



# **CONDITSIS LAWYERS**

**DEFENDING TRAFFIC OFFENCES**

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## **Defending Traffic Offences**

This paper discusses some ways in which traffic offences can be defended. It is intended to be a practical guide for traffic law practitioners who daily advise and represent individuals charged with the commission of traffic offences. It is not, and does not pretend to be, an academic treatise. It argues no particular position and has no central theme except that betrayed by its title. Consequently, it is little more than a mosaic of different defences and defence strategies relating to traffic offences and hence lacks a rigid structure. While this makes it less erudite than some, it is the writers hope that what it lacks in scholarly elegance, it makes up for in practical utility.

### **Why examine traffic offences?**

Traffic law is, as we all know, merely a branch of the criminal law. Traffic offences must be proved to the criminal standard and commission of traffic offences attracts criminal penalties. However, one could sometimes be forgiven for thinking that traffic law stands outside the 'real' criminal law. Most non-lawyers make a distinction between criminals on the one hand and traffic offenders on the other (no doubt because most members of our society have themselves committed traffic offences). Lawyers too sometimes fall into the error of trivialising the importance of traffic offences.

One consequence of this is that we can develop a tendency to pay less careful attention to the possibilities that exist for defending against traffic offences than we may do in relation to more serious 'real' criminal charges. Often, sitting in court on a list day, the writer hears matters put to Courts in mitigation of a plea of guilty which would appear to in fact be fertile ground for a defence. No doubt, this is largely because clients do not wish to spend the money necessary to mount a defence; however it is difficult not to feel a sense of unease at the prospect that some may not have been given advice that they may have a potential defence.

A moment's reflection reveals why it is indeed important to be alive to potential defences when advising in respect of traffic offences.

For a start, traffic offences have a much wider reach than other types of offences. They are by far the most ubiquitous type of offence committed in the community. Hence, the way we as practitioners approach the task of advising and representing individuals who have been accused of traffic infractions has an impact on a much wider section of the community.

Secondly, the consequences of commission of a traffic offence can be severe. Loss of license, which is a very common penalty for traffic offenders, can set in train a chain of events which leads to loss of livelihood, financial ruin, loss of the family home and, in some cases, relationship breakdown.

With this in mind, the aim of this paper is to contribute, albeit in small measure, to an increase in the level of understanding of the artillery available to a criminal law practitioner when representing persons accused of traffic offences. This paper does

not purport to be either exhaustive or definitive on its subject. The writer merely hopes to point out some aspects of the law which practitioners may find of assistance when advising and representing clients in respect of traffic matters.

### **Honest and reasonable mistake of fact.**

One of the most fertile sources of defences to traffic offences is the doctrine of honest and reasonable mistake of fact. While most practitioners are familiar with the defence of honest and reasonable mistake of fact or, as it is sometimes referred to, a *Proudman and Dayman* defence (or, “the rule in *Tolson’s* case”), it is worth restating.

The most commonly quoted formulation of the doctrine comes from the judgment of Dixon J in *Proudman v Dayman* (1941) 67 CLR 536:

“As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.”

The defence applies to offences of strict liability. That is, offences where *mens rea* is not an element of the offence, but which are not offences of absolute liability (in which case, the offence conclusively established upon proof of the *actus reus*).

So much is probably not news to most seasoned criminal practitioners. The writer now turns to consider some aspects of the defence which, in the writer’s experience, are sometimes less frequently appreciated.

#### Not really a “defence”

Describing the issue of honest and reasonable mistake as a “defence” can lead to confusion about its true nature. It is often supposed that proof of existence of honest and reasonable mistake lies on the defendant on the balance of probabilities. That is not so.

Absence of honest and reasonable mistake is an element of any strict liability offence. The defendant bears only an evidentiary onus to raise the issue (unless the issue arises on the evidence adduced by the prosecution itself). Once raised, the prosecution must negative it beyond a reasonable doubt in order to secure a conviction.

In *He Kaw Teh v R* (1985) 157 CLR Gibbs CJ said

“provided that there is evidence which raises the question the jury cannot convict unless they are satisfied that the accused did not act under the honest and reasonable mistake”

More recently in *CTM v The Queen* [2008] HCA 25 Gleeson CJ, Gummow, Crennan and Kiefel JJ in their joint judgment preferred to describe the doctrine as ‘a ground of exculpation’. At paragraph 8 their honours stated :

“As explained in *He Kaw Teh v The Queen*, the evidentiary onus of raising the ground of exculpation is on the accused, but, once that occurs, the ultimate legal onus of displacing the ground lies on the prosecution.”

The practical effect of this is very significant. In the absence of an admission to police, it can be very difficult for the prosecution to establish beyond a reasonable doubt that an accused did not make an honest mistake where he or she claims to have made it. It is therefore important when relying on the *Proudman and Dayman* ground of exculpation to assist the bench to properly understand where the onus of proof lies.

#### Mistake of fact and mistake of law

The *Proudman and Dayman* ground of exculpation is only made out where the mistake is one of fact. A mistake of law does not provide any ground of exculpation. In *CTM* at paragraph 7 their honours specifically adverted to this issue:

“Mistakes of law are not a ground of exculpation: ignorance of the law is no excuse”

The simplicity of this statement belies the difficulty in distinguishing between matters of fact and matters of law. This distinction has often been acknowledged as being particularly problematic. In *Ostrowski v Palmer* McHugh J said (at paragraph 37) :

“The distinction between a mistake of fact and a mistake of law is by no means a simple one”.

A comprehensive discussion of this distinction is beyond the scope of this paper (indeed, it would merit a paper of its own). However, it is important to point to some aspects of this issue which often arise in the area of traffic law.

The most recent High Court authority on the question of what is a mistake of law versus one of fact in *Ostrowki v Palmer* [2004] HCA 30. Briefly, the facts of the case were as follows.

The Respondent (who was a commercial fisherman) was charged with the offence of fishing for rock lobster in a prohibited area contrary to a regulation made under WA law. Before he set out fishing, the Respondent had attended the offices of the relevant fishery authority and requested a copy of the fishing regulations for that year. Unfortunately, he was given an incomplete copy of the regulations which was missing the regulation which declared the area in which he was fishing a prohibited area.

Accordingly, the Respondent, having done everything reasonably possible to inform himself of his obligations, set about fishing in the relevant area, ignorant of the fact that the area was in fact declared a prohibited area in so far as fishing for rock lobster was concerned. He was, as luck would have it, detected and charged with the offence, which carried with it a very substantial mandatory monetary fine calculated by reference to the value of lobster caught by the accused.

At hearing, the Respondent relied in his defence on the provisions of s 22 and 24 of the *Criminal Code* (WA). These provisions were accepted by the majority to reflect with “complete accuracy” the common law with regard to honest and reasonable

mistake of fact<sup>1</sup>. Thus, the question before the Court became whether the mistake made by the Respondent was one of fact or law.

The Court found that the Respondent's mistake was a mistake of law, not one of fact. The basis of that finding was that the Respondent knew about the existence of each element of the offence (he knew that he was fishing, for rock lobster and he was not mistaken about the location in which he was fishing). He was merely operating under a mistaken belief as to the absence of a prohibition on the conduct in which he was engaged.

The proposition which emerges from *Ostrowski* is that it is no answer to a charge that one did not know that particular conduct was prohibited. However, if the mistake made by the accused goes directly to the existence of one of the elements of the offence, it is strongly arguable that the mistake was a mistake of fact, not of law.

This proposition is most clearly articulated in the judgment of McHugh J where at paragraph 42 his honour cites with approval the following passage from the judgment of Brennan J in *He Kaw Tei*:

"Similarly, in *Thomas*, Latham CJ said that a "**[m]istaken belief as to any relevant element of the offence is sufficient to bring the case within the rule in *Tolson's Case***". His Honour summarised the rule in *R v Tolson* as follows: "[T]he accused is not guilty if he had an honest and reasonable belief in the existence of facts which, if they had really existed, would have made his act both legally and morally innocent." (emphasis added, footnotes omitted).

Support for this proposition can also be found in the judgments of the joint judgment of Gleeson CJ and Kirby J<sup>2</sup>.

*Ostrowski* has important implications in the area of traffic law.

#### Honest and reasonable mistake and drive after license cancelled.

One area in particular where the distinction between mistake of fact versus mistake of law often assumes significance is in relation to charges of drive after license cancelled contrary to 54(4) of the *Road Transport Act 2013*. A common scenario leading to this charge is that of a person who has been disqualified from driving for a particular period and recommences driving after the expiry of the disqualification period without obtaining a new licence, unaware of the fact that a disqualification operates as a cancellation of their license by virtue of s207 of the *Road Transport Act 2013*.

In these circumstances, an attempt to rely on honest and reasonable mistake is often met with a retort from the prosecution (and/or the bench) that the mistake (even if genuinely and reasonably held) is one of law not one of fact, and therefore affords no exculpation to the accused. The operative mistake, it is said, stems from ignorance of the law which provides for automatic cancellation of a license upon disqualification, and therefore is clearly a mistake of law.

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<sup>1</sup> Per Gleeson CJ and Kirby J at par. 9; per McHugh J at par.29

<sup>2</sup> Per Gleeson CJ and Kirby J at par. 10 and 11

On its surface, this proposition seems cogent. However, in the writer's view, closer analysis in the light of *Ostrowski* yields a very different result. The fact that the accused, at the time of driving, had their license cancelled is an essential element of the offence. Accordingly, a mistaken belief that one's license has not been cancelled goes directly to an element of the offence. Hence, in accordance with *Ostrowski*, it is to be characterised as a mistake of fact.

A different way to demonstrate the correctness of this proposition is to point out that the mistake is not one which goes to the existence of a law prohibiting the conduct constituting the offence, but rather to the existence of a state of affairs which bring the conduct of the accused within the ambit of that law. That is, the accused knew that a person whose license is cancelled is not entitled to drive, but was simply unaware that he/she belonged to that class of persons.

### Honest and reasonable mistake and PCA charges

Honest and reasonable mistake of fact applies to PCA charges. In *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002) [2004] NSWCCA 303* Howie J twice affirmed that PCA offences are offences of strict liability (see [40] and [101]).

Moreover, in *DPP v Bone* (2005) 64 NSWLR 735, Adams J expressly rejected the DPP's submission that PCA offences are absolute liability offences, and affirmed the availability of the defence of honest and reasonable mistake.

The effect of this is that if the accused raises the issue that he/she honestly and reasonably believed that he/she was not over the legal limit at the time of driving than, unless the prosecution can negative that issue beyond a reasonable doubt, the accused is entitled to be acquitted.

In practice, the most obvious application of this defence to PCA matters is in relation to the so called "morning after" offence. That is, where the accused is detected with typically a very low blood alcohol concentration after having consumed alcohol the previous night.

In such a case, it is almost always the situation that the accused thought that he/she was not over the legal limit and was very much surprised when told by police that he/she was in fact over. For a lay person (without the benefit of the accrued wisdom about how alcohol is metabolised by the human body which most magistrates and criminal practitioners acquire during their career) such a mistake is (in the writers view at least) quite a reasonable one to make. Indeed, there seems to be an implicit recognition of this fact within the profession and amongst members of the magistracy.

This is evidenced by what used to be the common practice of dismissing charges in these circumstances under the provisions of section 10 of the *Crimes (Sentencing Procedure) Act 1999* before low range PCAs became a penalty notice offence. What

is missing however is widespread recognition of the applicability of the honest and reasonable mistake issue.

Another good candidate for this defence is the accused who in his/her drinking has been scrupulous to count their drinks and ensure that they stayed within the familiar guideline which was historically promulgated by the RTA (as it then was) of “two standard drinks in the first hour and one every hour thereafter”, and then before driving waited some time to allow a further margin for abundant caution. Again, in that situation one would have thought that the accused was operating under an honest and reasonable belief that he/she was under the limit.

It is worth noting that the TfNSW no longer promulgates the guideline referred to above. Instead, the current road user’s handbook simply states that it is not possible to either estimate or calculate one’s BAC and provides a list of reasons why this is so. This advice is, in the writer’s view, next to useless in a society in which the consumption of alcohol is very much a part of the culture and where personal breath testing devices are not widespread.

All of this serves to underscore the complex task that it is to accurately judge one’s BAC at any given point in time. Seen in this light, the defence of honest and reasonable mistake assumes particular relevance.

Below is a suggested checklist of some of the matters with respect to which instructions should be obtained when a defence of honest and reasonable mistake for a PCA matter is being contemplated:

1. What drinks were they, in particular, were they standard size?
2. Is there any possibility that some drinks might have been spiked without the accused’s knowledge?
3. What method was the accused using in an effort to ensure that he/she was under the limit at the time of driving?
4. Was the accused ever previously subjected to an RBT after having relied on this method and if so:
  - a. What was the result of the RBT
  - b. What conclusions did the accused draw about the reliability of that method from that experience?
5. Did the accused rely on the ‘rule of thumb’ referred to above?
6. If so,
  - a. how did the accused become aware of that rule
  - b. when did the accused obtain his/her driver’s license (i.e. Was it at a time when the RTA was still promulgating the rule of thumb).

- c. did the accused allow a margin for error before commencing the journey.
7. How did the accused feel before commencing the journey?
8. Was there any facility for checking ones BAC at the venue where the accused was consuming alcohol?
9. Did the accused in fact undergo a breath test before commencing driving?

### Honest and reasonable mistake and offences against Road Rules

Another area where the ‘defence’ of honest and reasonable mistake is under-utilised is in relation to alleged breaches of the Road Rules. It is not uncommon to hear practitioners and magistrates refer to offences under the road rules as ones of strict liability. This is not in fact the case. The offence of honest and reasonable mistake is available for most breaches of the road rules, albeit via a different route.

The principles of criminal responsibility applicable to the road rules are not the common law principles which are applicable to all other offences in NSW, but in fact the principles set out in Chapter 2 of the *Commonwealth Criminal Code*.

This is because of regulation 10-1 (1) and (2) of the of the *Road Rules 20014* which reads:

*“Subject to this rule, Chapter 2 of the Criminal Code set out in the Schedule to the Criminal Code Act 1995 of the Commonweal (the “**Commonwealth Criminal Code**”) applies to an offence against these Rules as if the Chapter were in force as a law of New South Wales.”*

*Further, regulation 10-1 (2) reads:*

*“An offence against these Rules is a strict liability offence for the purposes of Chapter 2 of the Commonwealth Criminal Code (as applied by subrule (1)), except where these Rules expressly provide otherwise.”*

In effect, these two provisions engage the operation of sections 6.1 and 9.2 of the *Commonwealth Criminal Code*. In turn, these sections essentially codify the common law in respect to honest and reasonable mistake.

Honest and reasonable mistake is therefore fertile ground for defending a whole range of traffic offences.

Consider for instance speeding infringements (i.e. Infringements of rule 20 of the Road Rules). Speeding allegations can be very difficult to beat by challenging the actual speed travelled. However, in some cases, the defence of honest and reasonable mistake is open.



One such instance is where the accused honestly thought that he/she was travelling at or under the speed limit by relying on the reading on their speedometer. In most cases a belief based on the speedometer fitted to the car would have to be considered to be reasonably held. In this regard, it is worth noting that Australian Design Standards for speedometers fitted to vehicles only require them to be accurate to plus or minus 10%. This can be quite significant. A vehicle travelling at 120 km/hr could be indicating to its driver a speed of 110 km/hr.

It should however be noted here that honest and reasonable mistake has been held not to be available where the driver was under and honest and reasonable misapprehension as to the speed limit applicable to the stretch or road on which they were travelling. In *Roads and Traffic Authority (NSW) v O'Reilly* [2009] NSWSC 134 Schmidt AJ, applying *Ostrovski*, held that a mistaken belief as to the applicable speed limit was a mistake of law, not one of fact. This is because it is a mistake not as to the elements of the offence (the driver knows what speed they are travelling at) but rather a mistaken belief that travelling at that speed is not prohibited by law.

### **The Jiminez “defence”**

In *Jiminez v R* [1992] HCA 14, the High Court held that a person cannot be said to be driving while unconscious at the wheel. In a joint judgment the majority said at paragraph 9 :

*“If the applicant did fall asleep, even momentarily, it is clear that while he was asleep his actions were not conscious or voluntary (an act committed while unconscious is necessarily involuntary) and he could not be criminally responsible for driving the car in a manner dangerous to the public. The offence of culpable driving is, in this respect, no different to any other offence and requires the driving, which is part of the offence, to be a conscious and voluntary act”*

This does not mean that a person who has fallen asleep at the wheel will always escape criminal liability. The Court went on to hold that, while a person cannot be said to be driving while unconscious, their driving leading up to falling asleep can be said to be dangerous if they were driving in a condition which gave rise to a danger that they may fall asleep (or lose consciousness for some other reason). The majority of the Court said at paragraph 13:

*“so far as “driving in a manner dangerous” is concerned, the issue is ...whether the driver was so tired that, in the circumstances, his driving was a danger to the public.”*

The most obvious application of this principle is in respect of charges of drive manner dangerous and negligent driving. If the charge stems from a collision in which the accused was involved, and that collision resulted from the accused falling asleep at the wheel then the prosecution must prove beyond a reasonable doubt that just prior to the collision the accused drove in a state of tiredness which created a danger of falling asleep. Otherwise, the accused is entitled to an acquittal.

This is not the only scenario in which *Jiminez* can be useful to a traffic lawyer. Used imaginatively, it can be utilised (in appropriate cases) in relation to any charge which has driving as an essential element. As an example, some years ago the writer acted for a person charged with high range PCA. The client was found by passers-by slumped over the wheel of his car. He was asleep, the engine was running, his car was in gear and resting up against a parked car with which it had obviously collided. After being woken up, he was subjected to a breath analysis and returned a reading in the high range. Perhaps not surprisingly, he was charged with high range PCA.

He entered a plea of not guilty. The basis of the plea was that in accordance with the *Jiminez* principle, he could not have been said to be driving whilst unconscious. Therefore, since driving is an essential element of a PCA offence, he could not have committed the offence while asleep. While it was clear that the client had driven to the site of the accident at some earlier time, there was no way to ascertain when that was. This meant that the prosecution could not prove what his blood alcohol concentration would have been at that time, nor could they prove that the 2-hour rule was in fact complied with (see below). Following some last-minute discussions with the prosecutor, the charge was withdrawn and a charge of negligent driving proffered (to which a plea of guilty was entered and, dealt with by way of fine only).

### **Accident or reasonable effort**

A little known defence to breaches of the Road Rules is the defence of accident or reasonable effort.

The source of this defence is to be found in cl. 10-1(3) of the *Road Rules 2014* which reads:

*“Without limiting any defence under Chapter 2 of the Commonwealth Criminal Code ( as applied by subrule (1)), a person is not liable to a penalty for any offence under these Rules if the person proves to the satisfaction of the court dealing with the case that the offence:*

*(a) was the result of an accident, or*

*(b) could not have been avoided by any reasonable efforts on the person’s part.”*

This, potentially very useful, provision is very rarely relied upon.

Unfortunately there is, so far as the writer can ascertain, a complete lack of authority as to the interpretation of this provision. Hence, in order to determine what the provision actually means, one can only have recourse to the language of the clause and ordinary principles of construction of statutes and subordinate legislation. This is problematic because, as will appear from the analysis below, the clause is very poorly drafted.

On thing that is clear is that the clause throws the onus of proof squarely upon the accused person to establish the existence of the facts which give rise to the defence.

This is clear from the structure of the clause: “a person is not liable... if the person proves...”. Clearly the onus of proving the matters required by this clause rests on the person who wishes to escape liability for the offence.

The standard of proof which applies to this defence is less clear. The clause itself provides that the matters which must be proved in order to engage the operation of the clause must be proved “to the satisfaction of the Court dealing with the case”. This kind of nebulous standard is unusual.

The writer suggests that the better view is that the section should be read to require a standard of proof for this defence which is consistent with the general standard of proof in relation to criminal defences, that is, on the balance of probabilities.

The use of the words “is not liable to a penalty” instead of the more commonly used terminology such as “is not guilty of...”, “not liable to conviction for” or “it is a defence to..” is also problematic. Is this to be interpreted as some kind of a partial exculpatory provision in that it exculpates from *penalty* but not from *guilt* analogous to section 10A of the *Crimes (Sentencing Procedure) Act 1999*? Such a result would seem to defy logic.

On the other hand, if the words: “is not liable to a penalty” are to be read as being equivalent to: “is not guilty of”, then the provision is tautological. In order to engage the operation of the clause, the accused must prove that “the *offence*” (my emphasis) took place in one of the circumstances described in sub clause (a) or (b). Thus, the commission of an offence seems to be a pre-requisite to the clause being engaged. Of course, the commission of an offence (as opposed to engaging in conduct which would otherwise constitute an offence) by definition implies guilt- and therein lays the tautology. To put it another way, how can one be not guilty of an offence if one has “committed” it?

Notwithstanding this difficulty, the writer suggests that the better view is that the section should be read as providing a complete defence. Otherwise it just does not seem, to the writer at least, to make a great deal of sense.

If the writer’s forgoing suggestions about the true meaning of this clause are to be accepted, then the actual meaning of first part of the clause can be stated as follows:

“Without limiting any defence under Chapter 2 of the *Commonwealth Criminal Code* (as applied by subrule (1)), a person is not *guilty of* any offence under these Rules if the person proves *on the balance of probabilities that the conduct or omission which would, but for this clause, constitute the offence: .....*”

Fortunately, the meaning of the two subclauses seems to be reasonably uncontroversial.

Sub clause (a) provides a defence where the ‘offence’ was the result of an accident. While there is no judicial guidance on how the concept of accident should be construed in the context of this clause, the concept is not unknown to the criminal law.

In *Stevens v R* [2005] HCA 65; (2005) the High Court dealt with the defence of accident to a charge of murder provided for in section 23(1)(b) of the *Criminal Code Act 1899* (Q).

In that context, the court reaffirmed previous decisions that an even occurs by accident id it was both:

- a) Unforeseen and
- b) Not reasonably foreseeable.

(see par. 16 , per Gleeson CJ and Heydon J; par. 66 per Kirby J and par.155 and 156 per Callinan.)

As to sub clause (b), the concept of “reasonable effort” employed in sub clause (b), has not (to the writer’s knowledge) been the subject of judicial interpretation. However reasonable effort seems to be a question of fact and does not pose any obvious problems with interpretation.

It should be noted that the defence established by this sub-clause is very wide. Arguably, it subsumes both the defences of honest and reasonable mistake and accident- and goes substantially beyond their boundaries. It is for this reason that a practitioner should maintain this provision in the forefront of their mind when advising in relation to alleged breaches of the regulations and Road Rules or other offences to which this defence is applicable.

#### Possible applications:

The circumstances in which a defence of accident or reasonable effort might become relevant are multifarious.

Consider for instance the ubiquitous offence of not display “P” or “L” plates. It is not uncommon to come across situations where the driver had secured the plates to the car at the commencement of the journey, however they dislodge and fall off during the course of driving. If the driver was unaware that the plates had fallen off than (subject to the question of whether they adequately fastened) he/ she may be able to raise honest and reasonable mistake. However, if the driver was aware that the plate had fallen off (either because it was seen flying off the vehicle or noted as missing during a brake in driving) than that defence is not available because the requisite state of mind cannot be said to exist.

This does not mean however that a driver in this predicament should necessarily be advised to plead guilty (or forgo the right to elect to have the matter dealt with by a Court). Instead, further instructions should be taken to ascertain whether the defence of reasonable effort might apply. Where was the driver at the time? Where there any shops around which may have sold replacement plates? Did he/she have funds available to purchase replacements? Was it safe to pull over to affix replacement plates? Etc.

Another possible application of the defence is in relation to driving behaviour engaged in order to avoid an unexpected hazard on the road. For instance, crossing double unbroken lines to swerve to avoid an animal on the road or to avoid a collision with another vehicle merging from a different lane.

Yet another application is where a mauver contrary to the Road Rules occurs as a result of an involuntary reflex such as a sneeze, cough or hiccup.

Even a course of driving which occurs as a result of placing a foot on the wrong pedal, a foot slipping of a pedal etc... are potential candidate for the application of the defence of accident or reasonable effort.

### **PCA charges**

Apart from the issue of honest and reasonable mistake of fact discussed above, there are a number of other issues which, in some circumstances, can for the basis of a defence to a PCA charge.

### **Home safe rule**

The statutory bases for the so-called “home safe” rule appears in cl. 2(1)(e) of Schedule 3 to the *Road Transport Act 2013*, which relevantly provides that :

“A police officer cannot require a person to submit to a test, analysis or assessment, or to provide a sample, under this Schedule:

...

(e) at that person’s home.”

It was established in *R v Vanter* (1992) 29 NSWLR 311 that once the issue of whether or not this provision has been breached is raised by the evidence, the prosecution bares the onus of proving, beyond a reasonable doubt, that the breath test was not carried out in breach of that section.

In *Vanter*, which concerned the construction of the statutory predecessor to cl.2, the Court said at p 315-316 :

*“If, however, evidence were given in a particular case which raised an issue whether the requirement was made at the person’s usual place of abode within the meaning of subs (5)(d), then the onus would, in our view, rest upon the prosecution to establish beyond a reasonable doubt that the requirement [to undergo a breath test] was not made at the defendant’s usual place of abode...”*

The question of exactly in what circumstances the rule does and does not apply has been the subject of some judicial consideration. However, before proceeding to consider the case law on this point, a preliminary question raises for considerations.

In December of 2006, the statutory predecessor of the provision presently under consideration (i.e. section 17(d) of the Road Transport (Safety and Traffic Management) Act) was amended by the *Road Transport Legislation Amendment (Drug Testing) Act 2006* by deleting the words “place of abode” and replacing them with “home” (that is, sub section (d) previously read ‘at that persons place of abode’). Each of the decided cases consider the meaning of the old concept of “place of abode”. It is therefore necessary to consider whether, and to what extent the old cases can be applied to the provision as it currently stands.

The new wording has not yet received judicial consideration. However, the writer submits that the change from “place of abode” to “home” is cosmetic, not substantive, and does not alter the meaning of the section. There is support for this view in *Haberhauer v Simek* (1991) 9 Petty Sessions Review 4235. In that case, Sully J held that the phrase “usual place of abode” was equivalent to “home”. Hence, the change of wording can be regarded, in the writer’s view, as being merely an exercise in converting the wording of the provision into plain English without altering its meaning. It follows therefore that the cases which had previously considered the construction of “place of abode” are directly applicable to the provision in its current incarnation.

Based on this assumption, the question of what constitutes a person’s ‘home’ for the purposes of this section is ultimately a matter of fact to be determined on the facts of each individual case:

In *DPP v Skewes* NSWSC 1008 (12 November 2002) Sperling J, referring with approval to the remarks of Sully J in *Haberhaue* regarding the question of what constitutes a “place of abode”, said at paragraph 15 :

*“Each case, his Honour said, must be decided having regard to ‘the character and the circumstances of the item under consideration’”*

However, the following general propositions and indicia of what constitutes a person’s ‘home’ can be gleaned from the cases:

- The common law concept of ‘delineation of the curtilage’ (that is, the enclosed space within which a building is situated) is not a reliable indicator of a person’s home ( see *Skewes* at par. 5 and *DPP v Linnett* (2006) NSWSC 1086 at par. 37). Thus, if a person resides in a lodge within enclosed hospital grounds, the entire grounds of the hospital are not that person’s home. Similarly, a resident of a caravan park cannot sustain an argument that the entire grounds of that park are his home for the purpose of section 17(d).
- In the case of an ordinary residential property, anything inside the boundary of that property is the occupant’s home (see *Skewes* at par. 20)
- There is generally no distinction between a single occupancy property and a multi-occupancy property (see *Skewes* at par.21, but see also *Linnett* at par. 35 which suggests -referring to a caravan park- that this does not apply where the occupants do not “in any sense reside in the same physical space or area”)
- Physical contiguity or physical connection between the building in which the person resides and the place where the breath test took place is an indicia that that place was that persons home within the meaning of the section (see *R v Clampett* (1984) 11 A Crim. R 103). For instance, a car park which is part of

the same structure as the dwelling is more likely to be considered part of a person's home than one which is not.

- A further indicium is whether the place was used for the comfortable enjoyment of the dwelling. Ground which is used for the comfortable enjoyment of a dwelling may be considered as integral to the dwelling and therefore form part of the home regardless of whether it is marked off or enclosed (see *Haberhauer* at 4.15).

Once it is established that a breath test was conducted contrary to cl.2(1)(e) the next question is what effect that has on the proceedings for a PCA charge. In this regard, there are two competing points of view.

On one view, a breath test contrary to cl. 2(1)(e) merely renders the test itself, the subsequent arrest and breath analysis illegal. The consequence of that illegality is that the evidence of the breath analysis is illegally obtained evidence within the meaning of s138 of the *Evidence Act 1995*, giving the Court discretion to exclude it from evidence.

The competing view, which appears for the moment to have the ascendancy, is that the consequence of a breath test contrary to cl.2(1)(e) is not just **illegality** but in fact **invalidity** of the clause 35 certificate which is used to evidence the result of the breath analysis.

This view emanates from the two penultimate paragraphs of the decision in *Skewes* in which Sperling J said :

*“25 In Vatner, as I have recorded, the Court decided where the onus of proof lay on the issue as to whether a person is at the person's place of abode. The Court then went on to hold (at 316) that, because the prosecution had failed on that issue, the offence of refusing to undergo a breath test was not made out. Similarly, because the arrest was then invalid and the requirement to submit to a breath analysis was then also invalid, the offence of failing to submit to a breath analysis was not made out. The Court accordingly remitted the proceedings to the District Court with a direction that the appellant was entitled to a verdict of not guilty on each charge.*

*26 By parity of reasoning, so far as the present case is concerned, the prosecution having failed on the issue as to whether the breath test was required at the defendant's place of abode, the conditions necessary for the issue of a certificate under the legislation were not established. The certificate was therefore not a valid certificate and was, accordingly, inadmissible. In these circumstances, no question of discretion arose as to whether the certificate should be admitted into evidence. It had to be rejected.”*

This view is contrary to the view expressed by Sully J in *Haberhauer* where his honour said

*“the notion that a breach of s4E(5)(d) [of the Traffic Act 1909- which is the predecessor of s17(d)] renders absolutely inadmissible evidence of the result*

*of a breath test analysis conducted after the breach, can not be sustained, in my opinion, in light of the decision of the High Court in Merchant v The Queen [ (1971) 126 CLR 414].”*

In *Linnett*, Buddin J declined to express a concluded view on the issue (see par. 42-43).

The writer suggests that the view expressed in *Haberhauer* is the better view. The view in *Skewes* is very difficult to reconcile with the high court decision in *Merchant*.

In *Merchant*, the Court considered the issue of the admissibility of a breath analysis certificate under s.4E(12), which is the forerunner of the present cl.31 of Schedule 3. It was submitted to the Court that the certificate was not valid because the breath test which was administered to the driver was performed in breach of the provisions then applying to such tests. The Court rejected that argument and held that :

*“Where a constable employs the authorities given by the section there is a progression through the various stages from a reasonable belief in the mind of the constable, s. 4E (2), the administration of the breath test, s. 4E (2), the arrest, s. 4E (3), and the subsequent breath analysis test, s. 4E (4), to a point where the material for a certificate under s. 4E (12) becomes available. But that does not mean, in my opinion, that all the stages in that progression, called by the applicant's counsel steps in a chain, are an indispensable prelude to the admissibility of a certificate given in conformity with s. 4E (12). In my opinion, there is no warrant for introducing by implication any conditions prerequisite to the admissibility of a certificate under that subsection. If the certificate complies with the provisions of the section it is, in my opinion, admissible on its mere production in a prosecution under s. 4E (1) whether or not those proceedings emanated from an arrest under s. 4E (3).”*

Given that the legislative scheme described by the High Court is mirrored by the current legislation, it is difficult to see how *Skewes* can be reconciled with the dictum of the High Court.

None the less, it is at least arguable that until and unless *Skewes* is overruled, lower Courts are bound by it.

### Road

Section 110 of the *Road Transport Act 2013* (the Act) makes it an offence to drive with a prescribed concentration of alcohol in one's blood per-se. That is, it does not limit the offence to driving taking place on a road or road related area. However, in an apparent anomaly which the writer is at a loss to explain, the power of a police officer to require a person to undergo a random breath test is inextricably linked with activity taking place on a road or road related area.

Clause 3 of schedule 2 to the Act provides that :

- 1) A police officer may require a person to submit to a breath test in accordance with the officer's directions if the officer has reasonable cause to believe that:



(a) the person is or was driving a motor vehicle **on a road**, or

(b) the person is or was occupying the driving seat of a motor vehicle **on a road** and attempting to put the motor vehicle in motion, or

(c) the person (being the holder of an applicable driver licence), is or was occupying the seat in a motor vehicle next to a learner driver while the holder of the driver is or was driving the vehicle **on a road or road related area**.

(emphasis added).

Clause 4 then gives the police a power of arrest following a failed breath test carried out in accordance with clause 3 and clause 5 provides a power to require a person arrested under clause 4 to undergo an evidential breath analysis.

The effect of this legislative scheme is that if, at the time of issuing the demand to a person to undergo a breath test, the police officer did not have reasonable grounds to suspect that the activity described in sub-sections (a), (b) or (c) above took place on a road, there was in fact no power to demand the submission to the breath test.

It follows that the subsequent arrest and subsequent breath analysis are illegal and therefore the result of the evidential breath analysis is illegally or improperly obtained within the meaning of section 138 of the *Evidence Act 1995*. It is therefore liable to be excluded from evidence.

The upshot of all of this is that in advising clients in respect of PCA charges, some attention should be devoted to whether the driver was in fact on a road (as that term is defined for the purposes of the legislation) at or about the time of the breath test.

It needs to be borne in mind however that the issue of 'road' is of relevance in relation to admissibility of evidence of PCA, not in relation to the commission of the substantive offence. Two points of caution flow from this:

1. What is of importance is not whether or not, as a matter of fact, the activity which enlivens the power to subject a person to a breath test took place on a road or road related area but rather whether the police officer conducting it had reasonable ground to suspect that it did. Accordingly, it may of little comfort to an accused that the police officer conducted a breath test in the middle of a paddock if that same police officer also happened to see the accused drive onto that paddock from a road.
2. Even if a court is satisfied that the police officer conducted the breath test contrary to clause 3, that does not automatically render the subsequent breath analysis excluded from evidence. It merely engages section 138 of the *Evidence Act 1995*, which

requires the court to undertake a balancing exercise in deciding whether to exercise its discretion to exclude the evidence.

Although, if the view about the admissibility of a section 33 certificate following a breach of s17(d) espoused by Sperling J in *Skewes* is to be accepted, then it is arguable that it is equally applicable to a clause 35 certificate issued after a breach of clause 3.

### The 2 hour rule

The so called '2 hour rule' holds that the breath analysis must be carried out within 2 hours of the last act of driving. In actual fact, there are two limbs to this rule.

The first limb arises out of the provisions of clause 31(3) of schedule 3 to the Act. This is a deeming provision. Its effect is that, as long as the breath analysis was conducted (or blood sample taken) within 2 hours of the last act of driving (or other activity referred to in clause 3) than the reading it produces is rebuttably presumed to be the reading at the time of driving (or other activity referred to in clause 3).

This provision is intended to overcome the difficulty which would otherwise exist in proving the blood alcohol concentration (BAC) of the accused. Given that BAC is not constant, but fluctuates with time, a breath analysis result taken even 30 mins. after the last act of driving does not, in truth, accurately represent the BAC at the time of driving. By utilising clause 31 the prosecution is relieved of the burden of extrapolating the BAC at the actual time of driving from a reading taken some time later.

It is not impossible, with the assistance of expert pharmacological evidence, to extrapolate the BAC at the time of driving. However, to do this requires information which may not be available to the prosecution or, if it is available, may not be sufficiently reliable to ascertain the BAC beyond a reasonable doubt. This information includes the time of first and last drink, the amount of alcohol consumed and the alcoholic content of the drinks.

In order to avail itself of clause 31 (3), the prosecution must prove (beyond a reasonable doubt of course) that the breath analysis or blood sample was in fact taken within 2 hours of the last act driving. If this proof is not available, the prosecution must prove the BAC at the actual time of driving or else the prosecution fails.

This analysis is consistent with authority. In *R v Olejarnik* (1994) 33 NSWLR 567 the last act of driving occurred at 7.26 pm but, the breath analysis was performed at 9.40pm, some 14 minutes outside the 2-hour period. At hearing, objection was taken by defence counsel to the admissibility of the reading on the basis of the second limb. In the course of determining that issue, Curruthers J. with whom Abadee and Blanch JJ agreed, said (at 572):

*“Accordingly, the time period in subs (11) [now cl.31(3)] was exceeded by about 15 minutes and the Crown is denied the benefit of the deeming provision in the subsection.”*

The second limb of the 2 hour rule arises out of the provisions of clause 2(c) schedule 3 to the Act.

This provision reads as follows:

“A police officer cannot require a person to submit to a test, analysis or assessment, or to provide a sample, under this Schedule:

...

(c) at any time after the expiration of the relevant period (if any) for the test, analysis assessment or sample concerned.”

In turn, the “relevant period” is defined in clause 2(2). In relation to a breath test or analysis, that period is 2 hours from the time of the event in in clause 3(1) which enlivens the power to conduct a breath test.

Under this limb, a breach of the two-hour rule is even more problematic for the prosecution. This is because the consequences of a breach of the 2-hour rule under this limb are identical to a breach of clause 2(3) discussed above. That is either illegality of the breath analysis leading to an application to exclude under s138 of the *Evidence Act 1995* or, on the basis of the *Skewes* decision, complete invalidity of the resulting evidently certificate.

Moreover, *Olejarnik* stands as authority for the proposition that, where there is a breach of the clause 2(3), and there prosecution does not adduce any pharmacological evidence to supplement the reading produced by the breath analysis, the discretion to exclude the evidence of the reading ought to be exercised. At 573 Curruthers J stated:

*“I conclude therefore, that the absence of expert evidence of a pharmacological nature, or an indication by the Crown that it proposed to call such evidence, the learned trial judge was required, in the proper exercise of his discretion, to reject the tender of the certificate [evidencing the result of the breath analysis] as no weight could be placed upon the reading contained therein to establish the fact in issue.”*

Clearly, it is generally preferable to utilise both limbs of the two-hour rule. However, before deciding to utilise the second limb, a number of strategic considerations should be resolved.

First, when asserting the inadmissibility of evidence, the onus of proving the facts which make the evidence inadmissible is on the person seeking to exclude that evidence (to the civil standard - see s.142 *Evidence Act 1995*). Sometimes the Accused is not in a position to discharge that onus in relation to the 2-hour rule but is simply relying on the fact that the prosecution cannot come up to proof either.

Second, reliance on the second limb of the 2-hour rule must generally be flagged earlier in the proceedings than reliance on the first limb. If objection is taken to the admission of evidence of the reading on the basis of a breach of clause 2, it must be taken at the time that the prosecution tenders that evidence. This gives rise to a possibility that once the prosecution is alive to the fact that there is a problem in their case, an application for adjournment could be made to allow the police to carry out further investigations with a view to ascertaining the time of driving. On the other hand, reliance on the first limb need not become obvious until after the prosecution closes its case, in which case it would be much more difficult for it to seek to adduce further evidence. Accordingly, if there is a possibility that further investigation could produce evidence of the time of the last act of driving which may not be favourable, it may be prudent to forgo reliance on the second limb.

In the writer's experience, the 2-hour rule can be very useful in defending matters. This is particularly so in cases where the Accused is apprehended as a result of a collision. In these circumstances, the police are not at the scene at the time of the collision and therefore it can be difficult to prove what time it occurred. Further, even where there is good evidence of the time of the collision, by the time the police are called, arrive at the scene, deal with any injuries and convey the accused either to a police station for a breath analysis or a hospital for a blood sample, more than 2 hours has often elapsed. The point here is that whenever one obtains instructions that the offence involves a collision, alarm bells should start ringing as to whether there is a potential defence based on a breach of the 2-hour rule.

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