Inconsistent breath/ blood analysis

Mandatory Interlock Orders

Inconsistent breath and blood analysis results

When the result of a breath analysis indicates a breath alcohol concentration in excess of the legal limit but a subsequent blood analysis returns a reading below it the limit, a legal dilemma ensues as to which reading ought to prevail. This portion of the paper is devoted to addressing that dilemma. As will be seen, there is little authority on this point, and what authority there is favours the prosecution. Despite this, it will be suggested that there may still be some room for an argument in favour of an accused.

Before an analysis of the problem can be undertaken, it is necessary to first define its source with greater precision. This requires careful attention to the relevant portions of the statutory regime concerning PCA offences.

As any criminal practitioner will know, PCA offences are created by s 110 of the *Road Transport Act* 2013 (NSW) (the Act). It provides, in effect, that that a person is guilty of a PCA offence if at the time of driving they have present in either their breath or blood a concentration of alcohol above the legal limit. In an attempt to avoid patronising members of the audience, that section will not be set out in this paper. It suffices for present purposes to observe two salient features of s110.

First, the offence of PCA requires contemporaneity between driving and alcohol concentration. That is to say, the prosecution must prove that the relevant offending alcohol reading is attributable to the time the accused was driving, and not some later time. Second, the section provides for two alternative means of proof of alcohol concentration. Alcohol concentration can be established either by a reading of the amount of alcohol in a person's breath (to be more precise, 210L of breath) or alternatively, in their blood (in which case the relevant volume is 100mL). In this paper, the umbrella acronym BAC is used to refer to blood/ breath alcohol concentration.

What is of particular relevance to the issue under discussion are the provisions which are designed to facilitate proof of a PCA offence. These are contained in schedule 3 to the Act (the Schedule). As practitioners would know, the general scheme of Division 2 of the Schedule is that police are empowered to require drivers to undergo a breath test (cl.2). A failed breath test (i.e. one that indicates a BAC in excess of the legal limit applicable to the driver in questions) enlivens a power to arrest the driver for the purpose of a breath analysis (cl.4). Once a person is arrested for the purpose of a breath analysis, clause 5 deals with the requirement to submit to a breath analysis.

Critically, a person who is subjected to a breath analysis pursuant to the scheme described above is entitled to request that a sample of their blood be taken and analysed for BAC. This entitlement is dealt with in cl.21 of the Schedule which reads as follows:

21 Request for blood sample to be taken for analysis when person required to submit to breath analysis

(1) A person who is required by a police officer under Division 2 of Part 2 to submit to a breath analysis may request the police officer to arrange for an authorised sample taker to take, in the presence of a police officer, a sample of that person's blood, for analysis in accordance with Part 4 to determine the concentration of alcohol in the blood at the person's own expense.

Note : Part 4 provides for the procedures in relation to the taking and analysis of samples taken under this subclause.

(2) A request by a person under subclause (1), or the taking of a sample of that person's blood, does not excuse that person from the obligation imposed on the person to submit to a breath analysis in accordance with Division 2 of Part 2.

As an aside, the value of the entitlement is Cl. 21 is questionable. It is to be observed that the right is merely to "request" rather than "demand" a blood test. Further, there is no corresponding obligation on the police to accede to such a request. Further, there is no obligation on police to even inform a person of this entitlement. Consequently, the utility of cl. 21 for an accused person depends a great deal on the good faith of the police dealing with them.

In any event, the upshot of the above scheme is that, where the cl.21 procedure is utilised, two BAC readings are produced. One from the breath analysis and one from the blood analysis. In cases where both readings support the PCA charge in question, the existence of two BAC readings is of no great moment. However, where the breath analysis returns a reading which supports a PCA charge, but the result of the blood analysis is below the legal limit (or below the threshold for the relevant charge) the question arises as so which reading is to be preferred over the other. This question directs attention to cl 31 of the Schedule, the relevant parts of which are set out below:

31 Evidence of alcohol concentration in proceedings for offences against section 110

(1) This clause applies to any proceedings for an offence against section 110 (Presence of prescribed concentration of alcohol in person's breath or blood).

(2) Evidence may be given in proceedings to which this clause applies of the concentration of alcohol present in the breath or blood of the person charged as determined by:

(a) a breath analysis carried out by a police officer authorised to do so by the Commissioner of Police, or

(b) an analysis of the person's blood under this Schedule.

> (3) In any such proceedings, the concentration of alcohol so determined is taken to be the concentration of alcohol in the person's breath or blood at the time of the occurrence of the relevant event referred to in clause 3 (1) (a), (b) or (c) if the breath analysis was made, or blood sample taken, within 2 hours after the event unless the defendant proves that the concentration of alcohol in the defendant's breath or blood at the time concerned was:
>
> (a) in the case of an offence against section 110 (1)-zero grams of alcohol in 210 litres of breath or 100 millilitres of blood, or
>
> (b) in the case of an offence against section 110 (2)-less than 0.02 grams of alcohol in 210 litres of breath or 100 millilitres of blood, or
>
> (c) in the case of an offence against section 110 (3)-less than 0.05 grams of alcohol in 210 litres of breath or 100 millilitres of blood, or
>
> (d) in the case of an offence against section 110 (4)-less than 0.08 grams of alcohol in 210 litres of breath or 100 millilitres of blood, or
>
> (e) in the case of an offence against section 110 (5)-less than 0.15 grams of alcohol in 210 litres of breath or 100 millilitres of blood.

It will be noted that cl.31 provides that the reading obtained from a breath or blood analysis carried out under the Schedule is rebuttably presumed (i.e. deemed) to be the accused's BAC at the time of driving (or other relevant act constituting the offence) as long as the relevant test is conducted within 2 hours of driving (or other relevant act).

The purpose of this deeming provision is clear. It is intended to facilitate proof of a PCA offence. It is necessary because of the requirement in s110 for contemporaneity of driving with a BAC in the relevant range.

As a matter of actual fact, the BAC of a person who has consumed alcohol is very dynamic. It can vary significantly over a relatively short period. This creates a practical problem for the prosecution of PCA offences. It almost always takes some length of time from first pulling the driver over to the conduct of the breath or blood analysis. This means that it is almost inevitable that the reading produced by the analysis does not in truth represent the actual BAC of the accused at the time of driving. Hence, without the benefit of the deeming effect of cl.31 it would be next to impossible for the prosecution to discharge its onus of proof as to the accused's BAC at the time of driving.

It will further be noted that the deeming effect of the provision extends to both a breath and a blood analysis conducted within 2 hours of driving. In circumstances where there is both a breath and a blood analysis; and where the results of the two analysis are inconsistent with each other this creates an apparent paradox. Both the inculpatory and the exculpatory results are cloaked with the deeming effect of cl. 31 and the legislation has no express provision for resolving the conflict between them.

Until recently, the circumstances described above were auspicious for a defence. In the writer's experience, faced with inconsistent readings the prosecution would invariably be amenable to withdrawing PCA charges. However, the decision of the Court of Criminal Appeal in *Bignill v DPP* [2016] NSWCA 13 has radically altered the landscape.

The facts of *Bignill* were can be shortly stated. Around 9 am at on Saturday 19 April 2015 Mr. Bignill was driving on a road in Neutral Bay. He was stopped by police and subjected to a random breath test. That test indicated the presence of alcohol in his breath above the legal limit. He was than arrested and conveyed to a police station where at 9.26 am a breath analysis was conducted. The breath analysis revealed a BAC of 0.054. Mr Bignill was subsequently informed of his right to request a blood test pursuan to cl. 21. He availed himself of that right and was conveyed to a hospital where at 10.35 am a doctor took a sample of his blood. That sample was subsequently analysed and found to have a BAC of 0.049.

Consequent upon the above described series of events, Mr. Binill was charged with Low Range PCA. He pleaded not guilty before the Local Court. In the summary trial, the prosecution sought to establish his BAC by tendering the result of the breath analysis. The defence countered by tendering the result of the blood analysis. The Local Court Magistrate hearing the matter found that both results were entitled to the benefit of the presumption in cl. 31 and dismissed the charge. The prosecution than appealed to the Supreme Court. Adamson J. found that the magistrate had erred in dismissing the charge and remitted the matter to the Local Court. Mr. Bignill than appealed against the Decision of Adamson J to the Court of Appeal.

The Court of Appeal found unanimously against Mr. Bignill. The decision rested on a finding that the only the prosecution can obtain the benefit of the deeming provision in cl. 31(3). At [28] Bathurst CJ (with whom Ward JA and Emmat AJA agreed) said:

> "The applicant was not entitled to the benefit of the "deeming provision" in seeking to prove that the concentration of alcohol was blow the legal limit at the time the applicant was required to submit to a breath test. The only operation of the deeming provision is to raise the rebuttable presumption to which I have referred [concerning the BAC of the accused at the time of driving]. It has no operation in assisting the accused to rebut the presumption."

In reaching this conclusion, His honour placed reliance primarily on two matters. First, that the construction adopted by the court is consistent with the purpose of cl. 31, which was said by his honour to be the facilitation of proof of a matter which would otherwise by difficult, if not impossible, to prove (at [33]). Second, his honour took the view that the construction of the deeming provision in this way was consistent with previous authority dealing with the statutory predecessor of cl. 31(3).

Caution is required in determining what the significance of the *Bignill* decision is. If not properly understood there is a danger that it may be applied too broadly. In particular, it is important to appreciate that *Bignill* does not stand for the proposition that where there is a

conflict between the result of a breath analysis and a blood test, the breath analysis is to be preferred. On the contrary, the *Bignill* decision expressly acknowledges that :

"… clause 31(2) gives no primacy to a breath test over a breath analysis"

Presumably, the equal status of both types of analysis would also carry over to the deeming provision in cl.31(3).

The only proposition that *Bignall* establishes is that the deeming provision operates only on the evidence tendered by the prosecution, not the defence. The reason that in *Bignill* the breath analysis attracted the deeming provision and the blood test did not was that the prosecution only tendered the result of the breath analysis in its case, the blood analysis being tendered by the defence.

On one view, this places the prosecution in the best position of all, since the prosecution can choose to lead evidence of the analysis which produced the highest reading in any give case and thereby cloak that reading with the substantial advantage of the deeming effect of cl. 31 (3). However, the writer suggests that there is another way to approach the problem that *Bignill* poses for the defence.

Although this argument does not seem to have been considered in *Bignill*, it is strongly arguable that where there are conflicting BAC readings available, it is not open to the prosecution to cherry pick the higher reading and ignore the lower one. After all, it is a well accepted principle of criminal justice that the prosecution has a duty to lead all available relevant evidence whether inculpatory or exculpatory. There is nothing in the Schedule, or elsewhere in the Act to suggest that this principle does not apply to evidence of a person's BAC in a prosecution for a PCA offence. It is therefore the writer's view that where there is a blood analysis which is inconsistent with a breath analysis, defence practitioners ought to insist that the prosecution tender the results of both in its case. A refusal by the prosecution to do so ought to be met with an application for a permanent stay on the basis of abuse of process and denial of an opportunity for a fair trial.

Mandetory interlock orders

Mandatory Interlock Orders (MIOs) have been a feature of traffic law in NSW since 1 February 2015. With the scheme now just over two years old, it is timely to re-visit it, with a particular focus on certain aspects of it which either appear to be less well understood or may be expected to become more prominent as the scheme enters maturity.

Broadly speaking, a MIO is an order imposed on certain offenders who commit a mandatory interlock offence (see table below). It is generally understood to require the offender to serve a relatively short disqualification period followed by a longer period on an interlock license before he/she becomes eligible for a 'normal' license again.

Below is a table identifying the Disqualification and Minimum Interlock periods relevant to each offence to which the MIO scheme applies.

Offence	Min. disq.	Max. disq.	Min. Interlock period
Novice, Special and Low range PCA – 2nd or subsequent offence	1 month	3 months	12 months
Mid range PCA- 2nd or subsequent offence	6 months	9 months	24 months
DUI- 2nd or subsequent offence	6 months	9 months	24 months
High range PCA- 1st offence	6 months	9 months	24 months
High Range PCA - 2nd or subsequent offence	9 months	12 months	48 months
Fail/ refuse breath analysis/ blood sample - 1st offence	6 months	9 months	24 months
Fail/ refuse breath analysis / blood sample- 2nd or subsequent offence	9 months	12 months	48 months

What is striking about the above table is the incongruity of the penalties provided for under this scheme and those for the less serious offences which are outside it. A comparison of the two reveals that, in a practical sense, the penalties for offences which attract MIO provisions by reasons of being a second or subsequent offence are less onerous than those for the equivalent first offence. The real 'bite' in a penalty for a PCA offence is the period of disqualification. It is that period that can have devastating consequences for a person's ability to be gainfully employed and therefore their financial situation. Yet, by way of example, a first-time offender who is convicted for a High Range PCA faces a minimum disqualification of 12 months and an automatic period of 3 years, whereas a second time offender may be disqualified for as little as 9 months and, at worst, 12 months.

An important aspect of the MIO scheme which is often glossed over (if not ignored all together) is the underlying 5 year disqualification. This disqualification arises out of the provisions of s211(1)(b), which is to the following effect (emphasis added):

211 Mandatory interlock orders

(1) A mandatory interlock order is an order that:

(a) disqualifies a person convicted of a mandatory interlock offence from holding any driver licence for a period, being:

(i) the minimum disqualification period for that kind of mandatory interlock offence, or

(ii) a longer period (not exceeding the maximum disqualification period for that kind of offence) specified by the court, **and**

(b) disqualifies the person from holding a driver licence (other than a learner licence or interlock driver licence) during the period of 5 years commencing on the day of the conviction unless the person has first held an interlock driver licence:

(i) for a period (or periods in total) equivalent to the minimum interlock period, or

(ii) for a longer period specified by the court.

As is patent from the above, every MIO disqualifies the offender for a period of 5 years, however that disqualification is remitted upon successful completion of the interlock programme. For the majority of offenders- who complete the programme- this is of academic interest only. For the few who do not however, it can be a disaster. It means that a person who, for whatever reason, does not complete the programme finds themselves disqualified for 5 years- a period which might be considered to be out of all proportion to the original offence. Worst still, the underlying disqualification is the same for all offences. This means that a person whose original sin (offence) is a low range PCA (second offence) will be subjected to the same 5 year disqualification as a person whose interlock order was made in respect of a second offence of High Range PCA. It is impossible to reasonably argue that this represents a just outcome.

It is suggested that several practical considerations flow from the underlying disqualification period. To begin with, when advising a client whom will be (or has been made) the subject of an MIO, the fact of the underlying disqualification ought to be explained to her/him so as to underscore the importance of participation in and completion of the program.

Moreover, when acting for a client who is pleading guilty to a mandatory interlock offence, instructions should always be obtained as to whether the client's circumstances are such that they may qualify for an interlock exemption order (see below). Once an interlock order is made, if the offender is unable to complete the program, they are faced with the inevitability of a 5 year disqualification period.

Lastly, practitioners need to be cognisant of the provisions of s215(2)(a) which provides that if a person is convicted of a major traffic offence during an interlock period, that person ceases to participate in the interlock program. Consequently, when acting for a person who find themselves in the unenviable position of having been charged with such an offence during an interlock period, it is particularly important to do whatever is possible to avoid a conviction. This may mean running a defence where in ordinary circumstances the prospects of success would not justify the cost, pressing the Court for a dismissal under s10 (admittedly a difficult task in circumstances where the offender likely has 2 previous major offences on their record), exploring whether there are grounds for an application pursuant to s32 of the

Mental Health (Forensic Provisions) Act 1990 or, if the Court is sympathetic to the client's predicament, seeking a s11 remand so as to take the date of conviction past the expiration of the interlock program.

As referred to above, it is possible to seek an interlock exemption order. The effect of such an order is that the offender is not subject to an MIO but receives a disqualification in accordance with the familiar provisions of s205 of the Act. For most offenders, an exemption order is not attractive because it results in a longer period of disqualification. However, for some it may be a "life saver".

If a person is simply unable to complete the interlock program (for instance for financial reasons), or is at grave risk of breaching the program conditions (perhaps due to a mental health issue) an interlock exemption order may be the only means of avoiding having to serve out the 5 year underlying disqualification period. Professional drivers who drive vehicles belonging to their employer often find that their employer is understandably unwilling to allow the instillation of an interlock device in their vehicles. For them, IMO effectively precludes engagement in their former employment for the duration of the whole program (which can be 5 years or longer).

Exemption orders are provided for in s 212 of the act, which is in the following terms:

212 Interlock exemption orders

(1) An interlock exemption order is an order that exempts an offender from the operation of section 211.

(2) Section 205 (Disqualification for certain major offences) applies to and in respect of an offender to whom an interlock exemption order applies.

Note : If an interlock exemption order is made, the offender concerned will automatically be disqualified from holding a driver licence for the relevant period set out in section 205 and will not be subject to the requirement to participate in an interlock program.

(3) A court may make an interlock exemption order only if the offender proves to the court's satisfaction:

(a) that the offender does not have access to a vehicle in which to install an interlock device, or

Note : For example, there is only one vehicle to which the offender has access in which an interlock device could be installed and it is used jointly with a family member or other person who has a medical condition preventing the person from providing a sufficient breath sample to operate the device and it is not reasonably practicable to modify the device.

(b) that the offender has a medical condition diagnosed by a registered medical practitioner that prevents the offender from providing a sufficient breath sample to operate an approved interlock device and it is not reasonably practicable for an interlock device to be modified to enable the offender to operate the device.

(4) A person has
"access" to a vehicle for the purposes of subsection (3):

(a) if the person is the registered operator, owner or part owner of the vehicle or shares the use of the vehicle with the registered operator, owner or part owner of the vehicle, and

(b) it is reasonable in all the circumstances to install an interlock device in the vehicle.

(5) An interlock exemption order must not be made merely because an offender:

(a) cannot afford the cost of installing or maintaining an approved interlock device, or

Note : Financial assistance for use of approved interlock devices is available in certain cases-see section 48.

(b) will be prevented from driving a vehicle in the course of his or her employment if a mandatory interlock order is made, or

(c) has access to a vehicle but the registered operator of the vehicle refuses to consent to the installation of an interlock device in the vehicle.

On one view, exemption orders are very difficult to obtain. The only two grounds for the granting of such an order are absence of access to a vehicle or medical grounds. Furthermore, ss5 expressly excludes affordability, employment requirements and even unwillingness of the owner of the vehicle to install an interlock as grounds of an exemption order. Consequently, in the writer's experience, applications for such orders are rarely made, let alone granted.

While the above-described attitude to exemption orders is well founded, there is another potential, if risky, way to approach them. On this view, it is quite simple for an offender to bring himself within the purview of s212. It will be noted that lack of access to a vehicle (as defined for the purpose of this section) is a circumstance which enlivens the Court's power to make an interlock exemption order. Clearly enough, the time at which the offenders lack of access to a vehicle is considered is the time of the imposition of sentence, not some earlier time such as the date of commission of the offence. Hence, if an offender wished to put themselves in a position to be eligible of an interlock exemption order he/she could simply make sure that at the date of sentence they did not own a car, nor had access to one (say owned by a partner) at the date on which the application for the order is made.

This strategy does of course have risks. It is entirely possible that a magistrate dealing with the application (or the police prosecutor) may enquire as to whether the offender had a

vehicle at the time of committing the offence and when and why that vehicle was disposed of. A practitioner faced with these sorts of enquiries would of course need to be honest with the Court in their response. In those circumstances, it may become very obvious very quickly that the offender had a vehicle and disposed of it in a deliberate attempt to render him/her-self eligible for an interlock exemption order.

A magistrate who is sympathetic to the plight of an offender for whom a MIO spells disaster may have no difficulty with this tactic. On the other hand, once can easily imagine that, while there is (in the writer's view) nothing unethical about this approach- it may well raise the ire of a magistrate who perceives it as an illegitimate attempt to circumvent the statutory restrictions on the granting of exemptions. This may lead not only to a refusal of an exemption order but could result in a higher penalty than would otherwise have been imposed. None the less, for some offenders, the risk of aggravating the Court may be one which in all of the circumstances is worth taking.