed that because of his gastric reflux disease he burped at the time of taking the test. Further, he claimed that he had not drunk nearly enough alcohol to warrant the reading. In finding the charge proved, the judge indicated that in assessing W.s credibility he had taken into account that W. had said "No comment" and that he did not mention having burped while taking the test. Upon appeal, the conviction was set aside and remitted to the County Court for hearing and determination by another Judge. On the rehearing the Judge found the charge proved. Upon appeal—

HELD: Application for review dismissed.

1. The circumstances of giving the breath sample were such that it was reasonable to assume that Mr Wilson would say something about having suffered from a bout of reflux while giving the sample. Mr Wilson had just finished answering a series of questions that were plainly directed to ensuring that he gave a readable and reliable sample. On his own evidence, there was about a minute between the time that he finished giving the sample and the time that he was informed about the reading and cautioned. In those circumstances, it was not a breach of his right to silence to call into question Mr Wilson's credibility on the basis that he said nothing about belching and made no complaint about the eruption of his condition at the time of testing.

2. In the circumstances described, there was no interference with Mr Wilson's right to silence. The judge commented that his conduct at the time of giving the sample was not consistent with the evidence that he gave at trial about suffering from heartburn and belching. This was part of her Honour's function in assessing his evidence.

3. Assuming that the defence under s49(4) was capable of being made out if Mr Wilson belched into the instrument, the onus lay on Mr Wilson to satisfy the court that he belched into the breath analysing instrument so as to cause the instrument not to be 'in proper working order'. On the evidence before the County Court about how the breath analysing instrument operated and its capacity to detect mouth alcohol, Mr Wilson had to satisfy the court that he belched into the instrument at a particular point in time. In the circumstances, the timing of the belch (and not merely the fact of the belch) was important to making out his defence.

4. Having regard to the difficulties discerning exactly what Mr Wilson was describing from time to time, it was open to the judge to find that Mr Wilson did not give a consistent account of when he belched. There was evidence that Mr Wilson told Professor Hebbard in 2004 that he could not remember when he belched into the instrument, although Professor Hebbard said that he did not ask Mr Wilson about regurgitation. Mr Wilson's evidence in chief before the judge was that he belched at the end of the test, but when taken by the prosecutor to the evidence he gave in the first County Court appeal, Mr Wilson said there were in fact two incidents of belching.

5. It was open to the judge to find that Mr Wilson gave inconsistent evidence about when he belched and to find the charge proved.

EMERTON J:

Introduction

1. On the evening of 9 September 2003, the plaintiff, Mr Leigh Wilson, was stopped by Victoria Police and asked to undertake a random breath test. After a preliminary breath test, Mr Wilson was required to accompany the informant to the 'booze bus', where he took a further test. The breath analysing instrument that was used gave a reading of 0.147% for the concentration of alcohol in Mr Wilson's breath.

2. Mr Wilson was later convicted in the Magistrates' Court of Victoria of an offence under s49(1)(f) of the *Road Safety Act* 1986 (Vic) (the 'Act').[1] Section 49(1)(f) of the Act creates an offence if a person within three hours of driving or being in charge of a motor vehicle furnishes a sample of breath that indicates that the prescribed level or more than the prescribed level of alcohol is present in the person's breath and that is not due solely to the consumption of alcohol after driving or being in charge of the vehicle. However, s49(4) of the Act provides that it is a defence for the person charged under s49(1)(f) of the Act to prove that the breath analysing instrument used was not in proper working order or was not properly operated.

3. Mr Wilson appealed to the County Court of Victoria, relying on s49(4) of the Act. He claimed that he had long suffered from gastric reflux disease and that this condition caused him to burp or belch[2] while taking the breath test, and the breath analysing instrument gave an incorrect result. Mr Wilson also claimed that he had not drunk nearly enough alcohol to warrant the high reading given by the instrument, having had only a small number of drinks at the Melbourne Airport Club prior to being breath tested.

4. Both of these propositions depended on evidence given by Mr Wilson, although he also relied on certain corroborative and expert evidence.

5. On the first occasion that his appeal was heard in the County Court (the 'first County Court appeal'), the County Court judge said that he was not convinced that Mr Wilson was being truthful in his evidence as to how much he had drunk and found the charge proven. In the course of pre-sentence discussions, his Honour made remarks indicating that he had taken into account in assessing Mr Wilson's credibility a 'no comment' answer given by him after he was notified by the informant of the high reading and given a caution.

6. Mr Wilson sought judicial review of the decision in the first County Court appeal. In *Wilson v County Court of Victoria*,[3] Cavanough J held that the judge's use of Mr Wilson's 'no comment' answer to impugn his credibility involved an error of law. As the outcome of the appeal could have been different if the error had not occurred, Cavanough J set aside the decision in the first County Court appeal and remitted the matter to the County Court to be heard and determined again according to law.

7. The remitted matter came on for hearing in the County Court in December 2011 (the 'second County Court appeal'). The County Court again dismissed Mr Wilson's appeal and entered a conviction, the learned judge giving *ex tempore* reasons for her decision. Mr Wilson again seeks to have the decision of the County Court set aside for error of law on the face of the record, principally because of what he says was another interference with his right to silence and because the judge applied the wrong test under s49(4) of the Act.

The decision under review

8. In the second County Court appeal, Mr Wilson again raised the defence that the breath analysing instrument was not in proper working order, based on the alleged distortion of the result due to his having burped or belched while breathing into it. He also argued that he had not drunk nearly enough alcohol to produce the high reading given by the instrument.[4] He adduced evidence from his gastroenterologist, Professor Hebbard, and from Mr Farrer, the inventor of the breath analysing instrument, who gave evidence as to the effects of the presence of exogenous or 'mouth' alcohol on readings given by the instrument. Mr Wilson also called two lay witnesses who were at the club at which he had been drinking prior to being stopped and breath tested.

9. In her *ex tempore* reasons for decision, the learned judge identified the evidentiary burden that Mr Wilson had to discharge under s49(4) of the Act to be the 'possibility' that the breath

analysing machine was not in proper working order or was not properly operated. In relation to what actually needed to be proved by Mr Wilson, the judge said as follows:

> In discharging that evidentiary burden [that] the breathalyser was not operating properly on that occasion, that is the occasion on which Mr Wilson's breath was analysed on 9 September 2003, the defence must also demonstrate the possibility that Mr Wilson belched into the machine one second or less at the end of the time he in fact was blowing into it. That is because, on all the evidence, I am satisfied that the machine could only be said to be possibly not in proper working order if that occurred, that is, if a person breathed mouth alcohol into the machine one second or less before the end of that period of blowing into it.

10. This was based on evidence given by Mr Wilson's expert, Mr Farrer, that if mouth alcohol was present at the time of blowing into the breath analysing instrument, there would be a spike in the reading followed by a decline. The instrument was programmed to identify the decline or 'negative gradient' and would not produce a reading. However, if the mouth alcohol was detected in the last second of the test, the analysis would proceed and a reading would be given, because the instrument would not have had time to identify the negative gradient and abort the analysis.

11. Mr Wilson gave evidence that he belched into the instrument towards the end of blowing. However, the judge said she could not accept Mr Wilson's evidence on this point. Her Honour found that Mr Wilson had given different accounts of when he belched: he told Professor Hebbard in 2004 that he could not remember when he belched into the instrument; in the first County Court appeal (in 2005), he gave evidence that he belched into the instrument just before the mouthpiece was placed in his mouth, then later in the same evidence he said he belched at the end; his evidence before her Honour was only that he belched at the end, but when taken by the prosecutor to his earlier evidence, Mr Wilson said there were in fact two incidents of belching.

12. Her Honour then said:

> I also find it rather incredible that a man [as] apparently *au fait* with the requirements under the *Road Safety Act*, as [is] Mr Wilson, in terms of his decision to apparently take note of times when certain matters were carried out, should not have revealed to the informant the fact that he belched while breathing into the instrument. Ultimately it was Mr Wilson's evidence that he suffered heartburn and discomfort, and even in the absence of any particular knowledge of what effect this might have one would have expected, in the circumstances, that he would make some complaint about it.

13. Returning to the question of when Mr Wilson had belched into the breath analysing instrument, her Honour said:

> In any event, his later evidence and the inconsistency between when it was said he belched in the machine, does not leave me with a particularly high regard as to his reliability and credibility, and certainly, [he] has not discharged the duty of even establishing the possibility that he belched into the machine one second or less from the end of the time he breathed into the machine. This is an evidentiary burden that must be satisfied by the defence if it is to avail itself of the defence under s49(4). In my view, I have trouble even accepting that Mr Wilson belched at all, and certainly there is no evidence before me that he belched at that precise time said by [Mr Farrer] to render the machine possibly inoperative. I could not, on this evidence, find even that there was a possibility that he did so breathe at that particular time.

14. In discussion between counsel and the Bench following delivery of the judgment, counsel for Mr Wilson sought to clarify whether the fact that Mr Wilson did not reveal to the operator/informant having belched was a matter of significance to her Honour. Her Honour responded that it was not, saying that it was a matter that she took into account, but did not regard as enormously significant. She said:

> I do not regard it as a massively significant matter. The main emphasis of my finding related to the very inconsistent answers that your client gave in relation to when he belched basically. It seemed to me there was an inconsistency on a very important point such as it undermined to a significant degree your client's reliability and credibility.

15. At the end of this discussion, her Honour said:

> I just make it clear that in terms of the distinction that I draw insofar as what comprised a prior

> inconsistent statement and what didn't, a failure to raise a matter is certainly a matter which I regard as going to Mr Wilson's credit and in addition, other evidence I have mentioned I found to be most unsatisfactory and all over I did not accept his evidence in that regard.

16. As to the actual consumption of alcohol by Mr Wilson prior to being tested, the judge said that she again had a great deal of trouble accepting his evidence even as to the possibility that the instrument was in error because of the small amount of alcohol that he had consumed. The fact that Mr Wilson made no mention of 'half nips' or 'full nips' in the first County Court appeal undermined his reliability and credibility on that point. Her Honour did not accept Mr Wilson's evidence as to what he drank that night. Nor did her Honour accept the evidence of the two lay witnesses who had previously corroborated different evidence about what Mr Wilson had consumed, in that they made no reference to 'half nips' in the first County Court appeal.

Grounds of review

17. In the course of submissions, counsel for Mr Wilson refined the grounds of review upon which he relied. Ultimately, he relied on the following three grounds of review:

> (a) The learned judge erred in law in making findings adverse to his credit based on the fact that Mr Wilson exercised his right to remain silent after a caution was administered to him;
>
> (b) The learned judge erred in law in applying the wrong test under s49(4) of the Act in that, in order to discharge the evidentiary burden that the breath analysing instrument was not operating properly at the relevant time, it was not necessary for Mr Wilson to establish the possibility that he belched into the breath analysing instrument one second or less from the end of the blowing time;
>
> (c) The learned judge erred in law in making adverse findings as to Mr Wilson's credit in that her Honour misconstrued the evidence as to what Mr Wilson told Professor Hebbard in 2004 and the evidence that he gave in the County Court proceedings in 2005 as to when he belched.

Ground 1: Interference with the right to silence

18. Mr Wilson submits that in the passage of her reasons set out at paragraph 12 above, the learned judge erred in law in making an adverse finding as to his credit based on his exercise of the right to silence after a caution was administered. This, so he submits, was precisely the error made by the judge in the first County Court appeal.

19. In *Wilson No 1*,[5] Cavanough J held that Mr Wilson's 'no comment' answer – he having been notified of the high reading, given a caution and asked by the informant whether he had any comment to make – could not be used to impugn his credit without interfering with his right to silence. Justice Cavanough said:

> ... it is a central feature of the relevant principles that the exercise of the right to silence before the police and like officials must not be used to impugn the accused's credibility in any circumstance or in any way.[6]

20. Mr Wilson was entitled to remain silent (or give a 'no comment' answer) in the face of police questioning. While silence before officialdom may well be considered logically relevant and probative, it is clear that other values and purposes of the law require that silence while in the hands of officials must not be used adversely to the accused at the trial.[7]

21. In *RPS v The Queen*,[8] the High Court described the expression 'the right of silence' as a 'useful shorthand description for a number of different rules that apply in the criminal law'.[9] However, without more, reference to the 'right to silence' is not always a safe basis for reasoning to a conclusion in a particular case and the use of the expression may obscure the particular rule or principle that is being applied.[10] Gaudron ACJ, Gummow, Kirby and Hayne JJ referred to the speech of Lord Mustill in *R v Director of Serious Fraud Office; Ex parte Smith*,[11] in which at least six different forms of immunity were identified as covered by the 'right of silence'.[12] These included a specific immunity possessed by persons under suspicion of criminal responsibility when interviewed by the police or persons in authority from being compelled on pain of punishment to answer questions,[13] and a specific immunity possessed by accused persons undergoing trial from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.[14]

22. Although Ground 1 is based on the judge drawing an adverse inference from Mr Wilson's exercise of his right to silence after the administration of a caution, the relevant passage in the judgment read in the context in which it appears shows that her Honour was not referring to Mr Wilson's refusal to answer questions after being cautioned but to Mr Wilson's conduct during the testing process more generally, observing that it was 'rather incredible' that a man as knowledgeable about the testing requirements as Mr Wilson would not have said something to the informant about belching into the breath analysing instrument or made a complaint about his heartburn and discomfort.

23. Unlike the judge in the first Wilson appeal, therefore, the judge in the second Wilson appeal did not focus on Mr Wilson's 'no comment' answer. Rather, her Honour took into account in assessing the reliability and credibility of his evidence Mr Wilson's lack of complaint at the time of testing, having regard to the circumstances in which he says he found himself when he gave the breath sample.

24. The fact that the judge did not specifically draw an inference from Mr Wilson's 'no comment' answer to a question from the informant is not, however, decisive. The 'right to silence' goes beyond the right to decline to give an answer when questioned by a person in authority. In *Petty v The Queen*,[15] the High Court of Australia decided that, at trial, it is not permissible to suggest that the exercise of the right to silence before trial can provide a basis for inferring consciousness of guilt or inferring that a defence raised at trial is a new invention or is otherwise suspect because the accused previously failed to mention it. Mason CJ, Deane, Toohey and McHugh JJ described the right to silence and the rationale for its existence as follows:

> A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied to the administration of the criminal law in this country. An incident of the right to silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information.[16]

25. Their Honours held that the denial of the credibility of a late defence or explanation by reason of the accused's earlier silence is just another way of drawing an adverse inference against the accused by reason of his or her exercise of the right of silence and that such an erosion of the fundament right should not be permitted.[17]

26. For her part, Gaudron J said:

> Although ordinary experience allows that an inference may be drawn to the effect that an explanation is false simply because it was not given when an earlier opportunity arose, that reasoning process has no place in a criminal trial. It is fundamental to our system of criminal justice that it is for the prosecution to establish guilt beyond reasonable doubt. The corollary of that – and it is equally fundamental – is that, insanity and statutory exceptions apart, it is never for an accused person to prove his innocence. Therein lies an important aspect of the right to silence, which right also encompasses the privilege against incrimination.
>
> To allow that an explanation might be judged false because it was not put forward before trial is, in effect, to allow that the burden of proving guilt may be more readily discharged because the accused person did not signal the precise basis of his innocence – in other words, his defence. That is so even if the accused person bears an evidential burden, for a burden of that kind does not relieve the prosecution of the ultimate onus of establishing the elements of the offence charged beyond reasonable doubt.[18]

27. Mr Wilson was charged with furnishing a sample of breath for analysis within three hours of driving indicating that there was more than the prescribed concentration of alcohol in his breath. The defence available to him under the Act was that the breath analysing instrument was 'not in proper working order or was not properly operated'. The defence that he put forward was that the breath analysing instrument was not in proper working order because he expelled mouth alcohol into it when giving the sample. The fact that he belched into the instrument was therefore a part of his defence. On its face, the judge's comment that it was 'rather incredible' that Mr Wilson did not disclose having belched while giving the sample involved drawing an inference

that his explanation for why the breath analysing instrument was not in proper working order was false because it was not given at the time of testing.

28. The informant submitted it was not a correct assessment of the words used by the judge that those words involved an interference with his right to silence. According to the informant, her Honour was merely saying, 'In the circumstances … as you described them, one might have expected you to have said something',[19] which was a comment arising out of something that was said to have happened in the process of taking the sample.[20] The informant submitted that the reference to Mr Wilson's failure to reveal having belched or to make a complaint about heartburn or discomfort was a legitimate function of the trial judge's task of evaluating the strength of his evidence.

29. I agree that, in the context in which it was said, her Honour's observation about Mr Wilson's failure to reveal having belched and his lack of complaint about heartburn and discomfort at the time of testing was a comment on the implausibility of this conduct, having regard to the testing regime and the circumstances in which Mr Wilson found himself. It did not involve a breach of Mr Wilson's right to silence.

30. Mr Wilson was obliged to undergo a breath test. Specifically, he was obliged to accompany the informant to a place where a sample was to be furnished and to remain there until a sample had been given,[21] to give more than one sample if the person operating the instrument believed the instrument to be incapable of measuring the concentration of alcohol because the amount of the sample was insufficient or because of a power failure or malfunctioning of the instrument or any other reason,[22] and to give a sample by 'exhaling continuously' into the instrument to the satisfaction of the person operating it.[23] Mr Wilson could have been required to provide a blood sample if it appeared to the informant that he was unable to furnish the required sample of breath on medical grounds or because of some disability, or if the instrument was incapable of measuring the concentration of alcohol for any other reason.[24] Mr Wilson himself had the option to request a blood test.[25]

31. The statutory scheme is therefore directed to ensuring that a sufficient, readable and reliable sample of breath is given and that, if that is not possible, other testing methods are used. The process contemplates a measure of cooperation by the person being tested.

32. Consistently with this objective, Mr Wilson answered a series of standard questions before he took the breath test. These questions were designed to ensure that he was capable of giving a sample and that the result would not be distorted by such things as the presence of mouth alcohol, the effects of medication or his inability to breathe properly. Mr Wilson was asked whether he suffered from a medical condition or physical disability that affected his ability to breathe. In answer to this question, he told the informant that he had an 'oesophagus problem'. He said he had a reflux problem 'whereby the gases from my stomach, when I breathe in I bring gas into my stomach'.[26] It was therefore no secret that Mr Wilson suffered from gastric reflux and Mr Wilson took care to inform the informant of this prior to giving a sample.

33. Mr Wilson gave evidence-in-chief in the second County Court appeal that after answering these questions and about halfway through the process of blowing into the instrument, 'regurgitation' was released from his stomach into his mouth and the instrument. He said, 'the officer keeps telling you, "blow, blow, blow, blow, blow, blow, keep going, going, going" and as – ah, the stress of trying to exhale comes up, I'd – I felt regurgitation released straight up through my oesophagus from my stomach, but it was just mixed together and it went into the instrument.'[27] Mr Wilson also gave evidence that he had 'acid reflux' prior to giving the sample and that he belched as he stood up and was walking to the machine.[28]

34. However, it is common ground that, having answered the preliminary questions as described and proceeded to give a sample, Mr Wilson then said nothing about the actual effect of his gastric reflux condition on the breath test, that is, that he belched while giving the sample. Mr Wilson now says that he did something that caused the breath analysing instrument to give an incorrect reading. That 'something' was an event known only to him which would remain exclusively within his knowledge unless he chose to share it with the informant.

35. In my view, the circumstances of giving the breath sample were such that it was reasonable to assume that Mr Wilson would say something about having suffered from a bout of reflux while giving the sample. Mr Wilson had just finished answering a series of questions that were plainly directed to ensuring that he gave a readable and reliable sample. On his own evidence, there was about a minute between the time that he finished giving the sample and the time that he was informed about the reading and cautioned.[29] In these circumstances, it was not a breach of his right to silence to call into question Mr Wilson's credibility on the basis that he said nothing about belching and made no complaint about the eruption of his condition at the time of testing.

36. I have concluded that in the circumstances described, there was no interference with Mr Wilson's right to silence. The judge commented that his conduct at the time of giving the sample was not consistent with the evidence that he gave at trial about suffering from heartburn and belching. This, as the defendant submitted, was part of her Honour's function in assessing his evidence.

37. If I am wrong and the judge drew an impermissible inference from Mr Wilson's exercise of his right to remain silent in the presence of the informant, it will not be sufficient to warrant the setting aside of the decision in any event. As the judge had independent reasons for not accepting Mr Wilson as a credible witness, any error of law was not a vitiating error.

38. In *Australian Broadcasting Tribunal v Bond*,[30] Mason CJ held that a decision does not 'involve' an error of law unless 'the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different'.[31] Toohey and Gaudron JJ also held that the error must have contributed to the decision in some way or, at the very least, it must be impossible to say that it did not so contribute. According to their Honours, it is necessary, at the very least, to show that the decision may have been different if the error had not occurred.[32]

39. Counsel for Mr Wilson submitted that as the case depended largely on Mr Wilson's credit,[33] it was immaterial whether the silence was the sole ground or merely one of many grounds for impugning Mr Wilson's credit. Her Honour's inference from Mr Wilson's silence was necessarily an integral part of her Honour's decision to reject his defence.[34]

40. It is certainly true that Mr Wilson's credit was important to the outcome in the second Wilson appeal: the success of his defence turned on the acceptance of his evidence as to when he belched. In *Wilson No 1*, Cavanough J held that the judge's decision might have been different had his Honour not drawn an impermissible inference as to Mr Wilson's credit from his 'no comment' answer. However, in setting aside the orders of the County Court, Cavanough J noted that the judge had not said that he had 'independent reasons' for reaching his conclusions;[35] to the contrary, 'his Honour defended his use of Mr Wilson's prior silence.'[36]

41. Assuming that the defence under s49(4) was capable of being made out if Mr Wilson belched into the instrument,[37] the onus lay on Mr Wilson to satisfy the court that he belched into the breath analysing instrument so as to cause the instrument not to be 'in proper working order'. On the evidence before the County Court about how the breath analysing instrument operated and its capacity to detect mouth alcohol, Mr Wilson had to satisfy the court that he belched into the instrument at a particular point in time. In the circumstances, the timing of the belch (and not merely the fact of the belch) was important to making out his defence.

42. The passage in which the learned judge is said to have infringed Mr Wilson's right to remain silent about his defence is sandwiched between her Honour's analysis of the conflicting accounts given by Mr Wilson as to when he belched. The judge made an adverse finding about the reliability and credibility of Mr Wilson's evidence on the basis of her finding that, since 2003, Mr Wilson had given different accounts about the point at which he belched during the testing process. The judge rejected Mr Wilson's evidence about when he belched and held that he had failed to discharge the burden of establishing even the possibility that he belched into the breath analysing instrument at the relevant time. However, her Honour did not find that Mr Wilson did not belch, which was the inference most likely to be drawn from his failure to reveal belching or to make complaint about his condition at the time of testing.

43. Although the judge later said she had taken into account as a matter affecting his credibility Mr Wilson's failure to reveal belching and to complain about heartburn and discomfort,[38] in her judgment the adverse credit finding is squarely based on the fact that Mr Wilson gave 'very inconsistent answers' about when he belched.[39] When Mr Wilson belched was critical, as her Honour saw the case. The observation about Mr Wilson's failure to reveal having belched at all did not, in fact, result in a finding that he did not belch. The failure of Mr Wilson's defence rested on her Honour's rejection of Mr Wilson's evidence as to when he belched, which was a subject about which he had given various accounts. Moreover, insofar as Mr Wilson relied on the 'corroborative' evidence of the number of drinks he had, her Honour had independent reasons for rejecting both Mr Wilson's evidence, and the evidence of the people with whom he had been drinking.

44. In my view, therefore, the learned judge would have come to the same conclusion about the reliability and credibility of Mr Wilson's evidence had she not drawn any inference at all from his failure to reveal having belched or from his lack of complaint about suffering from heartburn and discomfort at the time of taking the test.

45. The judge was charged with assessing Mr Wilson's credit. She identified inconsistencies in his account of when he belched and how many drinks he had consumed. It was open to her Honour to question whether he was being frank or honest in his evidence. In the event, her Honour rejected Mr Wilson's evidence because she found that it contained too many inconsistencies.

46. I am therefore not persuaded that, but for the inference drawn from Mr Wilson's failure to reveal belching and his lack of complaint at the time of testing, the judge's decision to reject Mr Wilson's evidence and his defence would have been, or might have been, different. The basis for the credit finding in the second County Court appeal may be distinguished from the basis for the credit finding in the first County Court appeal, where there was no independent ground for impugning Mr Wilson's credit. The situation in the second County Court appeal was markedly different, in that – as the judge found – there was a suite of prior inconsistent statements as to when Mr Wilson belched into the breath analysing instrument.

47. Ground 1 is not made out.

Ground 2: application of the wrong test

48. The learned judge held that in discharging the evidentiary burden that the breath analysing instrument was not operating properly, Mr Wilson had to demonstrate the possibility that he belched into the machine one second or less from the end of the blowing time. Her Honour said that she was satisfied on the evidence that the breath analysing instrument could only be said to be 'possibly' not in proper working order if mouth alcohol was breathed into it during that short period at the end of the test.

49. Mr Wilson contends that in order to discharge the evidentiary burden that the breath analysing instrument was not in proper working order at the relevant time, it was not necessary for him to establish the possibility that he belched into the breath analysing instrument one second or less from the end of the blowing time. He submits that the correct test is as described by Balmford J in *Williams v Jacobs*,[40] where the Court was concerned with the incorrect operation of the breath analysing instrument. Her Honour held that s49(4) did not require the defendant to prove, not only was the instrument not properly operated, but also that the reading was unreliable because of the way it had been operated. It sufficed for the defendant to show that the instrument was not properly operated. Her Honour said:

> ... what the defence must establish is proof of the probability or possibility, as opposed to the certainty, that the result of the incorrect operation of the machine would be unreliable – in effect, would produce a wrong finding.[41]

50. In my view, Mr Wilson has confused the requirement to show the 'possibility' that the instrument was unreliable and the requirement to establish the event or the existence of the thing that made it possibly unreliable.

51. In *Ozbinay v Crowley*,[42] Byrne J described the 'relevant question of fact' for the magistrate under s49(4) to be whether the defendant had shown the machine was not properly operated at the

relevant time. This could be demonstrated by showing that some act or omission in the operation of the machine occurred which would affect its proper operation so as to impair its reliability. [43] However, the burden did not require the person charged to show the inevitability of error as a result of the machine not being properly operated. Rather, it was sufficient that the defendant established 'on the balance of probabilities' that the act or omission affecting the operation of the machine was such that the result was unreliable.[44]

52. The defence under s49(4) is not made out simply by reference to the 'possibility or probability' that the result of the breath test was unreliable. It must be shown on the balance of probabilities that something affected the operation of the breath analysing machine so as to give rise to the possibility that the result was unreliable. That 'something' is the 'relevant question of fact' to which Byrne J refers. Mr Wilson gave evidence that he belched into the instrument while blowing. Belching could have caused mouth alcohol to be detected by the instrument and elevate the reading. However, on the basis of the evidence before the court about the operation of the breath analysing machine, belching could produce an elevated reading only if it occurred in the last second of blowing time.

53. In my view, the test formulated by the learned judge correctly referred to the evidence required in this case to establish the 'relevant question of fact'. The expert evidence was that the breath analysing instrument would not respond to mouth alcohol unless it was detected in the last second of blowing. This meant that there could be no suggestion that the machine was not working properly by reason of Mr Wilson's belching unless the mouth alcohol entered the machine in the last second of blowing. The test formulated by her Honour correctly reflected this evidentiary hurdle.

54. Ground 2 is not made out.

Ground 3: misconstruction of the evidence

55. Mr Wilson contends that the court erred in law in misconstruing the evidence as to what Mr Wilson told Professor Hebbard in 2004 about when he belched into the breath analysing machine and the evidence that he gave in the first County Court appeal on the same issue. The judge referred to this evidence when stating that that she did not have particularly high regard for Mr Wilson's reliability and credibility. In effect, the judge found Mr Wilson's evidence to be unreliable because he had given different accounts over time as to when he belched into the machine.

56. Making a finding of fact for which there is no evidence is an error of law. However, a 'misconstruction' or misunderstanding of the evidence does not necessarily give rise to an error of law. In *S v Crimes Compensation Tribunal*,[45] Phillips JA said:

> It cannot be said as a matter of legal principle that a determination of fact can never give rise to an error of law, but ordinarily it will not be so unless it is shown that the fact-finding tribunal arrived at a finding that was simply not open to it. In so referring to a 'finding' I use the term not only to include a finding of fact derived from the acceptance of direct evidence to that effect; I include also an inference of fact drawn by the tribunal from other facts found by it. If the finding (be it a finding on direct evidence or inference) was not open to the tribunal, that may bespeak a relevant error of law.[46]

57. I have reviewed the evidence that was before the County Court judge as to when Mr Wilson said he belched. It was somewhat confused. The confusion may have partly resulted from the complexity of Mr Wilson's physical symptoms and his references to belching, regurgitation and episodes of reflux. He described having had a 'burping sensation', a 'constriction' and an 'escape above my oesophagus into my mouth'. In re-examination, counsel for Mr Wilson was at pains to elicit an answer from Mr Wilson that explained his earlier evidence about when he belched by describing a protracted process of 'regurgitation' rather than discrete episodes of burping, but he failed to obtain a clear answer to this effect.

58. Having regard to the difficulties discerning exactly what Mr Wilson was describing from time to time, I have concluded that it was open to the judge to find, as she did, that Mr Wilson did not give a consistent account of when he belched. There was evidence that Mr Wilson told Professor Hebbard in 2004 that he could not remember when he belched into the instrument, although Professor Hebbard said that he did not ask Mr Wilson about regurgitation. Mr Wilson's evidence in chief before her Honour was that he belched at the end of the test, but when taken

by the prosecutor to the evidence he gave in the first County Court appeal, Mr Wilson said there were in fact two incidents of belching. In my view, it was open to her Honour to find that Mr Wilson gave inconsistent evidence about when he belched.

59. If the learned judge misunderstood some of Mr Wilson's evidence or some part of the evidence of his history of complaint about belching, it was not an error of law. It was open to her to find as she did.

60. Ground 3 is not made out.

Conclusion

61. Mr Wilson has failed to establish an error of law on the face of the record. His application for review will be dismissed.

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[1] Mr Wilson was also charged and convicted in the Magistrates' Court under s49(1)(a) of the Act, but that charge is not in issue.
[2] 'Belch' is the term used by the County Court judge to describe the expulsion of air (or air and liquid) from Mr Wilson's mouth.
[3] [2006] VSC 322; (2006) 14 VR 461; (2006) 164 A Crim R 525; (2006) 46 MVR 117 ('*Wilson No 1*').
[4] Section 49(6) of the Act provides that '[i]n any proceedings for an offence under paragraph (f) or (g) of subsection (1) evidence as to the effect of the consumption of alcohol on the accused is admissible for the purpose of rebutting the presumption created by section 48(1A) but is otherwise inadmissible.' However, in *DPP v Hore* [2004] VSCA 192; (2004) 10 VR 179; (2004) 42 MVR 520, the Court of Appeal held that evidence of drinking may be used to corroborate other evidence.
[5] *Wilson No 1* [2006] VSC 322; (2006) 14 VR 461; (2006) 164 A Crim R 525; (2006) 46 MVR 117.
[6] Ibid 464.
[7] Ibid.
[8] [2000] HCA 3; (2000) 199 CLR 620; (2000) 168 ALR 729; (2000) 74 ALJR 449; (2000) 113 A Crim R 341; (2000) 21 Leg Rep C1.
[9] Ibid 630.
[10] Ibid
[11] [1993] AC 1; [1992] 3 All ER 456; [1992] BCLC 879; [1992] 3 WLR 66.
[12] Ibid 30-1.
[13] Lord Mustill's third category of immunity.
[14] Lord Mustill's sixth category of immunity.
[15] [1991] HCA 34; (1991) 173 CLR 95; (1991) 102 ALR 129; (1991) 55 A Crim R 322; (1991) 65 ALJR 625.
[16] Ibid 99.
[17] Ibid 101.
[18] Ibid 128-9.
[19] Transcript of Proceedings, *Wilson v County Court of Victoria & Anor (No 2)* (Supreme Court of Victoria, S CI 2012 601, Emerton J, 4 February 2013) 80.
[20] An analogy was presented as follows: 'It's as if to say, you see someone get kicked in the shins and they don't say "ow". I might have expected a person to say "ow" if they got kicked in the shins'.
[21] *Road Safety Act* 1986 (Vic) s55(1).
[22] Ibid s55(2A).
[23] Ibid s55(5).
[24] Ibid s55(9A).
[25] Ibid s55(10).
[26] Transcript of Proceedings, *Wilson v Whitteker* (County Court of Victoria, Judge Gaynor, 7 December 2011) 10.
[27] Ibid 117-8.
[28] Ibid 173; 174.
[29] Ibid 118.
[30] [1990] HCA 33; (1990) 170 CLR 321; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1.
[31] *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 353; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1.
[32] Ibid 384.
[33] Leigh Gordon Wilson, 'Outline of Submissions of behalf of the Plaintiff', Submission in *Wilson v County Court of Victoria & Anor (No 2)*, S CI 2012 601, 4 February 2013, 2.
[34] Transcript of Proceedings, *Wilson v County Court of Victoria & Anor (No 2)* (Supreme Court of Victoria, S CI 2012 601, Emerton J, 4 February 2013) 29.
[35] *Wilson (No 1)* [2006] VSC 322; (2006) 14 VR 461, 473; (2006) 164 A Crim R 525; (2006) 46 MVR 117.
[36] Ibid.
[37] Although the judge proceeded on the basis that the defence under s49(4) of the Act was capable of being made out by the injection of mouth alcohol into the breath analysing instrument at the right moment, I

have doubts about whether, on the plain meaning of the words 'not in proper working order', belching into the breath analysing instrument could cause it to be 'not in proper working order'. In my view, the defence provided in s49(4) of the Act envisages a challenge to the way that the instrument is maintained and operated; speaking generally, it is a defence focussed on whether the machine was operating as it was designed to operate and on whether it was operated in accordance with the relevant regulations, rather than on the conduct or personal circumstances of the person giving a sample. In *Director of Public Prosecutions v McNamara* (1993) 17 MVR 286 ('*McNamara*') and *Charles v Koetsier* (1994) 20 MVR 381 ('*Koetsier*'), Harper J and Byrne J respectively rejected the submission that mouth alcohol had caused the breath analysing machine not to be in proper working order or not operated properly. In these cases, the Court considered the effects of an alcohol-based breath freshener and heartburn and 'waterbrash' respectively. In *Koetsier*, Byrne J considered whether medical evidence could be relevant to whether the instrument was in proper working order or not operated properly. As I read his Honour's decision, he found that it could not. His Honour said (at 383):

In the present case the medical evidence cannot demonstrate that the machine was not in proper working order. Indeed, the burden of Dr Collin's evidence assumed that the machine was in proper working order. Nor does it bear upon its proper operation. Again, Dr Collin's evidence was directed to the fact that an erroneous blood alcohol content may have been indicated notwithstanding the most meticulous operation of the instrument.

In *McNamara*, Harper J said (at 289):
A breath analysing instrument is, in my opinion, in proper working order and properly operated if the evidence discloses that it was in working order as designed and that it was operated in accordance with the relevant regulations and procedures laid down for its operation.
[38] Transcript of Proceedings, *Wilson v Whitteker* (County Court of Victoria, Judge Gaynor, 7 December 2011) 288.
[39] Ibid.
[40] [1999] VSC 88; (1999) 29 MVR 244.
[41] Ibid 247.
[42] (1993) 17 MVR 176.
[43] Ibid 183.
[44] Ibid 184.
[45] [1998] 1 VR 83.
[46] Ibid 89-90.

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