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|  | **CASE SUMMARIES 2010** |
| **1** | **Bail application – show cause situation**  In *Re Houssein Hawli* MC01/10, Whelan J determined an application for bail by an accused charged with multiple serious offences and having failed to appear on bail on three previous occasions. The accused was required to show cause why his detention in custody was not justified.  HELD: Application for bail dismissed.  1. The question in the present case was whether or not the accused has shown cause why his detention in custody was not justified. If that question was answered in the affirmative, bail should be granted. If answered in the negative, bail must be refused. There is no second step.  *Re Asmar* [2005] VSC 487; MC30/2005, applied.  2. Given that a violent relationship between the accused and his ex-wife has existed for many years and that there is an intervention order in place, there is a high risk that if released on bail, the accused may commit further offences. Further, given that the accused has committed serious criminal offences in the past, has failed to answer bail on three occasions, and the prosecution case seems strong, the risk of his answering bail, endangering the safety and welfare of others, interfering with witnesses or otherwise obstructing the course of justice is unacceptable. |
| **2** | **Contempt of court by using a camera in court**  In *Prothonotary of the Supreme Court of NSW v Rakete* MC02/10, Harrison J dealt with an application that a person who used a camera to photograph a person who was giving evidence in a Court was guilty of contempt of Court.  HELD: Defendant guilty of contempt in that he acted in a manner which had a tendency to interfere with the administration of justice but not guilty of doing an act with the intention of interfering with the administration of justice.  1. The test that applies to the second charge requires a Court to be satisfied beyond reasonable doubt that the defendant's act in filming the witness was an act done in a manner that had a tendency to interfere with the administration of justice. That test is objective. An intention to interfere with the administration of justice is not necessary to constitute a contempt; the critical question is whether the act is likely to have that effect, but the intention with which the act was done is relevant and sometimes important.  *Lane v The Registrar of the Supreme Court of New South Wales (Equity Division)* [1981] HCA 35; (1981) 148 CLR 245 at 258;  *Attorney-General v Butterworth* (1963) 1 QB at pp725-726; (and see at pp722-723);  *John Fairfax & Sons Pty Ltd v McRae* [1955] HCA 12; (1955) 93 CLR 351, (at p371), applied.  2. At one level there was evidence in the present case that the defendant's actions did in fact interfere with the administration of justice in that the defendant was escorted from the court following a request by a Sheriff's officer that he leave. Even if on one view that was only at the lower end of the scale of seriousness, it must clearly be regarded nevertheless as an interference with the administration of justice. It was at least potentially and probably actually disruptive to the court process and to the smooth and efficient running of the trial.  3. More particularly, the use of a camera in the courtroom during this trial would have been something that none of the jurors would be likely to have observed at any time before in the course of this particular trial up to that point. It was also a reasonable inference that none of the jurors would have experienced the use of a camera by an apparently unauthorised private person filming from the public gallery at any time previously in other similar circumstances either. A distraction of this sort, potentially interfering with the concentration and focus of jurors and diverting their attention from the very important task confronting them, would clearly have a tendency to interfere with the administration of justice. The fact that there was no evidence to suggest that the witness was not intimidated by what R. did or whether he was aware of what R. was doing was not relevant. |
| **3** | **Inciting to an Act of Indecency; text messages exchanged**  In *DPP v Eades* MC03/10 the accused who was charged with an offence of inciting a 13-yr old female to an act of indecency, had exchanged text messages with the female in which the accused incited the female to send him a nude photograph of herself. The Magistrate found that he should not have regard to the context in which the act took place and dismissed the charge. HELD: Dismissal set aside. Remitted to the Local Court to be dealt with according to law.  In determining whether an act which another person is incited by the defendant to perform is an act of indecency, it is permissible to take into account the surrounding circumstances, including the intent or purpose of the defendant, the ages of the defendant and the female and the sexual inferences that can be drawn from the messages. Accordingly, the Magistrate was in error in failing to enter into an assessment of the weight which should be given to the evidence of surrounding circumstances, which would have involved questions of fact. |
| **4** | **Duty of Magistrates to give reasons for decision**  In *Shu Zhang v West Sands Pty Ltd* MC04/10, Byrne J was dealing with an appeal against a Magistrate’s decision in a civil matter involving breach of contract.  His Honour held:  1. It has been said again and again that the duty of a judicial officer is to provide adequate reasons for the orders made. This is particularly the case where the orders are made following a contested trial. This was a relatively long contested trial of substantial claims. What may be adequate reasons in a given case will depend upon the circumstances, having regard to the purposes for the giving of reasons. These purposes are to inform the parties why and how the result was arrived at and to inform any appeal court what were the contentions of the parties, what were the facts as found, what were the principles of law relied upon and how these principles were applied. A further reason is the fact that it is often useful for the judicial officer to set out his or her reasoning process as a discipline to ensure that this process was in fact undertaken and that it was intellectually satisfactory.  2. The reasons for the Magistrate in this case, regrettably, do not address these objectives. His Honour said nothing about the facts which he found or about the documentary evidence which suggested the vendor was operating the business as manager rather than as owner. His Honour may have been perfectly correct in his assessment of the competing witnesses and in the conclusions of fact which he reached. It may be that there was evidence which supported these conclusions but from the Magistrate's reasons no view can be formed view upon this matter.  3. The consequence is that the appeal must be allowed on the basis that the Magistrate failed to provide any or any adequate reasons for his decision. The proceeding must therefore be remitted to the Magistrates' Court at Geelong to be reheard by a differently constituted court as the trial is now nearly two years old and there will be little recollection of the detail of the evidence. This is a regrettable result which is the result of none of the parties. |
| **5** | **Application to vacate a Suppression Order**  In *DPP v Rintoull & Sabatino* MC05/10, Curtain J dealt with an application to vacate a suppression order previously made prohibiting the publication of any photographs or visual representations of two accused who had been sentenced.  Her Honour held: Application granted. Suppression order vacated and the relevant photographic exhibits released.  1. The principle of open justice is fundamental to the administration of justice, but it is not absolute. Sections 18 and 19 of the *Supreme Court Act* 1986 permit a derogation from that principle in the circumstances there described. An order prohibiting an aspect of the Court’s process is only made in wholly exceptional cases. The Courts have made orders where it is necessary to protect the identity of a witness or an accused, as commonly occurs when other proceedings are pending, so that the administration of justice is not prejudiced. Such orders, although not expressed as such, are for a limited period, that is, so long as is necessary to ensure that the administration of justice is served. Legislation also exists which protects the identity of victims of certain offences and, as a consequence, sometimes the identity of the accused is not published because to do so would identify the victim.  2. Whilst there will always be some risks to the safety of each of the defendants, not only because of the nature of their crimes but also because of their age, the Courts have recognised and proceed on the basis that prison authorities are capable of protecting persons whose safety is at risk; notorious criminals, those who have committed horrendous crimes, sex offenders, youthful offenders, prison informers and former police officers to name but a few. The identity of persons falling within these categories is not suppressed by Court orders, with the possible exception of witnesses held in custody, although there may be much about their offending or their personal circumstances which would excite interest and thereby render them vulnerable in the prison population. There is nothing about the circumstances of the defendants which indicates that their position is any different from others held in protection.  3. If release and publication of the photographs will lead to persons forming an opinion that the killing was racially motivated, so be it. People are entitled to their views, even if formed on a basis different from the material placed before the sentencing judge. Members of the public are not bound by the sentencing remarks and, in a free society, they are free to form their own view of the matters.  4. The defendants’ images have been previously published and films of both of them entering Court have been broadcast; therefore images which render them recognisable are already in the public domain. The sketched images are not particularly lifelike representations of either of the defendants, and the photographs taken at the time before the killing are no longer recent photographs and, indeed, as time goes by, the photographs will no longer serve to identify them. In any event, R. has changed his appearance considerably since 2007 and since appearing in Court for sentence in December 2009. In these circumstances, there is little utility in an order prohibiting that which has already been published, and there being no more recent photographs, the effect of vacating the order will not necessarily serve to identify them as they now appear.  5. There is no evidence that by reason of the publication of either of the defendants’ photographs or the photograph of the graffiti will pose a risk to the family of either of the defendants. Indeed, one would come to the view that the photographs would pose no greater risk to the family of the defendants and not serve to further identify them as would the publication of the family name.  6. Accordingly, the test of necessity has not been reached in this case and that wholly exceptional circumstances do not exist which warrant the continuation of the suppression order. |
| **6** | **Admissibility of Evidence**  In *DPP v Williams (Ruling No 1)* MC06/10, Lasry J dealt with an application from the Prosecution which sought to lead evidence from a medical practitioner and a psychologist who both saw the accused shortly before the incident which led to serious being laid. Lasry J held:  HELD: Evidence not allowed to be led.  1. The first question to be considered was whether the evidence proposed to be led was relevant pursuant to s55(1) of the *Evidence Act* 2008 ('Act'). A consideration of relevance “... requires consideration of the process of reasoning by which [the] information ... could rationally affect the assessment of the probabilities. The word “rationally” is significant in this context. In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury’s assessment of the probability of the existence of a fact in issue at the trial.  *Washer v Western Australia* [2007] HCA 48; (2007) 82 ALJR 33, applied.  2. There is no question that the test of relevance is a broad one and the Australian Law Reform Commission dealt with a situation in this category when they said: "An indirect connection with a matter in issue is sufficient (eg evidence that an accused expressed an intention to kill the victim leads from the inference that he did in fact have such an intention to the inference that he is more likely than others who did not express such an intention to have killed the victim)."  3. But in this case there are difficulties with the evidence proposed to be led. Assuming the conversation occurred in the manner described by the medical practitioner, this evidence resolved into a conversation which occurred in which W. described that he felt like killing someone and had taken some steps in relation to that but had been stopped or stopped himself. The description is not specific about when the feeling actually occurred, whether it was a current feeling and how he had been stopped. There was no clear statement of a future intention in relation to the victim of this attack. Further, there was no suggestion on the evidence that the specific preparations that W. used is said to have told the doctor he had made pursuant to his feeling of taping his shoes and wearing gloves were involved in the attack on the victim.  4. Accordingly, the evidence of the medical practitioner was not relevant within the meaning of s55(1) of the Act on the issues contended for by the Prosecution including the aspect of motive.  5. Further, this evidence would have been excluded pursuant to s137 of the Act. The probative value of this evidence, taken at its highest, was significantly outweighed by its prejudicial effect. So far as this evidence was concerned the danger of unfair prejudice was the risk that the evidence would be misused by the jury either to adopt an illegitimate form of reasoning or to give the evidence undue weight.  6. In relation to the evidence proposed to be led from the psychologist, the prosecution was not permitted to lead evidence about the enquiry of W. as to whether the police could be given information from the file of the psychologist. His reasons for the enquiry were thoroughly non-specific, invited speculation and arguably related to events which had already occurred. |
| **7** | **Application of the Principle in *Jones v Dunkel* (1959) 101 CLR 298**  In *Baker v Norcross Pty Ltd (Ruling No 2)* MC07/10, Kaye J dealt with the question of whether the principle in *Jones v Dunkel* should be applied.  1. The principle of *Jones v Dunkel* (1959) 101 CLR 296 applies if two conditions are satisfied, firstly, if the person who had not been called as a witness was available to give evidence and, secondly, if that person was a person who the other party would reasonably be expected to have called as a witness on the particular topic.  2. Whilst there was no direct evidence as to the availability of supervisors and charge hands who were responsible for directing the plaintiff at the defendant's premises, there was sufficient evidence to conclude that there were available persons who could give evidence in relation to the plaintiff's work. |
| **8** | **Criminal Injuries Compensation – child perpetrators**  In *BVB v Victims of Crime Assistance Tribunal* MC08/10 Cavanough J dealt with an appeal against the dismissal of an application for assistance where a child had been affected by repeated incidents of bullying and abuse by other children. Cavanough J held:  1. Where an applicant for an award of assistance had been affected by repeated incidents of bullying and abuse during primary school and experienced significant anxiety and emotional distress, the Tribunal was obliged to determine that the perpetrators intended to do what they did and to achieve the results they achieved. This constituted the relevant ordinary mental element in the case of each alleged offence and this was sufficient for the purposes of the definition of "criminal act" in s3 of the *Victims of Crime Assistance Act* 1996 ('VCAA Act').  2. It is true that the law conclusively presumes that a child under the age of 10 years cannot commit an offence. And it is also true that the common law includes the principle of *doli incapax*, whereby knowledge of wrongfulness by a child under the age of 14 years is required to be proven beyond a reasonable doubt; and that that principle is supported by a rebuttable evidentiary presumption in favour of the child. However, at least insofar as it relates to age, the very point of that part of the definition of “criminal act” in s3 of the VCAA that is expressed in hypothetical terms is to require the court or tribunal to disregard any legal principles or protections specially appurtenant to age that would or might apply outside the confines of the VCAA. This the Tribunal failed to do. |
| **9** | **Sentencing of an accused who has participated in the Koori Court**  The question of whether an offender’s participation in a sentencing conversation in the Koori Court should be treated as a mitigating factor was considered in the case of *R v Morgan* 09/10. The Court of Appeal (Maxwell P and Buchanan JA) held:  Where a relatively youthful Aboriginal offender had participated in a sentencing conversation in the Koori Court, the sentencing judge was in error in holding that the offender's participation in the sentencing conversation could not be treated as a mitigating factor. Whether and to what extent such participation will be a mitigating factor in a particular case will depend on the circumstances of the case.  Consideration of the sentencing procedures in the Koori Court and an analysis of how the issue of mitigation should be approached in this context. See paras 20-39. |
| **10** | **Typographical error in Roads Corporation Certificate**  In *DPP v Angell* MC10/10, Emerton J dealt with an appeal against a Magistrate’s dismissal of a charge of driving whilst licence suspended. The evidence revealed that the Certificate which was tendered to the Court was sent to an address in Thompson Street, Sale whereas the defendant lived at Thomson Street, Sale. In setting aside the dismissal and remitting it to be determined according to law, Emerton J held:  1. The question on appeal, which is a question of law, is not whether it was open for the Magistrate in the light of the evidence to find that the demerit point notice had not been served. The basis for the appeal is that in dismissing the charge because he was not satisfied that service had been effected in accordance with s25(4A), the Magistrate misunderstood what was required to be proved for a conviction to be entered. On a proper construction of the relevant provisions of the *Road Safety Act*, failure to serve the notice in accordance with s25(4A) was not determinative of whether the charge was proven or not.  2. It was common ground that A. was driving a motor vehicle on a highway while her licence was suspended and she defended the charge exclusively on the basis that the requirements for service in s25(4A) had not been satisfied. She did not submit that she did not receive the notice. Nor did she submit that she was unaware that her licence had been suspended. The defence of “fail to serve” was raised as a complete defence to the charge. The Magistrate accepted this submission. In so doing, he made an error of law.  3. The fact that the demerit point option notice was sent to a ‘43 Thompson Street’ in Sale rather than to ‘43 Thomson Street’ in Sale may well support a finding that A. did not receive the notice, which will be relevant to whether or not she was aware at the time of driving that her licence had been suspended. There was evidence in the informant’s statement that the respondent told the police officers that she did not know her licence was suspended. Consideration of this evidence may have led the Magistrate to conclude that A. was not aware that her licence was suspended. However, the Magistrate confined his inquiry to whether service of the demerit point notice had been effected under s25(4A). He was not willing to consider other evidence that was before him that might have been relevant to A's awareness of her licence suspension or to draw any inferences from it.  4. In truncating consideration of the case before him in this manner, the Magistrate treated service of the demerit point notice in accordance with s25(4A) of the Act as an element of the offence under s30(1). This involved misconstruing the relevant provisions of the *Road Safety Act*. The Magistrate’s finding that he could not be satisfied that service had been effected in accordance with s25(4A) of the *Road Safety Act* was not sufficient to dismiss the charge in the circumstances of this case.  5. Furthermore, a typographical error in the address of a person to whom a notice is required to be sent does not necessarily deprive the Corporation of the benefit of s25(4A). The Magistrate agreed that s25(4A) should be strictly interpreted, as it had the capacity to affect a person’s rights. However, sub-s(4A) also confers a benefit on the licence holder, in that it guarantees the licence holder 14 days in addition to 21 days in sub-s(3A) to make an election to extend the demerit point period. It provides certainty to licence holders as to the deadline for the making of an election. Accordingly, s25(4A) ought not to be construed so as to be inapplicable where a typographical error of a relatively minor kind is made in an address for service. |
| **11** | **Suppression Order in Committal proceedings**  The question of the making of a suppression order in relation to a person who was a participant in the witness protection scheme came under scrutiny in the case of *DPP & Anor v Dale & Ors* MC11/10. The magistrate ordered that the witness’ name be permitted to be published.  Beach J allowed the appeal and ordered that the order permitting the publication of the name of Witness be quashed and remitted to the Magistrate for further hearing and determination according to law.  1. The Chief Commissioner's interest in the operation of the Victorian witness protection program arises directly by force of the Act. Further, the Chief Commissioner has additional powers and responsibilities in respect of the witness protection scheme and participants in it as set out in ss3B, 3C, 5, 6, 15 to 21 and 23 of the Act. Consistently with these matters, the Supreme Court of Victoria has permitted the Chief Commissioner to make applications under ss18 and 19 of the *Supreme Court Act* in relation to matters concerning the operation of the witness protection program. Whilst the facts in *Re Applications by Chief Commissioner of Police (Vic) for leave to appeal* [2004] VSCA 3; (2004) 9 VR 275 concerned police methodology (and not the witness protection program), the interest of the Chief Commissioner in the operation of the witness protection program is at least as great as the Chief Commissioner’s interest in protecting the police methodologies the subject of *Re Applications by Chief Commissioner of Police (Vic) for leave to appeal*. There can be no doubt that the Chief Commissioner had standing to apply under s126 of the *Magistrates’ Court Act* for an order prohibiting matters concerning the identity of a participant in the witness protection program.  2. It appears that the Magistrate’s principal basis for denying the Chief Commissioner standing was that the Chief Commissioner was not a party to the committal proceeding. As was submitted by the Chief Commissioner, this was true – but irrelevant. The Chief Commissioner, likewise, was not a party in the underlying criminal proceedings in *Re Applications by Chief Commissioner of Police (Vic) for leave to appeal*. Similarly, the media are not parties to the underlying proceedings in which they are routinely granted leave to appear for the purpose of contesting an application for a suppression order. Whilst the committal provided the occasion for the exercise of jurisdiction under s126 of the *Magistrates’ Court Act*, the application under that section was not itself part of the committal. The application under s126 involved a separate exercise of jurisdiction. Accordingly, it follows that there was a jurisdictional error in denying the Chief Commissioner a hearing in respect of the application made to the Magistrate pursuant to s126 of the *Magistrates’ Court Act*. In the circumstances, the order permitting the publication of Witness “R”’s name must be quashed and the application remitted to the Magistrate for further hearing and determination in accordance with these reasons.    3. *Obiter*. The construction of s10(5)(a) of the Act is as follows:  (a) The offence created by s10(5)(a) has a mental element, being knowledge or recklessness as to a person’s status as a participant.  (b) Section 10(5)(a) prohibits publication (disclosure) of the identity or location of a person who is or was in the witness protection program where publication (disclosure) has some connection with that participation – such connection including the fact that the person is giving evidence in criminal proceedings. Further, it is not necessary for there to be an express reference to the person’s participation in the witness protection program in such a publication (or disclosure) in order to contravene s10(5)(a).  (c) It is not necessary for the purposes of this proceeding to further define the connection referred to in sub-paragraph (b) above or the limits of that connection.  *R v JP* [2008] VSC 86, approved. |
| **12** | **Application for Disqualification of Judge**  In *Slaveski v Victoria* MC12/10 an application was made on the 58th day of the trial by a party in a civil matter for recusal of the judge. Kyrou J held:  1. A judge is disqualified if there is actual bias or if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That is often called apprehended bias to distinguish it from actual bias, where the judge is actually biased.  *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337, applied.  2. A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. Further, when the parties have been engaged in a proceeding for some time, with the inevitable commitment of resources and costs that that entails, a member should not disqualify himself or herself unless there is – not may be – an issue to which a disqualifying factor is relevant.  *Re Polites; Ex parte Hoyts Corporation Pty Ltd* [1991] HCA 31; (1991) 173 CLR 78, applied.  3. A fair-minded lay observer would not reasonably apprehend that, because the judge in the present case advised some government departments or the Police Association while he was in practice, he might not bring an impartial mind to the resolution of the questions in this case. If that were the position, there would be few judges of the Supreme Court who would be able to hear any case involving the State. Further, the fact that the judge made several rulings which were adverse to the applicant party did not demonstrate bias or a reasonable apprehension of bias. |
| **13** | **Bail Application: Exceptional Circumstances: Pre-trial delay**  In *Re Marijancevic* MC13/10, Lasry J dealt with an application for bail where the applicant was required to show exceptional circumstances. One of the factors influencing His Honour’s decision to grant the application was that the applicant had served a period of 22 months’ pre-trial detention. His Honour Held: Bail granted with conditions.  1. Because of the nature of the offences alleged, M. was required to establish exceptional circumstances to enable him to be entitled to bail. The *Bail Act* 1977 does not define the term “exceptional circumstances”. The plain meaning of that term required that M. establish circumstances which were out of the ordinary in respect of a person who would be in custody. It has been recognised, in a number of decisions in the Supreme Court, that a combination of circumstances may jointly constitute exceptional circumstances notwithstanding that none of them, taken individually, may be so characterised.  *Marijancevic v DPP*, MC33/09; [2009] VSC 511, applied.  2. There is a variety of circumstances which have been found in various cases to constitute exceptional circumstances and they include issues such as the strength of the Crown case, the question of delay, strong family support, stable accommodation, availability of employment, low risk of flight or re-offending, lack of prior criminal history and the personal situation of the applicant.  *DPP v Cozzi*, MC15/05; [2005] VSC 195, applied.  3. A period of 22 months' pre-trial detention is completely unacceptable and is exceptional in itself for the purpose of the present application for bail.  *Marijancevic v DPP*, MC33/09; [2009] VSC 511, not followed on this point.  4. The question therefore was whether M. was an unacceptable risk if released on bail. Given the material which established a connection between the applicant M. and the jurisdiction, particularly in relation to his family, and given the non-contentious assertion by M. that he is indigent, the risk which is implicit in a release on bail of anyone charged with serious offences, as these are, can be made to be an acceptable risk by the imposition of appropriate conditions. Accordingly, bail is granted with certain conditions. |
| **14** | **Appeal from dismissal of charges in relation to an alleged contravention of a Planning Scheme.**  In *Houghton v Bond* MC14/10, Cavanough J dealt with an appeal against a dismissal of charges whereby an owner of land removed native vegetation without a permit. In dismissing the appeal His Honour held:  1. The informant’s onus of proof included an obligation to prove, beyond reasonable doubt, that the exemption in clause 52.17-6 of the Scheme did not apply.  2. The “Rural activities” exemption in clause 52.17-6 of the Scheme does not apply only in relation to existing farm structures and is not so confined insofar as it refers to the “construction” of farm structures. The clause applies to removal etc “for” the construction, operation or maintenance of a farm structure. The word “for” is purposive. In its context here, it looks to the future. As long as the farm structure in question was genuinely proposed it may fall within the “Rural activities” exemption even if it does not presently exist. The Magistrate did not err in this regard.  3. The very notion of maintaining a farm structure includes taking action to protect it against both immediate and non-immediate risks to its integrity. To maintain something is “to keep something in existence in a state which enables it to serve the purpose for which it exists”. Hence, maintaining a machine has been said to involve “the obligation to prevent foreign matter from reaching any place where it can interfere with the proper working of the machine”. Accordingly, it was open to the Magistrate to take the view that removing large trees in order to prevent them or their heavy limbs from falling onto a proposed cattle fence constituted action taken for the maintenance of a farm structure, namely the proposed fence, within the meaning of the “Rural activities” exemption in clause 52.17-6.  4. The informant called no expert or other evidence to the effect that any one or more of the trees did not need to be removed for the purpose of constructing or maintaining the proposed new fence. B. on the other hand, did call “necessity” evidence in that he gave evidence himself and called the former manager of the cattle property to give evidence on his behalf. Each of them had had considerable relevant experience. Both gave evidence supporting the proposition that each and every one of the trees removed had been sufficiently close to the boundary to require removal either for the construction of the new fence or for its maintenance.  5. In relation to the point that some of the trees were at a substantial distance from boundary, including one some 19 metres away, it was not sufficient to establish that the Magistrate was obliged to reject the evidence of B. and his former manager to be satisfied beyond reasonable doubt that one or more of the trees did not need to be removed. The trees removed were said to be quite tall and there was evidence that some were leaning towards the fence and dropping branches. Accordingly, there was no legal error in the reasoning of the magistrate. |
| **15** | **Barrister’s Claim against Solicitor for unpaid fees**  *Foster James Pty Ltd v Dalton* MC15/10 involved a claim by a barrister against a solicitor for unpaid fees for the barrister’s conduct of a trial. In its defence, the solicitor alleged that the barrister had been incompetent and acted in breach of his retainer. A Magistrate granted an application by the barrister for summary judgment. In dismissing the appeal, Mukhtar AsJ held:  1. FJP/L's proposition was that the advocate's immunity was irrelevant because this case did not concern D.'s conduct in court, but involved an examination of whether D. was fit and well at the time he ran the case. Such an argument is specious. For summary judgment purposes, it was bound to fail.  2. FJP/L elevated the rationale or justification of the advocate’s immunity into an applicable or decisive principle in itself, or a qualification to the immunity. But, the immunity is a substantive rule of the common law. It applies to any suit against an advocate concerning the conduct of a case in Court. If the rule applies on its terms then it applies; and it is no answer to say that it ought not apply or that it is irrelevant because the case will not involve a reopening of the trial (assuming that to be the case). The immunity means that a person is bound by the way the case was conducted in Court, so that negligence, actions without or contrary to instructions, not being a “team player”, or errors of judgment at trial all fall within the purview of the immunity. The one possible and rare exception referred to by McHugh J in *D’Orta-Ekenaika* [2005] HCA 12; (2005) 223 CLR 1 is the possibility of an intervention that an appellate Court may make in a case of “flagrant incompetence” of counsel which resulted in a miscarriage of justice. That consideration was not activated in the present case.  *D’Orta-Ekenaika v Victorian legal Aid* [2005] HCA 12; (2005) 223 CLR 1, applied.  *Francis v Bunnett* [2007] VSC 538, distinguished.  3. It is not enough to assert simplistically that the client would not pay the solicitor because of the barrister’s perceived physical and mental state, and therefore a loss has been sustained. The barrister has to be shown to be liable for a loss suffered by the solicitor. If D.'s personal condition and his conduct at trial caused the client to refuse to pay the appellant, then it must follow that D.'s performance during the trial of the principal proceeding would need to be assessed. That is, FJP/L had to establish that as a result of D.'s condition or incompetence or lack of diligence, the plaintiffs in the principal proceeding failed to be awarded a sum of damages that they would otherwise have been entitled to had they been represented by an advocate who was physically and mentally well. That necessarily involves revisiting the trial proceedings and collides with the immunity as well as its rationale. The source of the infliction of the alleged loss is the conduct of the case for which there is an immunity.  4. What FJP/L said he saw during the trial did not mean that D. did not conduct his case diligently and properly. The Magistrate was correct in finding that it was clear that the legal principle concerning the advocate's immunity precluded the defence of FJP/L. |
| **16** | **Claim for damages for alleged breach of *Fair Trading Act* 1985**  In *Structured Property Pty Ltd v Tirli-Bennett & Anor* MC16/10, Williams J heard an appeal against a Magistrate’s dismissal of a claim for damages for breach of the *Fair Trading Act* 1985 and the *Trade Practices Act* 1974. In dismissing the appeal, Williams J held:  1. The Magistrate’s conclusion that B. inadvertently failed to mention 30-35 phone calls was clearly open on the evidence. Although B. may have appreciated the value of the rent roll and its vulnerability in terms of loss of landlords, she said that she did not believe that it was her responsibility to tell Mr Deffert about the negotiations. She also claimed that Mr Deffert did not ask her about other negotiations and that she did not consider the 30 to 35 landlords she had contacted to be ‘losses’, explaining that ‘those clients were going to go wherever the rent roll was going to go’.The Magistrate took into account the informal nature of the conversations between Mr Deffert and B. when deciding the probability of her deliberately remaining silent about the calls she had made.  2. In relation to the contention that B.'s conduct was 'in trade or commerce', it was open to the Magistrate to conclude that B. was not engaged in any business dealing, or existing trade or commerce, with S. when she made the impugned statement. B. was not employed by anyone at the time of the conversations and that she would not have charged for answering enquiries about the rent roll, if she had not been given work afterwards. Further, B.'s subsequent charges related to the four hours’ work she did later and she did not charge for the telephone calls separately. In those circumstances, the Magistrate's conclusion was open. It was also open on the evidence for the Magistrate to conclude that B. was not acting in the trade or commerce between the liquidator and S., given his findings that she was not employed by I. or S. and that she was not to be paid to answer calls relating to the rent roll. Sometimes there may be a fine line between conduct which is in trade or commerce and that which is not.  3. Damages under s159 of the *Fair Trading Act* and s82 of the TPA are to compensate for the loss sustained by reason of contraventions of the respective acts. There must be a causal link between the conduct and the loss claimed. S. claimed the loss of income which it alleged it would have received had the 28 properties lost to S. been transferred to it. It also claimed some loss of the resale value of the rent roll. Even had there been evidence establishing such loss, it could not be causally linked to the representation made by B. S. did not forego the opportunity to enter into a contract with I. which would have delivered the claimed amounts to it. In other words, it cannot be said that it could have entered into such a contract and did not do so because of the effect of the misleading information as to the landlord losses. |
| **17** | **Summons served without Officer designation ticked**  In *DPP v Twigg* MC17/10, Bell J dealt with an appeal against a Magistrate’s dismissal of a charge because the officer designation on the summons was not ticked. In granting the appeal, His Honour remitted the matter to the Magistrate for hearing and determination according to law and held:  This was a case where, as required by s34(1)(b)(i) of the *Magistrates' Court Act*, the summons served on T. was a signed copy. The signed copy of the summons served on T. was, as required, a ‘true copy’ of the summons which was issued and was a 'true copy' of the summons even though that signed copy did not have the officer designation box ticked. To serve a copy summons (otherwise in proper form) without the officer designation box ticked did not mean that the summons was invalid. Accordingly, the Magistrate was in error in striking out the summons issued against T.  *DPP v Diamond*, MC14/04; [2004] VSC 35; (2004) 142 A Crim R 116, followed. |
| **18** | **Vehicle Owner can recover damages even if vehicle repaired without written authorisation**  In *Tehan v Saric* MC18/10, Bell J heard and appeal against a Magistrate’s dismissal of a claim where the repairer did not obtain the owner’s written authorisation prior to the repair. In granting the appeal and making an order of the amount claimed, His Honour held:  1. While the Act regulates the relationship between towing and repair service providers on the one hand and the owners of damaged vehicles on the other, it does not affect the separate common law obligation of drivers to pay damages for losses caused by their negligence. In a motor vehicle accident, the act of negligence and the damage to the vehicle usually occur at the same time. At that moment, the owner becomes entitled to sue the negligent driver for the loss. According to the established rules governing what losses can be recovered by the owner of the damaged vehicle from the negligent driver, where the vehicle is commercially repairable (not a write-off), the owner is entitled to recover the reasonable cost of repairing it and the measure of loss is the expenditure required to put the vehicle back into the same state as it was before the accident.  *Dimond v Lovell* [2002] 1 AC 384, applied.  2. The law of damages does not interfere with the owner’s freedom of choice in relation to whether or not the vehicle should be repaired. Whatever choice the owner makes, the loss represented by the reasonable cost of repairing the vehicle is recoverable against the negligent driver. That is the law’s assessment of the damage caused by the negligence of that driver.  3. T.'s direct and immediate loss was compensable in an award of damages. It is represented by the cost of repairing his damaged vehicle. That loss crystallised and was recoverable when the other driver's negligent driving caused the accident resulting in that damage. It is irrelevant in law that, under the towing and repair legislation, repairers cannot charge or recover fees or charges without the written authority of the owner. Accordingly, the magistrate erred in law in deciding otherwise. |
| **19** | **Sentencing in Trafficking in Cannabis Cases**  In *R v Bala* MC19/10, the Court of Appeal (Maxwell P, Ashley JA and Coghlan AJA) dealt with an appeal against a Judge’s sentence in relation to a charge of trafficking in 1.27kg of cannabis. In indicating that such a charge would usually be dealt with in the Magistrates’ Court, Maxwell P granted the appeal and said that the sentence imposed was manifestly excessive. The Court collected a number of decisions of the Court of Appeal in the period 2006-9 to illustrate current sentencing practices.  B. was sentenced on the basis that he had sold and subsequently delivered 1.27kg of cannabis, for which he received about $7,800. The amount which was trafficked was less than 5% of a commercial quantity of cannabis and such a charge would usually be dealt with in the Magistrates' Court and would very often attract a non-custodial sentence. The sentencing regime for drug trafficking is quantity-based, which means that the quantity trafficked will ordinarily be a key indicator of the seriousness of the offence, though it is never determinative of penalty. On the appeal, helpful references to a series of decisions of the Court of Appeal in the period 2006–09 were provided to illustrate current sentencing practice for trafficking offences. Those decisions are collected in the tables annexed to these reasons and it can readily be seen from Table B that the sentence imposed in the present case was anomalously high for the offence of trafficking in a non-commercial quantity, even allowing for B.’s plea of not guilty and his prior conviction for trafficking. Sentenced to 3½ years imprisonment with a non-parole period of two years. |
| **20** | **Witness protection legislation in respect of a person who is deceased**  In *Chief Commissioner of Police v Herald & Weekly Times Ltd & Ors* MC29/10, Beach J was called upon to decide whether the provisions of the *Witness Protection Act* 1991 applied to a person who had been a participant in the Witness Protection program but was now deceased. His Honour held:  1. Construing s10(5)(a) of the Act narrowly so as not to apply in respect of a deceased former participant would not promote the underlying purposes and objectives of the Act. It follows that s10(5)(a) of the Act applies not only to a living person who is or has been a participant, but also to a deceased person who was a participant. Such a construction serves the purpose of encouraging witnesses to come forward, safe in the knowledge that their families will remain protected, even after their death (that is, the death of the participant), by the prohibition upon disclosure of the identity of the deceased former participant.  *R v JP* [2008] VSC 86; and  *DPP & Anor v Dale & Ors*, MC11/10; [2010] VSC 88, considered.  2. Accordingly, it was appropriate to make a declaration that the reference to "a person ... who has been a participant" in s10(5)(a) of the Act includes a person who was a participant but is now dead. |
| **21** | **Standard of proof in Criminal Matters** |
|  | In *Tsolacis v Department of Transport* MC21/10, Beach J heard an appeal against the finding of a number of charges proved. In finding the charges proved, the Magistrate said: I find the charges substantially proved”. In allowing the appeal and remitting the matters to the Magistrates’ Court for hearing and determination by another Magistrate, His Honour held:  1. It is trite that in order for T. to be convicted of any of the charges, the elements of each charge had to be established against T. beyond reasonable doubt. Whatever might be encompassed by the expression “substantially proved”, charges that are only substantially proved are not proved beyond reasonable doubt.  2. The language of the Magistrate's reasons suggests that T. was found guilty on a standard different from, and lower than, beyond reasonable doubt. For this reason alone, the appeal must succeed. As was said by Dixon CJ in *Dawson v The Queen,* “it is a mistake to depart from the time honoured formula [beyond reasonable doubt]”.  *Dawson v The Queen* [1961] HCA 74; (1961) 106 CLR 18, applied. |
| **22** | **Indecent language – whether includes the words “fucking bitch”**  In *Gul v Creed & Anor* MC22/10, Beach J dealt with an appeal against a Magistrate’s finding that where a person was apprehended for stealing property and using the expression “fucking bitch” to the person apprehending her, the person was guilty of the charge of indecent language. In dismissing the appeal, His Honour held:  1. The principles in relation to determining whether language is indecent are well known. It is sufficient to say that indecency conveys a failure to meet recognised standards of propriety. Such a failure at the lower end of the scale amounts to an indecency; and at the upper end of the scale amounts to an obscenity. Further, in determining whether something is indecent, it is contemporary standards which must be applied. Additionally, the words complained of must be looked at in the context of the circumstances in which they were said. It is for the trier of fact to decide for himself or herself what current standards are, and it is inevitable that a subjective element must enter into the decision.  2. In this case, the witness gave evidence that upon confronting the defendant with the allegation that she was stealing and should leave the store, Ms Gul called her a “fucking bitch” and continued to use abusive language. It was open on this evidence for the Judge to conclude that, in the circumstances, the defendant used indecent language in contravention of s17(1)(c) of the *Summary Offences Act*. |
| **23** | **Accident compensation – claim for stress-related mental injury**  In *State of Victoria v Leck* MC23/10, the Court of Appeal (Ashley and Mandie JJA and Emerton AJA) heard an appeal against a Magistrate’s dismissal of a claim for a stress-related injury. In referring the matter to the Magistrate for further hearing and determination, the Court held:  1. The first reason why the matter must be remitted is that, even accepting that there was but one injury constituted by stress-induced mental illness, the Magistrate made no finding either way whether the stress arose wholly or predominantly from actions falling within paragraph (a) of s82(2A) and/or an expectation falling with paragraph (c). Evidently, there were other work stressors.  2. The second reason why the matter must be remitted is that the Magistrate’s findings appear to leave open a conclusion that the worker suffered compensable mental illness before any action conforming with paragraph (a) was taken, or expectation conforming with paragraph (c) was formed. It might then be concluded that the effect of such action and/or expectation was to cause further injury – that is, the aggravation of pre-existing mental injury. In those circumstances, L. would be entitled to compensation if the initial injury was a sufficient cause of the claimed incapacity. It would matter not that the ‘aggravation injury’ also sufficiently contributed to the incapacity, and that s82(2A) precluded entitlement to compensation in respect of that injury.  3. Given that the word ‘or’ will most often carry a disjunctive meaning, that is not always so. Whether it does so in a particular instance will be influenced by the context in which it appears. Context is primarily set by the particular provision in which the word appears. The word ‘or’ is found many times in the Act; and even within s82. But its meaning in those other provisions is of limited relevance when considering its meaning in s82(2A). Contextually, the meaning to be given to ‘or’ in s82(2A)(a) is informed by the concept of ‘action’. Not preceded by the indefinite article, ‘action’ is apt to embrace a course of conduct – possibly, though not necessarily, extending over some period of time. Whilst action, even over a period of time, might be constituted by conduct meeting one only of the descriptors in paragraph (a), the word sensibly fits a course of conduct involving more than one of those descriptors. For instance, disciplining and demoting a worker may be so intimately connected that it is not possible to break up the action constituted by such conduct into individual acts. The fact that ‘action’ might be constituted by conduct fitting only one descriptor does not yield the conclusion that each descriptor in paragraph (a) must be read as if the word ‘or’ preceded and followed it. 'Act' and 'action' should not be understood, in the particular context, as interchangeable.  4. In this case, the State of Victoria's conduct by which it disciplined and transferred L. was so intimately connected as to constitute ‘action’ for the purposes of s82(2A)(a). The State of Victoria ought be able to rely upon it notwithstanding that it involved more than one descriptor. |
| **24** | **Accident Compensation – statutory interpretation**  In *Department of Education and Anor v Unsworth* MC24/10, the Court of Appeal (Ashley and Mandie JJA and Emerton AJA) heard an appeal against an employee’s claim for damages for psychological or psychiatric injury caused by harassment. In referring the matter to the Magistrate for further hearing and determination, the Court held:  1. Section 82(1) of the *Accident Compensation Act* 1985 is one of four main provisions in the Act which prescribe the conditions of compensability of injury and precluded entitlement to payments of compensation in three broad classes of stress-caused injury. First, where the stress arose ‘wholly or predominantly’ from particular action taken by an employer. Second, where the stress arose wholly or predominantly from a decision of a particular nature made by an employer. Third, where the stress arose wholly or predominantly from an expectation of the taking of such action or the making of such a decision.  2. The kinds of action and decision specified by paragraphs (a) and (b) of s82(2A) were administrative in character. They were confined by the fact of their specification. The expectation referred to in paragraph (c) was anticipatory of the taking of ‘such action’ or the making of ‘such a decision’. It was evidently meant to pick up the situation where such action or decision was anticipated by the worker, but had not been taken or made.  3. The meaning to be given to s82(2A) in its then-relevant form is as follows:  (1) the expectation referred to in paragraph (c) is the subjective expectation of the worker;  (2) the expectation is to be understood as an expectation of the taking of action or the making of a decision of the kind described in paragraphs (a) and (b), accompanied by the qualities of reasonableness set out in those paragraphs;  (3) the expectation, congruently with paragraphs (a) and (b), presupposes the existence of facts, known to the employer and the worker, which – considerations of reasonableness aside – could found a relevant expectation;  (4) paragraph (c) is not necessarily inapplicable only because the worker’s expectation is that the employer will take action or make a decision which the employer does not in fact intend to take or make.  4. Bearing in mind the fact that the employer carries the burden of establishing the applicability of s82(2A), an employer could discharge that burden if it established that the worker’s expectation, in the circumstances, was of reasonable action taken in a reasonable manner. But if the worker’s expectation was that action would be taken which, having regard to the known circumstances, would be unreasonable, or was an expectation that action taken would be unreasonable in the manner of its taking, then paragraph (c) would not apply.  5. The question will always be: did the worker subjectively hold a relevant expectation? In answering that question, a first sub-question will be: did the worker hold an expectation of action at all? If that sub-question is answered in the affirmative, a second sub-question will be: did the worker have an expectation of reasonable action reasonable in the manner of its taking? That sub-question will require consideration whether there were any circumstances, known to the employer and the worker, which – reasonableness aside – could found an expectation of action; and then consideration whether, given those circumstances, the expectation was of reasonable action reasonable in the manner of its taking.  6. U. did have an expectation of dismissal. He formed that expectation by focusing upon circumstances in his employment which were known to both he and his employer. Considerations of reasonableness aside, those circumstances could conceivably have provided a basis for the employer taking action to dismiss him. The employer had no such intention. The unresolved question is whether the employer established that the respondent’s expectation of dismissal, in the circumstances, was of reasonable action reasonable in the manner of its taking. The fact that the employer did not intend to dismiss the respondent tells against – but does not conclusively establish – the question being resolved in the employer’s favour. Unless the unresolved question was answered in the employer’s favour, U's claim must succeed. |
| **25** | **Permanent Stay of Proceeding where property destroyed**  In *Wells v The Queen* MC25/10, the Court of Appeal (Ashley, Redlich and Weinberg JJA) heard an application for review of an interlocutory decision. The defendant had been involved in a motor vehicle collision and claimed loss of memory. The two vehicles were destroyed prior to the matter coming to court and the defendant sought a permanent stay of proceedings in that he was not given an opportunity to have the vehicles independently examined. In dismissing the application, the Court held:  1. The gist of the stay application made to the Judge was that W.'s inability to have the vehicles independently examined and his own want of recollection of the incident, singly and in combination, made it imperative that a stay be granted. W. relied upon what he claimed was the administration of justice having been brought into disrepute by the police having done nothing to prevent the destruction of the vehicles before he was charged.  2. A permanent stay is an extreme step. In the present case, the destruction of the vehicles, most particularly the utility, did not constitute circumstances which would justify grant of a stay. Whilst W. was deprived of the opportunity of having his expert examine the vehicles, the examiner’s conclusions, based upon his inspection of them, are not challenged. Further, it appears to be quite improbable, as matters stood at the end of the evidence of the examiner and hearing the expert on the *voire dire*, that examination by the latter could have provided evidence of a defect which could explain the collision. W. is by no means deprived of a forensic answer to the examiner’s evidence and the trial judge could no doubt seek to redress any disadvantage faced by W. by an appropriate observation.  *R v Edwards*, [2009] HCA 20; (2009) 255 ALR 399, applied.  3. Whilst, in the particular case, it would have been better had the police retained the vehicle. it was pertinent that—  (1) the owner of the utility was someone other than W.;  (2) the police were apparently on notice, before the vehicle’s release, that W. was asserting that he had no recollection of the incident; and  (3) the circumstances of the incident were, on their face, unusual. But to say that a different course would have been the preferable course is not to say that the course which was followed required grant of a permanent stay. The conduct of the police was not such as to bring justice into disrepute.  4. The present case falls into the category of memory loss resulting from the act constituting the alleged offence. That, of itself, did not constitute a circumstance justifying grant of a stay.  *Ross v Tran*, MC3/97; (1996) 87 A Crim R 144, distinguished.  5. In all, W. has not shown that, by reason of the destruction of the vehicles, he would suffer prejudice of such a degree as would significantly and irremediably impair his right to a fair trial. |
| **26** | **Drink/driving – driver refused to accompany police officer in rear of Police van**  In *Mastwyk v DPP* MC26/10, the Court of Appeal (Maxwell P, Nettle and Redlich JJA) dealt with an appeal against a Magistrate’s dismissal of a refusing to accompany a police officer for a breath test on the ground that requiring the driver to travel in the rear of a divisional van was a form of imprisonment. In overturning the dismissal, the Court held:  1. Per the Court:  The power conferred by s55(1) of the Act to require a driver to accompany a police officer, does not authorise the arrest or detention of a driver.  2. Per Nettle and Redlich JJA, Maxwell P dissenting:  Where a driver does not comply with a requirement to accompany the police officer because the proposed manner of compliance with the request is objectively unreasonable, the prosecution will fail to establish the element of ‘refusal’ by the driver.  *DPP v Webb* MC40/92; [1993] 2 VR 403; and  *Hrysikos v Mansfield* MC 32/02; (2002) 5 VR 485, followed.  *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, considered.  3. Per Nettle JA: Where a driver is otherwise willing to comply with a requirement that he or she accompany a police officer to a designated place to undergo a breath test, but the police officer directs the driver to accompany the police officer to that place by means of travel which are objectively unreasonable, a refusal by the driver so to travel is not without more a contravention of s55(1) of the Act. It is implicit in Ormiston JA’s reasoning in *DPP v Webb* [1993] 2 VR 403 that a requirement to remain in an unreasonably confined space is beyond the power conferred on a police officer by s55(1). Put another way, the power under s55(1) to require a driver to stay at a place does not extend to requiring a driver to stay in a space which is so confined as to be unreasonable.  *DPP v Webb* MC40/92; [1993] 2 VR 403; and  *Hrysikos v Mansfield* MC 32/02; (2002) 5 VR 485, followed.  4. Fundamentally, a statutory restriction on the liberty of the subject is to be strictly construed. In the absence of a clear indication to the contrary, it should be taken as going no further than necessary to achieve the object in view. Here, to adopt and adapt Ormiston JA’s reasoning in *Hrysikos*, the object in view is that the driver accompany the police officer to the designated place for testing. It is capable of being achieved by a requirement to accompany a police officer to a designated place by means of travel which is not objectively unreasonable.  5. Consequently, if an accused defends a prosecution under s49(1)(e) of the Act on the basis that the means of travel by which he or she was directed to accompany the police officer in question were unreasonable, the prosecution under s49(1)(e) will fail unless the Crown establishes that the stipulated means of travel were objectively reasonable.  6. Per Redlich JA:  In the absence of the express authority conferred by s55 of the RSA, a member of the police force would have no power to require a driver to accompany the officer to a police station for the purpose of a breath test. Section 55 provides a police officer with a limited tool of coercion, as a requirement is accompanied by the threat of penalty for non-compliance. The power differs from that of the power of arrest, however, as ultimately it leaves the driver with the choice of non-compliance, although non-compliance will then constitute the relevant offence. But neither at common law nor by statute do police officers have the power to detain people for the purpose of obtaining compliance with such a statutory requirement. This consideration makes it unlikely that Parliament intended that the power under s55 should be exercisable in unreasonable circumstances so as to deny to the driver the limitation on power which confines the statutory power of arrest.  7. The prosecution does not have to establish, as a separate element of the offence in s49(1)(e) of the RSA that the requirement made under s55 is reasonable. To do so would conflate the requirement with the means by which it is to be satisfied. But the reasonableness of the means by which the requirement is to be satisfied is relevant to proof, where it is in issue, that the driver’s failure constitutes a refusal under s49(1)(e). Once the defence that there was no ‘refusal’ is raised, objective reasonableness of the requirement becomes relevant to the question whether the prosecution has discharged its burden of proving a refusal.  8. The section should be construed so that the requirement must be one that is objectively reasonable in the circumstances. This conclusion rests upon the premise that Parliament would not have intended that the refusal of an objectively unreasonable requirement would constitute an offence. It is an implication that is derived from the accepted presumption of statutory interpretation that Parliament will not, without clear words to the contrary, be taken to have intended a restriction on individual liberty that goes beyond what is necessary to meet the purposes of the section and the Act. The elements of the offence should, therefore, be read to reflect the intention. Accordingly, where a driver does not comply with a requirement to accompany the police officer because the proposed manner of compliance is objectively unreasonable, the prosecution will fail to establish the element of ‘refusal’ by the driver.  9. Unlawful restraint can occur only where the driver has not consented to travel by the means proposed. Consequently where the driver is properly informed as to their choice and is prepared to accompany the officer by the means proposed, the driver will not by entering the rear of the divisional van be imprisoned. Hence an inquiry as to whether the proposed course would constitute imprisonment misconceives the issue. The true question is whether it is, in all the circumstances, objectively unreasonable to require the driver to travel by that means. If it is, the prosecution will fail to establish that the driver refused to accompany the officer. It is to the resolution of that question that the Magistrate’s attention should be directed.  *Salton v Wigg* (unrep, County Court of Victoria, Judge Kimm, 27 February 1998) not followed. |
| **27** | **Drink/driving – requirement to accompany police officer in rear of police van**  In *DPP v Foot* MC27/10, the Court of Appeal (Maxwell P, Nettle and Redlich JJA) heard an appeal against a Magistrate’s dismissal of a drink/driving charge where the driver was required to accompany the police officer in the rear of the police van. The Magistrate held that the driver was held under detention for a short period. In allowing the appeal and remitting the matter to the Magistrate for further hearing, the Court held:  1. The conclusion arrived by the Magistrate was not reasonably open on the facts as found. The entry into the police vehicle having been voluntary, F.'s change of mind did not, by itself, convert his presence in the van into involuntary detention. There would have needed to be evidence, and an affirmative finding, that the police officers had refused to release F. upon his request. The Magistrate evidently accepted that the officers did not hear his request and, in the particular circumstances of this case, it follows that there was no refusal and no detention.  2. In relation to the finding by the Magistrate that as the ‘requirement to accompany’ purportedly made under s55(1) was invalid (because of what was said to have been the period of involuntary detention), the charge under s49(1)(f) must necessarily fail, the premise of the argument was that, by analogy with the decision of *DPP Reference No 2 of 2001*, MC13/2001; [2001] VSCA 114; (2001) 4 VR 55 proof of the making of a valid ‘requirement to accompany’ was a ‘necessary precondition of proof’ of the offence under s49(1)(f).  3. Proof of the offence created by s49(1)(f) of the Act does not require the prosecution to establish that the informant has imposed on the driver each of the requirements to which s55(1) refers. These requirements have not been made essential ingredients of the offence but are nothing more than the machinery by which the police officer is empowered to bring the driver to the breath analysing instrument so that a sample of breath can be furnished.  *DPP v Foster* MC1/1999; [1999] VSCA 73; [1999] 2 VR 643, applied.  4. In the present case, the question of the possible exclusion of the evidence – should it arise – would fall to be determined in accordance with the applicable provisions of the *Evidence Act* 2008 (Vic) (ss135-138). The determination of that question would affect both the charge under s49(1)(f) and the charge under s49(1)(b) of the Act. |
| **28** | **Person claiming damages when injured by capsicum spray used by Police officer**  In *State of Victoria & Ors v Richards* MC28/10, the Court of Appeal (Nettle and Redlich JJA and Hansen AJA) heard an appeal against a decision to refuse an application by police officers for a claim against them to be struck out. In dismissing the appeal, the Court held:  1. The submission of the appellant police officers cannot be sustained. It has been recognised that people may be subject to a number of duties, provided they are not ‘irreconcilable’. While a duty of care will be denied which is inconsistent with a duty which the law imposes on police in the exercise of their powers it is only where the duty of care ‘would give rise to inconsistent obligations’ that a duty should be denied. Such inconsistency may not be present when the performance of the one duty does not of necessity require action that would create a substantial risk that the putative duty, if it existed, would be infringed.  *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562;  *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317; and  *Zalewski v Turcarolo* [1995] 2 VR 562, considered.  2. If R.'s claim is not arguably covered by any accepted category of liability, a consideration of the facts bearing upon the relationship between R. and the police and an analysis of the salient features, such as legal policy, coherence of the law, conformity with other duties and obligations, foreseeability, degree of harm, and vulnerability do not compel the conclusion that R. must fail in her claim that such a duty exists.  3. The police officers’ contention that the proposed duty of care was unarguable cannot be made out. Giving due weight to the imperative to preserve the autonomy of police officers in their operational judgments and decisions, it has not been shown that R.'s cause of action as pleaded involves an inconsistency between the police duty to apprehend, and the proposed duty to take reasonable steps to take care of R. It was open to R. to maintain her claim in negligence as there is no necessary incompatibility between the duty of the police to enforce the law by exercising their power of arrest and a duty to have reasonable regard for the welfare of third parties in doing so. |
| **30** | **Making sentencing clear when imposing an Intensive Corrections order and other sentences**  In *Fatouros v Jones* MC29/10, the issue on appeal raised the question of the meaning of a sentence of six months’ imprisonment to be served by way of an ICO together with two other sentences of imprisonment. Kaye J held:  1. The appropriate starting point for resolving the issue raised by this appeal was the terms of the ICO itself. Regulation 16 of the *Sentencing Regulations* 2002 provides that an ICO, under s19 of the *Sentencing Act*, must be in Form 9 in the schedule to the regulations. The ICO made by the Magistrate in this case, was contained in such a form, signed by the Magistrate. As required by the relevant form, F. also signed the order adjacent to the line, in which he acknowledged that he understood the effect of the conditions of the order, and consented to it being made.  2. The ICO contained in that document was clear and unequivocal and provided that F. was sentenced to a period of six months' imprisonment to be served by way of an ICO.  3. It is in that light that the extract of the orders, as recorded in the register, must be properly understood and construed. The order, thus recorded, commenced by reciting the terms of the ICO, namely, that F. was convicted and sentenced to an imprisonment term of six months. The next two lines – stating that the sentence was concurrent with “other State sentences imposed in this case”, and noting the “effective total State term imposed is 30 days” – was, in that context, clearly intended to refer to the two terms of imprisonment each of 30 days, imposed in respect of charges 3 and 4. In other words, the Magistrate, perhaps out of an overabundance of caution, was noting that the ICO was to be served concurrently with other “State sentences”, which he imposed in the same case, namely, “State sentences” the effective term of which was 30 days. The reference, to the other State sentences of 30 days, was a reference to the sentences imposed in respect of charge 3 and charge 4.  4. Whilst the drafting of the order made in respect of charge 2, and as recorded in the certified extract of the court’s register, left some scope for competing argument as to its proper meaning, the order, as expressed in this case, was not so ambiguous that it left its proper construction to an administrative discretion. Rather, notwithstanding its shortcomings, the order, as expressed in the register, was sufficiently clear as to its effect. Any uncertainty, in the proper construction of that order was sufficiently dispelled by the clear and unequivocal terms of the ICO signed by the Magistrate and F. In a particular case, an order may be insufficiently clear and certain to be valid. In particular, such a case may occur where a sentencing order is so expressed that the precise term of custody, to be served by the offender, may depend upon the interpretation of the order by those responsible for the offender’s custody.  5. While there are shortcomings in the manner in which the order recorded in the register was expressed, such shortcomings did not constitute an uncertainty, which would have left to administrative judgment the question of the length of sentence imposed on F. in respect of charge 2. |
| **30** | **Claim by solicitors for professional costs**  In *AJH Lawyers Pty Ltd v Hamo* MC30/10, a magistrate dismissed a claim by solicitors for their professional costs on the ground that they were negligent and the legal services they provided to their client were valueless. In dismissing the appeal, Beach J held:  1. A solicitor’s duty is to act with reasonable care and skill in the discharge of his or her retainer to his or her client. What is required for the performance of this duty in the particular case depends upon the circumstances, including the scope of the retainer and the nature of the task entrusted to and undertaken by the solicitor. A prudent solicitor in the position of AJH when retained to resist a winding up application would have advised the client that unless there were particular reasons for defending the application, if the company was insolvent, there may be no point in expending funds in defence of the application. On the evidence, it was open to the Magistrate to find that OTCO was insolvent and that AJH knew that it was insolvent.  2. There can be no doubt that unless a solicitor’s retainer is specifically limited, he or she should exercise reasonable care and skill in giving necessary advice in and around the performance of the retainer. Such advice would include (in appropriate cases) advice that defending a proceeding may not be worthwhile in circumstances known (or that ought to be known) to the solicitor. Such advice might be called “holistic”. So far as the grounds of appeal complain about the imposition of a duty to provide “holistic” advice is concerned, these grounds must fail for this reason. Ultimately, the real complaint made by AJH is not the imposition of a duty in perfectly conventional terms but rather the questions of whether there was any evidence of breach or a causal link between a failure to give advice and a course taken by H. Accordingly, the Magistrate was not in error (much less an error of law) in determining that AJH had a duty to provide relevant (or holistic) advice.  3. Whilst it was open to the Magistrate to conclude that in the exercise of reasonable care and skill, a solicitor retained in relation to the defence of a winding up application should advise that unless there were particular reasons, it may be pointless to expend monies defending a winding up application if the company is insolvent. As this advice was not given, it follows that there was no error (much less an error of law) in the Magistrate's conclusions in respect of this matter.  4. It was open for the Magistrate to infer from the advice given by AJH that as a matter of probability H. was encouraged to believe there was utility in defending the Supreme Court proceedings to wind-up OTCO. Further, it was open to infer that H. (acting rationally) would not expend thousands of dollars defending a proceeding if the same would only delay matters for a short period of time. The question of causation can sometimes be resolved not by direct evidence as to what part advice played in the decision-making process, but by a court determining what effect must be taken to have resulted. Indeed, this course may sometimes be preferable to one which rests solely on evidence later given on the point.  5. It was open to the Magistrate to infer from ordinary human behaviour that H. would not have expended thousands of dollars in defence of an application that was futile or might result in a Pyrrhic victory. Whilst it was not a conclusion which the Magistrate was necessarily compelled to make, it could not be said that it was not open in the circumstances of this case.  6. In relation to the dismissal of the other parts of the claim, in the circumstances it was open and correct to infer that the Magistrate concluded that the other claims were proved subject to monies paid wrongly being attributed to a file in respect of which the work done was valueless. They are conclusions in respect of factual matters which were open. It follows that the complaint that the Magistrate failed to give judgment in respect of the other matters was not well-founded. |
| **31** | **Effect of omission of proper venue in summons**  In *Salt v Godenzi & Anor* MC31/10, the police informant omitted the venue in the summons. Despite this, the defendant attended at the Court on a number of occasions and also at the hearing. The magistrate rejected a submission that the omission meant that there had been no valid service of the summons and convicted the defendant. In dismissing the appeal, Beach J held:  1. Section 33(1) of the *Magistrates' Court Act* 1989 ('Act') makes it mandatory for a summons to direct a defendant to attend at the proper venue on a certain date and at a certain time. However, that is far from the end of the analysis. The starting point is the approach described in *Project Blue Sky & Ors v Australian Broadcasting Authority*, [1998] HCA 28; (1998) 194 CLR 355 where McHugh, Gummow, Kirby and Hayne JJ said:  “An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of a purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. . . A court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors, if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. . . In determining the question of purpose, regard must be had to ‘the language of the relevant provision and the scope and object of the whole statute’.”    2. In circumstances where S. knew before the first return date of the summons that the venue of the Magistrates’ Court he was required to attend was Frankston, had there been an application to amend the summons before the Magistrate or (more importantly, having regard to the fact that the appeal was a rehearing) before her Honour, it is difficult to see how such an amendment could not have been granted. However, in view of the imperative terms in which the opening part of s50 of the Act is couched, it may be doubted whether any application for an amendment was necessary in this case.  3. Section s50 of the Actis the answer to S.'s argument. Section 50 prohibits a court from allowing an objection to a summons on account of any defect or error in it in substance or in form. In this case, S. sought to persuade the Court below to allow an objection to the summons “on account of ... [a] defect or error in it in substance”. There were five appearances at the Frankston Magistrates’ Court. S. was aware that the Frankston Magistrates’ Court was the venue for the proceeding and he attended with counsel on the day the charges were listed for hearing. S. then initiated an appeal from the orders of the Magistrate and again attended with counsel for the hearing of the appeal. The very purpose of s50 is to prevent an argument of the kind put by S. in this case.  *Onus v Seeley* [2004] VSC 396; MC 32/04, followed.  4. One further reason why the failure of the summons to direct S. to attend at the proper venue did not invalidate the proceeding commenced in the Magistrates’ Court was that the proceeding in the Magistrates’ Court was required to be conducted in accordance with Schedule 2 of the Act. Clause 1(3) of Schedule 2 provided that "A proceeding is not void because it was returnable or heard and determined at a venue of the Court other than the proper venue.”  5. The summons in this case was not returnable at the proper venue (or indeed, any venue). The fact that the legislature has provided that the mere failure of a proceeding to be returnable at the proper venue does not invalidate the proceeding lends further support to the discernment of a legislative purpose not to invalidate a summons that fails to direct a defendant to attend at the proper venue. The submission of S. in the Courts below fell to be determined in accordance with s50 of the Act and by reference to what was said by Kaye J in *Onus v Sealey*.It follows that in rejecting S.'s submissions, the Judge did not err in law. Further, there was no basis for quashing the orders made in the County Court or making the declarations sought. |
| **32** | **Application for change of trial venue from Mildura to Melbourne**  In *Butcher v Australian Tartaric Products Pty Ltd* MC32/10, the plaintiff whose proceedings were returnable at Mildura sought a transfer of the proceedings to Melbourne on the ground that a number of expert and medical witnesses proposed to be called lived and worked in Melbourne. In granting the application, Kaye J held:  1. The appropriate test is that the proper place of trial should be where the case can be heard most suitably, bearing in mind the interests of the parties, the ends of justice and the efficient disposition of the business of the court.  *National Mutual Holdings Pty Ltd & Anor v Sentry Corporation & Anor* (1998) 83 ALR 434, applied*.*  2. Rule 47.01 is a rule of practice and should be given a practical application. The purpose of it is to ensure that cases are disposed of fairly, justly and as expeditiously as possible.  3. Whilst this matter should be heard in Mildura and a transfer will delay the disposition of the case, these factors do not outweigh the substantial preponderance of convenience in favour of bringing the matter back to Melbourne. It is clear that a very large number of the witnesses in the case, and in particular professional witnesses, will need to be called from Melbourne. Even if the audio-visual link was working satisfactorily, it would be a second best trial for the plaintiff to have it conducted by having most of his professional witnesses give evidence by audio-visual link. |
| **33** | **Application to a Magistrate for bail where bail previously refused by the Supreme Court**  In *DPP (Cth) v The Magistrates’ Court of Victoria and Barbaro* MC33/10, Pagone J was required to consider whether a Magistrate had power to entertain an application for bail where bail in respect of the applicant had been previously refused by the Supreme Court. In upholding the Magistrate’s decision to entertain the application, His Honour held:  A refusal to grant bail by a Judge of the Supreme Court does not always remove the power of a Magistrate to grant bail. Other provisions operate on their own terms and must be given their effect in the circumstances which they govern. In schedule 5 of the *Magistrates’ Court Act* 1989 (Vic), as it relevantly stood in the past and as it was accepted that it applies to this case, upon committal for trial, the Magistrate is, amongst other things, required to consider afresh the question of bail; and whatever the proper construction of s18(1) may be, there is no justification to read down or narrow the provisions and effect of other provisions which confer power or require a fresh consideration of whether bail should or may be granted.  *Scher v Popovic* unrep, VSC, Cummins J, 12 January 1990, followed. |
| **34** | **Inquest: Finding that person may have committed an indictable offence wrong in law**  In *Cahir v Jamieson & Ors* MC34/10, Beach J considered a finding by a Coroner that a police officer in the execution of his duties may have committed an indictable offence. In declaring that a Coroner made an error of law on the record, His Honour held:  1. Section 21(3) of the *Coroners Act* requires a Coroner who forms an opinion that an indictable offence has been committed to make a report to the DPP. However, the occasion of the report (and the underlying belief) have no place in the record of investigation. Neither version of Form 1 of the *Coroners Regulations* 1966 and 2007 permit the recording of the Coroner's belief as to the possible commission of an indictable offence nor the fact of any necessary report to the DPP. Whilst such a statement in the findings or comments is expressly prohibited, any such statement is also impliedly prohibited in the course of discussing the evidence.  *Keown v Khan* [1998] VSC 297; [1999] 1 VR 69, followed.  2. The function of the Supreme Court in the present case is not to conduct a merits review of the Coroner’s decision. Whilst the Coroner made a mistake as to an important matter of fact, it could not be said that it was not open to the Coroner to make the statement that the Police relied too "heavily on bravado and spontaneity". If it was the Supreme Court's role to make findings based on the evidence given before the Coroner, the Court would not have concluded that the evidence justified any statement that might suggest that C. relied upon “bravado” or “bravado and spontaneity”. There is much to be said for the proposition that C. was confronted with an extremely dangerous situation on the evening of 22 May 2004 and took steps, the appropriateness of which, with the benefit of hindsight and cool reflection, can be debated. Nevertheless, the view the Coroner came to was one that was open to her and not liable to be attacked on the basis of lack of rationality or reviewable unreasonableness. The fact that a judge would differ from a magistrate [Coroner] on a question of fact does not necessarily show any more than that the view of the judge differs from that of the magistrate [Coroner] on a question of fact.  *Ericsson Pty Ltd v Popovski* [2000] VSCA 52; (2000) 1 VR 260, applied. |
| **35** | **Discovery of documents on a computer**  In *Automotive Dealer Administration Services Pty Ltd v Kulik* MC35/10, Mukhtar AsJ dealt with an application for discovery of documents which were said to be found on the defendant company’s computer and its hard drive. In granting the application for discovery, Mukhtar AsJ held:  1. Discovery and inspection are essential tools of justice to enable litigants, both plaintiff and defendant, to investigate facts ultimately to enable a Court to get to the truth of the matter. Agreements are frequently made in the course of litigation in order to avoid interlocutory skirmishes and added expense. In the context of civil procedure, such agreements usually as here involve an existing duty or obligation to comply with procedural steps anyway, and therefore lack consideration. Such agreements cannot be regarded as binding in a sense of precluding any additional steps being taken. The “agreement” was the product of an isolated summons and in any event, the previous arrangements did not extend to inspection of the computer server and the networked computers.  2. A Court might intervene and prevent further discovery and inspection if the Court regards the additional pursuit over and above that which was “agreed” as being indicative of a misuse of court processes. But this is not the case here. To the contrary, it appears that the nature of the investigative exercise is such that it now does require the involvement of a computer expert to look into or “interrogate” the database and the server and the network computers to truly make the most of the discovery process. One cannot tell, but it may well result in the ascertainment of facts which corroborate the defendants’ case.  3. Orders of the type sought by ADAS are naturally resisted in trade or commerce because they are, by their nature, invasive. No business is comfortable having a litigation adversary having access to its database, its server and its networked computers. There is the probability that the ADAS's expert scrutineer will come across irrelevant or privileged or confidential information, and the inspection exercise will be disruptive to the second defendant’s business. But there is no avoiding this. The discretion to be exercised in this case is beneficial in character. The most a Court can do practically speaking is to put in place undertakings as to strict non-disclosure and confidentiality by the computer expert and directions requiring that the expert’s work be done under the supervision of K's company and that any information extracted be also given to the defendants or their legal representatives. Another measure is to ensure the second defendant has an opportunity to seek legal advice and consult with its lawyers to see if there are claims of privilege or confidentiality for any documents or information as extracted by the expert or proposed to be extracted.  4. The application is not fishing. With protective measures in place, ADAS' request is legitimate. The investigative task has become unavoidably computer technical, and it requires expert investigation. It would be unjust to deny ADAS to inspect the database again, and the server and the networked computers. Accordingly, the application is granted. |
| **36** | **Application for bail: show cause situation**  In *Re Bryans* MC36/10, Pagone J set out the approach a court should take when hearing an application for bail where the accused is in a show cause situation. His Honour held:  1. It is important to remember that s4(4)(c) of the *Bail Act* 1977 imposes a burden upon the applicant which needs to be discharged in difficult circumstances. The circumstances are difficult because there is a presumption of innocence to be weighed against important community expectations and considerations, and because such applications are made in a context in which the parties are in part restricted in what they can say as a trial is yet to occur and, on this occasion, there is yet to be a committal proceeding.  2. The decision in *Asmar* [2005] VSC 487; MC30/05 considered what was meant by “showing cause” in the context of applications for bail. The issue arose in that case in part because a difference of view had arisen about whether the authorities required a one-step process or a two-step process when considering bail applications. What Maxwell P made clear was that there is only one step in the process, namely that there needs to be established by the person in custody that there was no justification for the custody.  3. In considering whether to grant bail it is common to talk about and to consider four risks. They are whether the accused person (a) appears in accordance with his bail and surrenders himself or herself into custody, (b) does not commit an offence whilst on bail, (c) does not endanger the safety or welfare of members of the public, (d) does not interfere with witnesses or otherwise obstruct the course of justice. These are the four considerations which the law has described to deal with the one fundamental question, namely whether the custody is justified.  4. Having regard to all of the circumstances, the Court is not satisfied that the detention of B. in custody was not justified. Accordingly, the application for bail is refused. |
| **37** | **Estate Agent’s Commission – whether claim unconscionable**  In *Alievski v Cross Country Realty Victoria Pty Ltd* MC37/10, a Magistrate in upholding a claim for commission, found that a real estate agent’s conduct in the sale of properties and the claim for commission was not unconscionable. Upon appeal, Bell J dismissed the appeal and held:  1. The central issue was the concept of unconscionability and whether it was correctly applied by the Magistrate. A. relied on s51AB of the *Trade Practices Act*, which is mirrored in s8 of the *Fair Trading Act*. Section 51AB(1) prohibits a corporation (such as CCRV) in trade or commerce from engaging in conduct which is ‘in all the circumstances, unconscionable’. Section 51AB(2) specifies a number of matters to which the court may have regard in deciding whether the prohibition in s51AB(1) has been contravened. Section 51AC(1) specifies the same prohibition in respect of the supply in trade or commerce of goods or services. Section 51AC(3) specifies the same and further relevant matters.  2. The concept of ‘unconscionable’ in s51AB and s51AC of the *Trade Practices Act* has an enlarged (somewhat more protective) content which takes its scope from the ordinary meaning of the word. The provisions of s51AB(2) and s51AC(3) assist in applying that enlarged concept. Those provisions also underscore that the concept in s51AB(1) and s51AC(1) is statutory and not limited to the unwritten law form. So interpreted, ‘unconscionable’ in s51AB(1) and s51AC(1) means unconscionable according to the accepted standards of human behaviour in the context of trade and commerce, reflecting the dictionary meaning of the word as understood in that context.  3. On the Magistrate’s findings, A. signed the agent’s authority at the office of his own solicitor and in his presence. It is to be inferred that A. signed the authority after taking advice from that solicitor. A. was not under any special disability, such as age or infirmity. Indeed, he was a businessman with some experience in buying and selling property. The commission clause was written in terms which reflected A.'s express wishes, and was actually inserted by the handwriting of his solicitor. While CCRV told him the value of the units was ‘$180,000-$200,000 approximately’, it also said it did not know what they would sell for.  4. On the basis of these findings, it is not surprising the Magistrate decided that CCRV had not behaved with undue influence or unconscionably towards A. Having considered the evidence on which the Magistrate relied in making these findings, the findings were not only open but demanded. |
| **38** | **Duty of sentencing Judge**  In *Campisi v The Queen* MC38/10, a sentencing Judge sentence an offender to a term of imprisonment on a basis that was different from the Crown opening. In upholding the ground of appeal in this regard, the Court of Appeal held:  1. As the decision of the Court of Appeal in *R v Lowe* [2009] VSCA 268 makes clear, the principles of natural justice require a sentencing judge to inform the parties, and to provide the opportunity for submissions, if the judge intends to go beyond the facts contained in the Crown opening. The judge is never ultimately confined to what is set out in the Crown opening. But, given the function which a written opening conventionally performs on a plea in mitigation, it is the obligation of the judge to alert the parties if dissatisfied with any aspect of the Crown opening, or wishes to take into account some different state of facts discerned from a reading of the depositions. This is but an example of the right of every person to be alerted to any adverse matter likely to be taken into account against him or her, in order that there be an opportunity to deal with that matter before the relevant exercise of discretion takes place.  2. The references by the sentencing Judge to $300,000 were such as to breach the hearing rule. It seems clear that C. was entitled to assume that the judge would proceed on the basis that the amount demanded was $100,000. It is clear that no notice was given to the defence that the Judge would proceed on the basis that the demand was three times that.  3. Grounds 1 and 2 of the application for leave to appeal asserted that the sentencing judge erred in relying on facts and circumstances as aggravating features for sentencing purposes by having regard to matters which went beyond the facts stated in the Crown opening at the plea hearing. These Grounds are upheld but the appeal against sentence is dismissed. |
| **39** | **Cold case: Application for permanent stay of charges**  In *Aydin v The Queen* MC39/10, a delay of 28 years occurred between the date of offence and the trial date. The accused applied to the trial judge for the grant of a permanent stay of the trial. The application was refused. On appeal, the Court of Appeal in dismissing the appeal held:  1. The power of a court to grant a permanent stay of a criminal prosecution is to be exercised only in an exceptional case.  *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23, applied.  2. Delay of itself is not enough. The delay of almost 28 years between September 1982 and July 2010 was itself not such as to warrant the success of the application. Just as the community has an interest in ensuring the fairness of criminal trials, so it also has an interest in ensuring that those who are guilty of crimes are brought to justice.  3. Much reliance was placed upon the proposition that the destruction of the file was part of a deliberate policy. This, of itself, was not significant. The trial judge did not fall into error in not giving that circumstance sufficient weight. There was no suggestion of bad faith, or of any intention to abuse the process of the courts or otherwise obstruct the course of justice. Rather, it might be supposed (and there was evidence before her Honour to support this) that the policy was the product of a desire to enhance administrative efficiency; and it is no business of the courts to instruct Victoria Police in how best to conduct its administration.  4. What was important in a case such as the present, therefore, was not the document management policy as such, but the effect that the unavailability of the police file had on the fairness of the trial.  5. It is not sufficient that the loss of relevant material could or might result in injustice or unacceptable lack of fairness; it must be shown that that would be the result. A permanent stay must not be granted unless the court before which the application is made is satisfied that the continuation of the proceedings constitute an abuse in an exceptional or extreme case.  6. It may be that during the course of the trial material does come to light which alters the perspective which at present seems to be compelling. In the meantime, one can conclude that this case does not fall into that exceptional class in respect of which an application for a permanent stay will succeed. Accordingly, the appeal against the judge's refusal to stay the prosecution was dismissed. |
| **40** | **Legal Practitioners immunity from suit**  In *Foster James Pty Ltd v Dalton* MC40/10, the question of a barrister’s immunity from suit for conduct of litigation in court was raised. This particular case had been the subject of an appeal to Mukhtar AsJ in MC15/10 in which the Judge upheld the defence. Ferguson J, in dismissing the appeal held:  1. The key issue was whether the principle of the advocate's immunity from suit precluded FJP/L from relying on its defence.  2. In *D’Orta-Ekenaike* [2005] HCA 12; (2005) 223 CLR 1 the majority of the High Court held that the immunity of advocates continues to apply in Australia. It applies whether the suit is for negligence or otherwise. Gleeson CJ, Gummow, Hayne and Heydon JJ stated that the central justification for the immunity is that controversies, once resolved, are not to be re-opened except in a few narrowly defined circumstances.  3. Whilst the High Court authorities concerned claims by clients against their lawyers – that is, as a ‘shield’ against suit, the justification for the immunity must apply equally where the lawyer’s conduct is raised as a defence to a claim for fees. Both limbs of the defence of FJP/L's (breach of retainer and set-off) would inevitably lead to the re-litigation of at least part of the controversy in the Griffiths & Beerens proceeding.  4. In relation to the claim that the immunity does not apply where the party's position is merely defensive, one should look at the central justification for the immunity as expressed by the majority of the High Court in *D’Orta-Ekenaike*; that is, that controversies, once resolved, are not to be re-opened. That justification alone must also apply in circumstances where the client seeks to raise as a defence to a claim for fees, the conduct of counsel of the type alleged by Foster James against Mr Dalton. The same vice of collateral agitation of the substance of the matter will arise where there is subsequent litigation between persons involved in the original litigation although not parties to it.  5. FJP/L could not succeed simply by proving that Mr Dalton was ill. It would be necessary for FJP/L to establish that his ill health had led to a failure to provide the services of a competent barrister such that he was in breach of his retainer. Putting FJP/L's case at its highest, there would at least have to be evidence and argument about what Mr Dalton should have said and done in the Griffiths & Beerens proceeding if he had performed at the level he is alleged to have performed at in the past. That must lead to re-opening the matters that were in controversy in the Griffiths & Beerens proceeding.  6. Accordingly, the appeal from the Associate Judge's decision must be dismissed. FJP/L did not have an arguable case on appeal and it could not possibly succeed. |
| **41** | **Sentencing in Domestic Violence Cases**  In *Smith v The Queen* MC41/10, the Court of Appeal dealt with an appeal against sentence in respect of a charge of recklessly causing serious injury to a partner. The Court held, in dismissing the appeal:  1. The sentencing judge was not bound to give any weight to the unsupported assertions that were made concerning the victim's attitude to the prosecution. As was said by Neave JA in *R v Hester* [2007] VSCA 298 even in cases where there is evidence of forgiveness of the victim of domestic violence, this evidence should be treated with extreme caution.  2. Notwithstanding the attempts which S. had made to rehabilitate himself to deal with his drug and violence problems since being remanded in custody, the sentence imposed below was well open. The Judge properly took into account the personal circumstances of S., his bad criminal record, principles of general deterrence, specific deterrence and denunciation. This Court has said on many occasions that domestic violence will not be tolerated and that general deterrence is a very important sentencing principle in the sentencing disposition which must be, and must be seen to be, condemned by the courts.  *R v Jojanovic* [2002] VSCA 467, [31] (Coldrey J);  *R v Robertson* [2005] VSCA 190, [13] (Chernov JA);  *DPP v Smeaton* [2007] VSCA 256, [21]–[22] (Dodds-Streeton JA); and  *R v Hester* [2007] VSCA 298, [19] (Chernov JA), applied. |
| **42** | **Standing**  In *Gargan v Commonwealth of Australia* MC42/10, Robson J dealt with an appeal in respect of a decision made by a magistrate refusing an application for an interlocutory injunction restraining the Commonwealth of Australia from continuing to deny access to an appeal to a Full Court of the Federal Court. In dismissing the appeal, His Honour held:  1. Standing should be considered in light of the particular relief sought. On the issue of standing in relation to G. it was clear that G. had no interest in the application concerning Mr Buultjens’ proceedings in the Federal Court of Australia. No private right of G. was being violated, nor did he suffer any special damage.  2. In relation to the argument that G had standing in view of the fact an order for costs was made against him by the Magistrate, the originating motion did not seek any order reviewing the decision of the Magistrate. As it was, the originating motion and the summons did not seek to attack the order for costs in the Magistrates’ Court.  3. In relation to the argument that G. had standing pursuant to s13(a) and (b) of the *Crimes Act* 1914 (Cth), none of the matters constituted an application by any person to institute proceedings for the commitment for trial or the summary conviction of either the Registrar or the Commonwealth. In relation to G.'s application that the Commonwealth of Australia pay Mr Buultjens the sum of $165,000 plus the $750 costs of filing, such an application and originating motion of just one line did not constitute the institution of proceedings, for the commitment for trial of the Registrar or the Commonwealth, or the institution of proceedings for the summary conviction of the Registrar or the Commonwealth.  4. Accordingly, G. had no standing to bring the summons and the originating motion. |
| **43** | **Drink/driving: reasonable belief for believing person intended to drive a motor vehicle**  In *DPP v Farmer* MC43/10, Bell J dealt with an appeal against a Magistrate’s dismissal of a charge of refusing a preliminary breath test on the ground that the police informant lacked reasonable grounds for believing that the driver intended to drive the motor vehicle. In allowing the appeal, His Honour held:  1. The Magistrate had to decide whether he was satisfied beyond reasonable doubt that F. was guilty of the charge and to determine whether on the facts proved by the prosecution, the police officer made the request to undergo the PBT on reasonable grounds.  *DPP v Mitchell* (2002) 37 MVR 142; MC22/02, followed.  2. The issue about which the police officer was required to have that belief was whether F. intended to ‘drive the motor vehicle’ as specified in s3AA(1)(b) of the *Road Safety Act*. Intending to drive here has a temporal aspect. It means intending to drive near, but not necessarily exactly at, the point in time when the request to undergo the preliminary breath test is made.  *Woods v Gamble* (1991) 13 MVR 153; MC11/91, applied.  3. Remembering the function of the magistrate was to determine beyond reasonable doubt whether the police officer’s belief was reasonable, the magistrate held the observations made by the officer were equally consistent with the vehicle being stopped with a view to the cessation of any further driving by F. The magistrate pointed to a number of possibilities not consistent with F. intending to drive. The thrust of the Magistrate's reasoning was towards what was inconsistent with the officer's belief, not towards whether the grounds given for having the belief were reasonable.  4. By focusing on whether there were contrary possibilities, the magistrate did not really focus on the reasonableness of the police officer's grounds for having the belief. None of the contrary possibilities identified by the magistrate undermined the validity to a reasonable mind of the facts which were relied on by the officer as the grounds for his belief that F. would drive the vehicle. They were that F. was found alone in the driver’s seat of a motor vehicle with his seat belt on, with the ignition turned on and with the engine running. The officer was told that he had just driven from home. The reasonableness of a belief based on these grounds cannot be defeated by pointing to mere possibilities consistent with F. having ceased driving.  5. While the magistrate purported to decide beyond reasonable doubt whether the police officer had reasonable grounds for the belief which he held, this is not the test which the magistrate actually applied. Rather, the magistrate determined beyond reasonable doubt whether he (the magistrate) held that belief on those grounds. That was to misunderstand and misapply the reasonable belief test. |
| **44** | **Costs in traffic infringement matters**  In *Hobsons Bay City Council v Viking* MC44/10, Osborn J dealt with an appeal against a Magistrate’s refusal to award professional costs to a local Council on the grounds that it was unfair to the defendant and the amount sought was disproportionate to the nature of the charges. His Honour held:  1. The power of a magistrate to award costs is effectively unfettered. In cases involving the review of discretionary judgments there is a strong presumption in favour of the correctness of the decision appealed from and the general rule is that the decision should be affirmed unless the appellate court of review is satisfied that it is clearly wrong.  2. The orderly administration of justice requires that decisions should be consistent one with another and decision-making should not be open to the reproach that it is adventitious.  *Norbis v Norbis* [1986] HCA 17; (1986) 161 CLR 513, 518, applied.  3. In the present case it should be noted that breaches of the *Victorian Road Rules* with respect to parking infringements may be prosecuted either by a police officer, an authorised council officer or certain other authorised persons. It was open to the Magistrate to form the view that the discrepancy in costs outcomes between police prosecutions and council prosecutions in respect of the same offence and more generally raised a relevant issue of consistency. Inconsistent outcomes do not support a system in which the public may be expected to have confidence. They give rise to a system which may appear adventitious and arbitrary in its outcomes.  4. Proportionality is the touchstone of just outcomes of the criminal justice system. The purpose of an award of costs is not to punish the unsuccessful party but to indemnify the successful party. The Magistrate was entitled to compare total outcomes in terms of fines plus costs, with other outcomes of the summary prosecution system not only as informing a view as to consistency, but also as informing a conclusion as to the proportionality of the costs sought to the criminality of the conduct in issue. It was in turn open to him to conclude that the costs sought were disproportionate to the criminality of V.'s conduct. The conclusion he reached was one by a member of the court which is confronted with a large number of summary offences on a daily basis and accordingly, the issue was one on which the Magistrate was well placed to form an opinion.  5. The factors upon which the Magistrate based his decision were capable of being regarded as relevant to the exercise of his discretion and the consequent exercise of that discretion was open to him. |
| **45** | **Evidence: tendering complainant’s statement**  In *DPP v Nicholls* MC45/10, Beach J heard an appeal against the dismissal of assault charges against a partner where the partner objected to giving evidence against the defendant. When the prosecutor sought to tender the complainant’s written statement, the application was refused and the charges dismissed. In allowing the appeal, His Honour held:  1. There are a number of decisions in which courts have held that if a witness simply refuses to answer questions, that witness is taken not to be available within the meaning of clause 4(1) Part 2 of the Dictionary of the Act by virtue of the operation of paragraph (f). In *Mindshare Communications Limited Taiwan Branch v Orleans Investments Pty Ltd,* [2007] NSWSC 976*,* Hamilton J accepted a submission that the purpose of (f) “is to deal with the situation where the attendance of the witness has been secured, but it is impossible to obtain the evidence, because, for instance, the witness declines to give it on the ground of privilege or simply refuses to give it, whatever threats are made concerning the consequences arising out of a contempt of court”.    2. Nothing in s18 of the Act (or the policy underlying it) operates to limit the application of s65 or the operation of clause 4 of Part 2 of the Dictionary. Section 18 permits a family member to be relieved of the obligation of giving evidence because of a possible likelihood that harm would be caused to the family member or to the relationship between that person and the defendant. However, the section says nothing about the use by the prosecution of a statement already given by the family member. The resolution of this appeal falls to be determined by construing the terms of clause 4 of Part 2 of the Dictionary.  3. Notwithstanding the identified difference between the circumstances of the authorities referred to and the circumstances of the present case, there is no relevant point of distinction. There is no relevant difference, for the purposes of s65, between a refusal to give evidence that is without legal foundation and a refusal to give evidence that is authorised by an order of the Court. Further, in *Mindshare*, Hamilton J specifically accepted the possibility that clause 4(1)(f) had operation where a witness declined to give evidence on the ground of privilege. Whilst what Hamilton J said was only *obiter*, it is correct and should be followed.  4. Accordingly, the magistrate was in error in concluding that L. was not available to give evidence about the matters in her statement and it was that error that led to the rejection of the tender of the statement and ultimately to the dismissal of the charges against N. |
| **46** | **Drink/driving: Essential elements of charge of refusing to comply with a requirement**  In *DPP v Kypri* MC46/10, Pagone J dealt with an appeal against the dismissal of a drink/driving charge by a Magistrate. The charge before the Magistrate did not specify which of the various statutory requirements under s55 of the *Road Safety Act* 1986 the defendant had failed to comply with. In dismissing the appeal, Pagone J held:  1. Section 55 of the Act does not itself create offences. It is s49 of the Act which creates the relevant offence by, in this case, providing that a person is guilty of an offence if he or she “refuses to comply with a requirement made under section 55(1), (2), (2AA), (2A) or (9A)”. The charge plainly enough alleged that K. had refused to comply with a requirement made pursuant to s55 but did not specify which of the various statutory requirements under s55 he had failed to comply with. Accordingly, each of the subsections referred to in s49(1)(e) in fact create separate offences.  *Goodey v Clarke* (2002) 37 MVR 121; MC 05/02, followed.    2. Section 49(1)(e) refers to separate offences but in the present case a reading of the charge would not identify which of the many potential obligations to accompany a member of the police force which s55 permitted had not been complied with. Accordingly, the magistrate was not in error in concluding that the charge had failed to include essential elements and in dismissing the charge.  3. Whether or not to allow an amendment of a charge which fails to disclose an offence is to be determined as a matter of degree. In undertaking that task it is necessary to ask whether the “amendment” is clarifying something in the nature of a misstatement which is otherwise clearly indicated in the charge. There may, perhaps, be other situations where an amendment may be justified but it must usually be possible for the amendment to be said to clarify a charge otherwise found to have been identified in some meaningful, albeit defective, way. In this case the amendment which was sought could not fairly be described as clarifying something which was otherwise disclosed in the formulation of the charge. An amendment to the charge by referring to subsection 55(1) would, rather, be a selection of one of a number of competing possibilities which the charge in its present form equally permits. Accordingly, the amendment would not be allowed even if it had been properly engaged as a ground of appeal.  *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583, applied. |
| **47** | **Application for Adjournment due to illness of main witness; application for witness’ statement to be admitted**  In *DPP v Easwaralingam & Anor* MC47/10, Pagone J dealt with an appeal against a Magistrate’s order in refusing an application for an adjournment and an application that the witness’ statement be admitted into evidence. In allowing the appeal and remitting the matter for determination according to law, His Honour held:  1. There may be many circumstances when refusing an adjournment will be justified in the exercise of a discretion even though the practical effect of a refusal to adjourn the hearing will result in the dismissal of a proceeding. However an application for an adjournment which is likely to have that effect should not be refused without considering that consequence and taking it into account as a factor to be weighed against others. In this case the only evidence against the defendant was of the one single witness who was not able to give oral testimony because of unexpected surgery only a few days before. The matters put against the adjournment might all have been accommodated by a relatively short adjournment although the Magistrate did not explore or explain whether or not that was possible. The inability of the witness to give oral evidence might conceivably not have been fatal to the outcome of the case if the written statement she had made had been admitted in evidence by her under s65 of the *Evidence Act* 2008 (Vic) (Act’), however the Magistrate did not consider whether the effect of ruling against the adjournment would be to insist upon a hearing in which no evidence would be called with the consequence of dismissal of the charges. The refusal of the adjournment would have had, and did have, the effect of denying the informant the opportunity to present his case (unless the written statement of the witness had been admitted in evidence). The Magistrate did not weigh that consequence against the factors tending against an adjournment. An adjournment, all things being equal, may more readily be refused where a hearing may still be conducted meaningfully upon evidence. It may even be refused in some cases where the effect of a refusal may lead inevitably to a party not being able to present a case, but it should not be refused without taking that into account. The Magistrate ought to have considered whether the consequences of the refusal of the adjournment were warranted by those matters put to her as bearing against the adjournment.  2. In relation to the admissibility of the statement pursuant to s65 of the Act, the Magistrate failed to consider whether a condition of s65 was satisfied namely, that the witness was "not available to give evidence about an asserted fact".  3. The Magistrate was in error in concluding that the notice had not been served within a reasonable time or had not given sufficient detail of the matters required to be provided by the Act. What constitutes reasonable notice is something which must depend upon all of the circumstances of the case. In this case notice of an intention to rely upon the written statement was given to the defendant's legal representatives promptly as soon as the unavailability of the witness became known. Section 67(3) provides that the notice must state “the particular provisions” of the division “on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence”. In this case the written notice formally served on 24 February 2010, but reliance upon which was conceded to have been conveyed on 23 February 2010, identified s65 as the section upon which reliance was placed and, on page 2 of the notice, there was express statement of an intention to rely upon s65(2)(a) or (b) or (c) or (d), s65(3)(a) or (b) or 65(8)(a) or (b). Some of these provisions may not have sustained the application but there was asserted the provisions on which reliance was placed. The Magistrate's conclusions to the contrary were not sustainable.  4. Observations in relation to whether or not the matter should be referred to a differently constituted Magistrates' Court. |
| **48** | **Civil Proceedings; Finding by Magistrate that legal practitioners negligent**  In *AJH Lawyers Pty Ltd v Hamo* MC48/10, a Magistrate found that in giving their client certain advice the client’s legal practitioners were negligent and accordingly, their claim for professional fees was dismissed. In allowing the appeal and giving judgment for the legal practitioners, the Court of Appeal (Maxwell P and Nettle JA) held:  1. The question was whether AJH Lawyers Pty Ltd owed a duty to Hamo (‘H.’) to provide him with 'holistic' long-term advice. There was a problem with the way in which the Magistrate characterised AJH’s duty to H. as one to provide ‘holistic’ advice. It failed to define the circumstances of which the Magistrate considered H. needed to be warned. Additionally, it was not in the least clear what the Magistrate meant by a requirement to ‘tell [H.] about the holistic situation’. On one view of the Magistrate’s reasons, it meant a requirement to warn H. that the defence of the winding up application could only result in a short breathing space. On another interpretation, it meant that AJH was bound to warn H. in terms or to the effect that, because the company was insolvent, and because the defence of the winding up application would only result in a short breathing space, there was no purpose in defending the winding up application.  2. The Magistrate did not decide the matter on the basis that AJH were bound to warn that there may be no point in expending funds in defence of the application. The plain and ordinary meaning of what he said is that he decided on the basis either that AJH was bound to warn H. that the defence of the winding up application could only result in a short breathing space or, alternatively, that AJH was bound to warn H. that the company was insolvent and, because the defence of the winding up application could only result in a short breathing space, there was no purpose in defending the winding up application. Either way, the Magistrate was in error.  3. The question of whether a party owes another a duty of care is a question of law. It was open to the Magistrate to conclude that AJH was under a duty to warn H. that the defence of the winding up application might result in no more than a short respite. On one view of the Magistrate’s reasons, he so concluded. But there was no basis to find that AJH breached that duty. The terms of the email of advice of 12 March 2009 made plain that a successful defence of the application would leave it open to the creditor to serve a fresh statutory demand and a further application to wind up the company. The Magistrate was also in error, therefore, in holding that AJH breached that duty. |
| **49** | **Contract: sale of business: whether a certain letter terminated the contract**  In *Umbers v Kelson* MC49/10, the question of the proper construction of a letter which purported to terminate the contract was the main point in issue. The letter said that if an extension of time to complete the contract was not given the “letter may be treated as written notice ending the contract”. The Court of Appeal (Neave, Redlich and Hansen JJA) held:  Appeal dismissed.  1. The central issue was whether the 18 July letter terminated the contract. That turned on the construction and terms of the letter. If the letter did not terminate the contract, the contract remained on foot and estoppel fell away.  2. The general principle to be distilled from decided cases on the question of the proper interpretative approach to a notice of termination is that a notice purporting to terminate a contract must do so in clear and unequivocal terms.  *Catley v Watson* (1983) V ConvR ¶54-003, followed.  3. The judge below was correct to conclude that the 18 July letter was not a ‘written notice ending the contract’. The letter did not state that it was a ‘notice ending the contract’ or that the appellant thereby gave notice to ‘end the contract’ pursuant to general condition 4, or even that the contract would be terminated if the approval date was not extended. Rather, the letter gave the respondents the option of treating the letter as a written notice ending the contract, in the event the extension was not agreed to. The letter thus left the question of whether the contract was to be ended entirely in the hands of the respondents, at least in the event that they did not agree to the extension. On the other hand, in the event that the respondents did agree to the extension, the letter did not purport to end the contract. It follows that on neither scenario could the letter be regarded as a written notice ending the contract. It was clear that the meaning of the letter was as stated above, and the judge was correct to conclude as he did.  4. Accordingly, the appellant’s submission that a reasonable person would have understood the letter as ending the contract if, within a reasonable time, an extension was not granted is rejected. Such a meaning was not open on the terms of the letter, properly construed. But even if it be assumed that such a meaning was possible, the letter equally bore the other possible meaning, namely that it did not end the contract but merely gave the respondents the option to do so. In those circumstances the letter would have been ambiguous as it carried two potential meanings. Thus, the letter could not have operated as written notice ending the contract.  *Umbers v Kelson* MC43/2010; [2008] VSC 348, approved.  5. In the circumstances, the alternative plea of estoppel was simply irrelevant. |
| **50** | **Proof of testing, sealing and use of speed measuring device**  In *Agar v Dolheguy & Anor* MC50/10, Macaulay J dealt with an appeal against a conviction imposed in relation to a charge of driving a motor vehicle at a speed exceeding the limit. In dismissing the appeal, His Honour held:  1. The word "satisfied" in reg 306 is not to be construed in a manner that mandates the use of a particular scientific method before the relevant testing officer could reach the state of satisfaction required by the regulation. The legislation contemplates that the assertion that a testing officer was relevantly “satisfied” may be challenged. If so, he or she could not be found to have been “satisfied” of the relevant matters if that state of mind is seen to be baseless or pretended or indeed not held at all. As an ordinary English word, to be satisfied, in the relevant connotation, means to be furnished with sufficient proof or information, to be assured or convinced. The tester’s state of mind is a matter of fact. That state of mind is, *prima facie*, established if a schedule 2 certificate is admitted because that “satisfaction” is one of the elements which the certificate implicitly proves. But if it is challenged, as it may be, the challenger may seek to adduce evidence to prove that the testing officer was not so “satisfied”.  2. When the Victorian Parliament legislated as to the method by which a speed measuring device is to be tested for the purpose of law enforcement, it was not obliged to import any specific legal metrology methodology. It chose not to specify any method of testing the relevant devices but, rather, it adopted an alternative, rational method of assuring certain qualitative standards by prescribing the technical competence of the testing officer. In those circumstances, there is no warrant to imply the application of legal metrological principles in construing the meaning of “satisfied” where it appears in reg 306, either as a necessary legal consequence of Australia’s treaty obligations or as a consequence of the Commonwealth legislation.  3. The error tolerance in the speed measuring device is taken into account because, as is clear from the legislative regime, it is the speed indicated by that device that is used by the prosecuting authority to establish a case against the driver, not the driver’s vehicle’s speedometer. Proof of the prosecution case does not involve any assumption as to the accuracy of the speedometer in the car driven by the appellant.  *Van Reesma v Police* [2010] SASC 201 at [13], considered.  4. The defence of honest and reasonable mistake of fact did not apply.  *Kearon v Grant* [1991] 1 VR 321, applied. |
| **51** | **Drink/driving - refusal to accompany – temporal limitation not mentioned**  In *DPP v Piscopo* MC51/10, Kyrou J dealt with an appeal against the dismissal of a drink/driving charge on the ground that the informant had not established all of the elements of the offence. In dismissing the appeal, His Honour held:  1. The issue for determination on this appeal was the meaning of the expression ‘refuses to comply with a requirement made under section 55(1)’ in s49(1)(e) of the Act. It was not concerned with the types of requirement 'under section 55' that are sufficient to support a charge under any other provision of the Act.  2. For the purposes of s49(1)(e), s55(1) sets out two, rather than three, requirements. The first requirement is to furnish a sample of breath. The second requirement is to accompany a police officer to a police station where the sample of breath is to be furnished and to remain there until the sample is furnished and a certificate is given or until three hours have elapsed since the driving, whichever is sooner. The second requirement has both an ‘accompany’ component and a ‘remain’ component. These components, however, are not separate requirements; they are integral parts of a single composite requirement. This interpretation of s55(1) accords with the plain meaning of the words of the section.  3. The fact that the verb ‘require’ (when preceded by the auxiliary verb ‘may’) appears in s55(1) twice, rather than three times, clearly indicates that the section sets out only two requirements. Logically, the nature and scope of the two requirements must be governed by the words that follow each reference to the verb ‘require’. If the Parliament had intended to set out three requirements in s55(1), one would expect it to have used the verb ‘require’ three times and to have separated the second and third requirements with the words ‘may further require’ in the same way that it has separated the first and second requirements. The fact that the Parliament did not do so reinforces the interpretation that arises from a plain reading of the section.  4. This interpretation of s49(1)(e) is consistent with the proposition that the Act contemplates that a motorist who is subject to a ‘requirement made under s55(1)’ is presented with the choice of compliance or refusal, with the penalty for refusal being the risk that he or she will be convicted of an offence under s49(1)(e). In conferring such a choice, the Parliament must be taken to have intended that the motorist would be placed in a position to exercise his or her rights in an informed manner. Plainly, a motorist who is required to accompany a police officer to a police station for the purpose of furnishing a sample of breath without being told the maximum period for which he or she will be required to remain at the police station for that purpose would not be in a position to make an informed choice.  5. The nature of the second requirement that is set out in s55(1) should not be confused with the manner in which it may be communicated. The cases make it clear that the requirement need not take the form of a demand in imperative terms and that no particular verbal formula needs to be used; it is enough that the intent of the police officer to issue a requirement and the obligation of the motorist to comply with that requirement have been made clear. This means that the two components of the composite requirement can be communicated sequentially: a motorist can be required to accompany a police officer to a police station for the purpose of furnishing a sample of breath and, once he or she arrives there, he or she can be required to remain until a sample of breath is furnished and a certificate is given or until three hours have elapsed from the driving, whichever is sooner.  6. It follows that, where a motorist is required to accompany a police officer to a police station for the purpose of furnishing a sample of breath, without more, the motorist would not commit an offence under s49(1)(e) if he or she refused to accompany the police officer. Likewise, where such a requirement is made, a motorist would not commit an offence under s49(1)(e) if, after accompanying the police officer to the police station, he or she refused to remain there for the purpose of furnishing a sample of breath. This is because a requirement that does not inform the motorist that he or she would be required to remain at the police station until a sample of breath is furnished and a certificate is given or three hours have elapsed since the driving, whichever is sooner, is not ‘a requirement made under section 55(1)’ within the meaning of s49(1)(e).  *Uren v Neale* [2009] VSC 267; (2009) 53 MVR 57; MC 17/09, followed;  *DPP v Foster; DPP v Bajram* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 425; MC1/99, distinguished.  7. In relation to s32 of the *Charter of Human Rights and Responsibilities Act* 2006, the interpretation of s55(1) of the Act is correct and that, so interpreted, s55(1) is compatible with the human right set out in s21(3) of the *Charter*. That interpretation requires that a motorist be informed of the temporal limitation in s55(1) and thereby ensures that any deprivation of liberty that is involved in complying with a requirement under s55(1) is in accordance with the procedures that are set out in that section. By being aware of the temporal limitation, a motorist can take steps to ensure that the deprivation of his or her liberty does not exceed the maximum period permitted by s55(1).  8. The submission that in the circumstances of the case the requirement that was communicated to P. was invalid because it was objectively unreasonable fails at the threshold. It cannot be the case that a requirement that is made under s55(1) of the Act will be invalid unless and until the police officer disabuses the individual of each and every irrational fear that he or she raises. In the present case, there was no rational basis for P. to be concerned that he would be locked up. |
| **52** | **Witness not available to give evidence**  In *Easwaralingam v DPP* MC52/10, the Court of Appeal (Buchanan and Tate JJA) dealt with an appeal against a Judge’s allowance of an appeal against a Magistrate’s decision to refuse an application for an adjournment of charges due to the main Prosecution witness being unable to attend due to poor health. HELD:  In relation to the order granting *certiorari* in respect of the adjournment application, leave to appeal granted. In relation to the admissibility of the witness' statement, appeal dismissed. Remitted to the Magistrates' Court for further hearing.  1. By reason of s10 of the *Administrative Law Act* 1978, in Victoria the ‘record’ includes a court’s reasons, whether the application for judicial review is brought under the *Administrative Law Act* or under Order 56. The transcript of proceedings may be incorporated into the record by reference.  2. In the present case, the reasons were transcribed. The applicant accepted that other matters in the transcript could be considered to the extent that reference to them was necessary to enable understanding of the Magistrate’s reasons. Beyond those matters, only the charges, the oral application for the adjournment, and the oral decision of the Magistrate could be taken into account. What could not be taken into account was the content of the witness' statement that detailed the circumstances of the offence, including the circumstance that only she and the applicant were present at the scene, or the notes taken by the informant.  3. The trial Judge (Pagone J) considered material which was well beyond the ambit of the record, however defined. Indeed, the error he made – of considering material not before the Magistrate on the adjournment application – would still have been an error had the challenge to the refusal to adjourn been brought by way of an appeal (if an appeal had been available). However, because the proceeding was an application for *certiorari*, this should have alerted the trial Judge to the need to be particularly careful in identifying precisely to what material reference could be made in determining whether the Magistrate had committed an error of law. This he failed to do.  4. The trial Judge (Pagone J) found that the Magistrate was in error in reaching the conclusion that the application for the admission of the statement was an abuse of process. Amongst the errors committed by the Magistrate was the erroneous conclusion that what was meant by ‘not available’ was not defined in the legislation when it is so defined, in the ‘Dictionary’ section at the back of the *Evidence Act*. It is defined in a manner that includes where ‘the person is mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability’. The trial Judge found that the Magistrate failed to consider whether that condition was satisfied, and her failure to do so contributed to her conclusions about abuse. Had she been alert to the relevant definition she may have considered that a policy objective of s65 was to provide for evidence to be adduced in the circumstances before her, if the statutory pre-conditions were satisfied on the facts. It was necessary for the statutory definition of a person’s availability, upon which s65 depends, to have been considered before determining whether or not reliance on s65 in the circumstances of the case was an abuse. The failure of the Magistrate to consider the statutory definition of ‘not available’, and the consequent failure to determine whether that definition was satisfied in the circumstances of the case, was an error of law. |
| **53** | **Drink/driving: Failure by informant to specify relevant subsection in charge**  In *DPP v Kypri* MC53/10, the Court of Appeal (Harper and Hansen JJA) dealt with an appeal in which a Magistrate dismissed a drink/driving charge on the ground that essential ingredients of the charge were omitted. HELD: Leave to appeal granted.  1. Only two of the specified subsections of s55 empower a member of the police force to require a person who has already been required to furnish a sample of breath to subsequently accompany such a member to a place where a sample of breath is to be furnished. These are subsections (1) and (2) of s55. As framed, the charge therefore, at least arguably, raised no difficulty with the remaining subsection specified in s49(1)(e), namely sub-ss (2AA), (2A) and (9A).  2. It is arguable that the charge as framed adequately specified the offence which the prosecution sought to establish had been committed by K. It is true that both sub-s (1) and sub-s (2) of s55 empower a member of the police force, when the circumstances specified in one or other of those subsections obtain, to require a person to accompany that member to a police station. But, although the preconditions which enliven the right to so require are (slightly) different as between those two subsections, the offence constituted by a failure to comply with the requirement is the same in each case. And that is the offence of which (as the prosecution alleged) K. is guilty, namely the offence of failing to obey a requirement that the respondent accompany a member of the police force to a police station.  3. It is arguable that the magistrate ought to have allowed the prosecution the opportunity to amend the charge or to make an election in favour of one of the counts included in the duplicitous charge. The fact that the opportunity was not allowed is another argument for the conclusion that the magistrate was wrong to dismiss the charge. |
| **54** | **Inconsistency between Commonwealth and State Laws**  In *Dickson v The Queen* MC54/10, the High Court dealt with an appeal against a conviction imposed under Victorian law in respect of property belonging to the Commonwealth. In allowing the appeal and quashing the conviction and sentence the Court HELD:  1. The cigarettes in question in this prosecution belonged to the Commonwealth as, on the date of the offence, they were in the "possession" of the Customs. Further, for the purposes of the theft provisions in the Victorian *Crimes Act*, property is regarded as "belonging to" any person having "possession" of it (s71(2)). Thus, if the Victorian provisions had a relevant valid operation, for those purposes the Commonwealth also had possession of the cigarettes on the date of the offence.  2. When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth, then to that extent it is invalid. This proposition is often associated with the description "direct inconsistency".  *Victoria v The Commonwealth* (1937) 197 CLR 61 at 76, applied.  3. The case for inconsistency between the two conspiracy provisions with which this appeal was concerned is strengthened by the differing methods of trial the legislation stipulates for the federal and State offences, particularly because s80 of the *Constitution* would be brought into operation. In the present case, the jury trial provided by the law of Victoria under s46 of the *Juries Act* did not require the unanimity which, because s4G of the Commonwealth *Crimes Act* would have stipulated an indictment for the federal conspiracy offence, s80 then would have mandated at a trial of the appellant.  4. The direct inconsistency in the present case was presented by the circumstance that s321 of the Victorian *Crimes Act* rendered criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s11.5 of the Commonwealth *Criminal Code*. In the absence of the operation of s109 of the *Constitution*, the Victorian *Crimes Act* would alter, impair or detract from the operation of the federal law by proscribing conduct of K. which was left untouched by the federal law. The State legislation, in its application to the presentment upon which K. was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room was left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream* (1968) 117 CLR 253 at 258, the case was one of "direct collision" because the State law, if allowed to operate, would impose upon K. obligations greater than those provided by the federal law.  5. The federal law excluded significant aspects of conduct to which the State offence attached, such as:  (a) The effect of s11.5(1) was that the Commonwealth conspiracy provision applied only where there was a primary offence which was punishable by imprisonment for more than 12 months or by a fine of 200 penalty units or more, whereas s321 of the Victorian *Crimes Act* applied to agreements which would involve "the commission of an offence".  (b) Secondly, the offence under s321 was complete upon the making of the agreement without proof of overt acts, whereas par (c) of s11.5(2) required that for the person to be guilty that person, or at least one other party to the agreement, must have committed an overt act pursuant to the agreement.  (c) Thirdly, a person could not be found guilty of conspiracy under s11.5 if, before the commission of an overt act pursuant to the agreement, that person had withdrawn from the agreement and taken all reasonable steps to prevent the commission of the primary offence (s11.5(5)). There was no such provision in s321.  (d) Fourthly, sub-s(7) of s11.5 stated that any defences, procedures, limitations or qualifying provisions that applied to an offence applied also to the offence of conspiracy to commit that offence. There was no equivalent provision in Victoria.  6. The result in the present case was that in its concurrent field of operation in respect of conduct, s321 of the Victorian *Crimes Act* attached criminal liability to conduct which fell outside s11.5 of the Commonwealth *Criminal Code* and in that sense "alters, impairs or detracts from" the operation of the federal legislation and so directly collided with it. Accordingly, the appeal was allowed on the ground that there was a direct inconsistency between the Commonwealth law and the State law. |
| **55** | **Evidence: photoboard identification: admissibility**  In *R v Tran* MC55/10, Hollingworth J dealt with a submission that certain evidence proposed to be led by the Crown was inadmissible. In overruling the objection, the judge HELD: The Crown permitted to lead the evidence.  1. Even if one of the witnesses had not made a positive identification, his evidence would have been admissible as part of the Crown’s circumstantial case. Evidence to the effect that an accused person is similar to, or resembles, the offender has been held to be admissible as part of the circumstantial evidence in cases involving issues of identification. Although such evidence is not sufficient in itself to sustain a conviction, it may nevertheless form part of a circumstantial case pointing to the accused as the offender.  *Murphy v The Queen* [1994] SASC 4674; (1994) 62 SASR 121; and  *Pitkin v R* [1995] HCA 30; (1995) 80 A Crim R 302, applied.  2. Evidence is not unfairly prejudicial to an accused merely because it makes it more likely that the accused will be convicted. In order to be excluded, there must be a real risk of some unfairness in the way that the jury might use the evidence, for example, by leading them to adopt an illegitimate form of reasoning or to give the evidence undue weight.  3. The law recognises that there are various risks inherent in any identification evidence, in particular with photoboard identification. That is why comprehensive directions are required to be given to juries, to warn them of such risks. Any risks or limitations in the evidence of the witnesses would be capable of being explained to and understood by the jury. Accordingly, the probative value of the evidence was not outweighed (substantially or at all) by the danger of unfair prejudice to the accused T. |
| **56** | **Drink/driving: driver unable to undergo breath test: blood test administered: authority of police officer**  In *Rugolino v Howard* MC56/10, Bell J dealt with an appeal against a Magistrate’s imposition of a conviction where the question of the authority of the police informant was in issue. In dismissing the appeal, Bell J HELD:  1. In a criminal appeal, a finding of fact supporting conviction beyond reasonable doubt can be attacked as erroneous in law if (but only if) there was no evidence to support it or, where the finding was made by drawing inferences from circumstantial evidence, the inference of guilt was not reasonably open in the sense that there was no evidence on which the inference might reasonably have been drawn. In the present case, there was direct evidence to support the magistrate’s finding. Even if the magistrate made the finding by drawing inferences from the totality of the evidence, the inference was reasonably open on that evidence. There was no inference, consistence with innocence, which the magistrate could not rationally exclude. Accordingly, the magistrate made no error of law in finding the operator to have been authorised at the time of the alleged offence.  2. On the proper interpretation of the applicable provisions of the *Road Safety Act*, the police officer was empowered to require the driver to allow a sample of blood to be taken because he was entitled to require him to furnish a sample of breath and he formed the view that the driver appeared unable to do so for medical or physical reasons. The authority of the operator of the breath analysing instrument was not legally material to the powers which the police officer exercised. The prosecution was based on the sample of blood taken from the river, not on a sample of breath. Accordingly, even if the magistrate erred in law in the finding he made about the authority of the operator, the finding clearly did not affect the result of the hearing. The conviction of the driver must therefore stand in any event. |
| **57** | **Practice and procedure: whether magistrate should follow previous magistrate’s decision**  In *Torney v Victoria Legal Aid & Anor* MC57/19, Cavanough J dealt with a magistrate’s decision which was made on the basis that he should not interfere with a previous magistrate’s decision. In allowing the appeal, His Honour HELD:  1. A magistrate who conducts a final hearing should not necessarily be slow to depart from an earlier interlocutory order of another magistrate, “at least when it is clear that the earlier decision is wrong or inapplicable in the way in which circumstances may have developed since it was made”. However the freedom of a court to depart from a prior interlocutory order of the court is no less when considering the making of a further interlocutory order than it is when considering the making of a final order. This inherent jurisdiction is possessed by all courts, including inferior courts, unless taken away by statute.  *Thomas v Campbell* [2003] VSC 460; MC32/03, considered.  2. Where a magistrate proceeded on the basis that if (contrary to his primary view) he had any power at all to examine the correctness of a previous magistrate's determination, it was not a proper course to do so unless there was something before him that was not or could not have been before the first magistrate. That self-imposed restriction was erroneous in law. |