CITATION:	*Michael James Duminski v Territory Insurance Office* [2004] NTMC 080
PARTIES:	MICHAEL JAMES DUMINSKI v TERRITORY INSURANCE OFFICE
TITLE OF COURT:	Local Court
JURISDICTION:	Civil
FILE NO(s):	20312183
DELIVERED ON:	19 October 2004
DELIVERED AT:	Darwin
HEARING DATE(s):	22, 23, 26 March 2004, 14 April 2004, 10 May 2004
JUDGMENT OF:	Jenny Blokland SM

CATCHWORDS:

ACTION ON INSURANCE CONTRACT – BURDON OF PROOF – DRIVE UNDER THE INFLUENCE – ADMISSIBILITY OF CERTIFICATE

Traffic Act NT
Evidence (Business Records) Interim Arrangements Act (NT)
Traffic Act Amendment Act 2003

Noonan v Elson; Ex parte Elson [1950] SQR 215
Gavin Yunupingu v The Queen, No CA 11 of 2002
Iskov v Matters [1997] VIC 220
The Queen v Turner [1975] SASR
The Queen v Little [1976] 14 SASR 556
Bunning v Cross [1978] 141 CLR 54
Novacik v Cooper (1973) ACTR 99
Smith v Brazendale (1980) TAS R 83 at 88
Wojtasik v Cockburn (1990) 12 MVR 527 (SA)
Houston v Harwood [1975] VR 695
Alan William Peter Thomson v Harry Ernest Andrews (1992) 84 NTR 20
Carlile v The Nominal Defendant [1978] QLDR 132
Nottle v Chaplin (1988) 8 MVR 268
Webb v Padman (1989) 9 MVR 55

Williams, *Burdens and Standards in Civil Litigation* Vol 25, 165 Sydney Law Review
Brown, *Traffic Offences and Accidents,* (Butterworths) 3rd Edition

REPRESENTATION:

Counsel:

Plaintiff:	Ms Farmer and Mr Rowbottom
Defendant:	Mr Currie

Solicitors:

Plaintiff:	Withnall Maley
Defendant:	Morgan Buckley

Judgment category classification:	B
Judgment ID number:	[2004] NTMC 080
Number of paragraphs:	36

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20312183

BETWEEN:

MICHAEL JAMES DUMINSKI
Plaintiff

AND:

TERRITORY INSURANCE OFFICE
Defendant

JUDGEMENT

(Delivered 19 October 2004)

JENNY BLOKLAND SM:

Introduction*:*

1. The plaintiff, Mr Michael Duminski claims $14,870 plus certain fees and costs that he alleges is due to him from the defendant insurer, Territory Insurance Office (TIO). The origin of the claim concerns damage to Mr Duminski's motor vehicle being a Toyota Land Cruiser Utility (Reg. No 497-307), "the motor vehicle". The defendant, the Territory Insurance Office, were the vehicle's insurer pursuant to an Insurance Policy, "The Insurance Policy" that is before the court. In May 2002, the plaintiff was involved in an accident in the motor vehicle. The motor vehicle was damaged and he made a claim under the Insurance Policy. The defendant has refused to process or pay the cost of the loss or damage, relying on a term in the Insurance Policy (see Exhibit P3) that reads as follows:

> 12.2 we will not be liable if at the time of an accident Your Vehicle and any attached trailer is being -
>
> 12.2.8 driven by or is in the charge of any person –

(a) while under the influence of alcohol or drugs;

(c) whose recorded reading following a breath analysis or blood test exceeds the level of alcohol permitted by law, or who is convicted of the offence of refusing to take a breath analysis or blood test when requested to do so in a lawful manner.

2. Primarily the proceedings involve the question of whether Mr Duminski is disentitled from claiming under the Insurance Policy if it can be proved he was driving the vehicle at the material time when he was *under the influence of alcohol,* or *had more than the concentration of alcohol allowed by law in his blood indicated by an analysis of breath or blood.*

Burden of Proof Issues

3. Consistent with usual rules of proof, the plaintiff must prove, on the balance of probabilities, that the relevant material facts exist that give rise to his entitlement to claim under the Insurance Policy. I have concluded that the defendant bears the onus of proving the disentitling factors it relies on. As well as the matters put by the parties, I have relied on the analysis by Professor C.R.Williams in "Burdens and Standards in Civil Litigation", Vol 25, 165 Sydney Law Review, in particular page 171 (footnotes omitted) that reads as follows:

> "If an issue is commonly listed among the constituent elements of a cause of action, the burden of proof will be said to be on the plaintiff. If the issue is commonly referred to as a factor leading to the avoidance of liability, the burden of proof will be on the defendant. Thus, in torts law the burden of proving negligence rests on the plaintiff, while the burden of proving contributory negligence is on the defendant".

4. I have approached the matter as one where the defendant relies on avoidance of liability, or is a situation analogous to avoidance of liability, hence the burden of proving the matters raised in paragraph 12.2.8 of the Insurance Policy rests with the defendant.

Evidence called on behalf of the Plaintiff.

5. The plaintiff, Mr Michael Duminski, is a self employed experienced block slasher and driver. He gave evidence that in 1996 he purchased a '94 Toyota Land Cruiser Utility, ("the motor vehicle"), for $28,000, financed primarily by AGC. At the time of purchase it had no extras; that after the accident in question it was a "write off" and he received $6,625 from the wreckers (see Exhibit P2).

6. Mr Duminski's evidence was that on the date of the accident, (4 May 2002) he had been working for himself slashing three blocks; that he went to his friends, Stuart Higgins's place and was involved in loading a container until about 6.00 pm; he then towed Mr Higgins's vehicle to his own residence – he told the court he thought he was at his own residence at about 6.30pm. At some point after this time he headed back to Mr Stuart Higgins's place via Howard Springs; he told the court that the two of them talked about having a game of pool and subsequently both went to the Howard Springs Tavern. Mr Duminski said he usually drinks "light" and that he drank "Hahn Light" on this occasion when he and Mr Stuart Higgins were at the Howard Springs Tavern; he said he didn't remember leaving the Howard Springs Tavern; he said he did not remember the accident; he does not recall being taken to hospital or speaking to police at the accident scene.

7. Mr Duminski referred to the police report and the motor vehicle claim form that became Exhibit P4 in these proceedings. I note that on that claim form he has stated "I have no memory of events prior to the accident". The accident is noted in the claim as being on the corner of Bastin and Findlay Road; I note that there is a gravel verge noted in the diagram on Exhibit P4. The police report indicates "vehicle has driven down Finlay Road, and turned left onto Bastin Road, when vehicle has negotiated turn late, over corrected and rolled onto roof, sliding for a short distance before hitting

edge of road with bull-bar and flipping the VEH back onto wheels, hitting fences of nearby property." Mr Duminski claimed to have no independent recollection of the events. He told the court that he had been involved in slashing blocks for some 15 years; that he would visit Stuart Higgins on a weekly basis, sometimes 3 to 4 times per week; that the particular intersection where the accident took place has loose gravel near it; that it is in poor condition; that people cut corners of the intersection and drive onto the corners; that it is not lit up at night; that Stuart Higgins lived near to his property (600 to 800 metres away); that the adjacent properties have barbed wire and some have a pig mesh fence; there is some clearing and swamp areas at the back of the nearby properties; that various animals are around the area regularly; that these animals include dingoes, kangaroos, horses, dogs and also people. The people are sometimes riding horses. He told the court he has no recollection of whether there were any people or animals around on the night in question. He told the court he felt "pretty distraught about the accident"; he was concerned about his friend, Mr Higgins; that he was concerned about his vehicle; that he himself suffered problems with his teeth and headaches and injuries around his mouth; he told the court he did not remember having a blood test; he believed he had no injuries to the chest. He acknowledged significant familiarity with the area. The flavour of his evidence was that although he didn't remember anything, he may have over-corrected, rolling the car on the gravel on the verge or a straying animal may have contributed to the accident.

8. In cross examination Mr Duminski accepted that he was drinking with Mr Stuart Higgins until shortly before the accident at or about 11.30pm; he admitted in cross examination that he may drink other drinks (such as rum) after drinking light beers; he accepted that it was his friend Stuart Higgins who had an alcohol reading of .221; he did not recall telling the ambulance officer that his, (Mr Duminski's) name was "Michael Higgins" and he could not recall telling anyone at the hospital that his name was "Michael

Higgins". Similarly, Mr Duminski says that he couldn't say whether at about 12.30 am on the 5th May 2002 Doctor Alasdair McNair took a blood sample from him; he said that he was not aware that such a sample had been taken. I note it was suggested to him in cross examination that at the time of the accident he was "well intoxicated" and he told the court he did not know what to say. He agreed he hadn't told anybody previously that he suspected a dog or horse or animal in relation to the cause of the accident.

9. In cross examination he said he was aware of the loose gravel and soft sides of the road; he agreed that he drove that way some four times a week; although a number of possibilities were put to him he could not offer an explanation for the accident. Mr Duminski said that he completed the diagram on the motor vehicle claim form from markings on the road and that his father completed it. He said that the motor vehicle claim form was filled out on the basis of what he and his father thought had occurred. He agreed that on page 4 of the claim form in answer to the question concerning alcohol and drugs he had written "unfortunately I have no memory of events immediately prior to the accident". In relation to his memory he seemed to also qualify the recollection noted in the claim of drinking "a few light beers" – he said that Hahn Lights was what he usually drank which explains this comment; he said that he occasionally drank rum but nothing else; he said that he couldn't remember what Stuart Higgins usually drinks. He agreed in cross examination that on page 3 of his statutory declaration, (part of exhibit P4), he stated in answer to the question "had you consumed any alcohol 12 hours preceding the accident? If so please state type and quantity"; his answer was "yes – a few light beers"; that in answer to the question "where had you consumed such alcohol? give details", he answered "Howard Springs". In evidence he said that he had a few light beers at the start of the evening and it was possible he had something more such as rum.

10. A previous conviction was put to Mr Duminski which he admitted, namely that in 1987 he was dealt with by a court for drink driving with a reading of

.230. He served a period of imprisonment. He said that he had learnt from that experience not to drink anything but light beers. He agreed in cross examination that because of the time of the accident (about 11.30) that he must have stayed at the Howard Springs Tavern until about then. He agreed he had never previously had problems with that corner where he had the accident.

11. He agreed he was still friends with Mr Higgins.

12. In re- examination Mr Duminski said that because of being dealt with in 1987 for the drink driving charge he basically does not do it anymore; he says he has learnt from that previous experience. He told the court he thinks Mr Higgins and his wife Jennifer left Darwin in 2002. He confirmed his evidence about lack of recollection.

13. Mr Duminski's father also gave evidence in the plaintiff's case. He gave evidence that he made certain observations of the scene, the vehicle and gave certain assistance to his son in the claim process; he said he found an open container containing alcohol in the vehicle. He also said that his son had learnt his lesson from being dealt with for drink driving previously and that he now only drank "Light Beer". He was cross examined on one matter concerning the alleged blood sample take from his son. He confirmed that when he picked his son up from the hospital he also picked up a vial of blood that was in the name "Higgins"; that that vial of blood has since been destroyed.

Evidence Called on Behalf of the Defendant

14. Constable Whiting gave evidence of the scene, noting that Mr Duminski smelt of alcohol; was disoriented, slurring his speech and was unsteady on his feet. There was no significant injury noted although he noted an injury to Mr Duminskis' face. In cross examination Constable Whiting conceded he had not noted the evidence of the *indicia* of intoxication in a previous

statement prepared for a prosecution of the plaintiff. In his contemporaneous notes which are before the court as *Exhibit P7*, he has noted, amongst other observations, *Duminski smelling of grog.....disorientated.....*

15. The ambulance officer, Mr Andrew Palandri gave evidence for the defendant in these proceedings stating that at about 11.00pm he attended the scene; he observed police vehicles, fire-trucks and debris; he noted the plaintiff appearing emotional and intoxicated; that he smelt of alcohol; that his speech was slurred. On the Ambulance Report that forms part of *Exhibit P8* he noted "Pt standing on road..Pt was staggering, waving and appeared agitated, when Pt spoke his words were slurred and hard to understand. Smelt strongly of alcohol…" Further he noted "Pt Post ? vehicle roll over. Pt agitated & emotional. Pt refused "c" collar adamantly, ripped collar off. Pt refused O2 therapy after several minutes of administration. Nil obvious injuries, Pt confused, agitated & non-compliant during tpt. Pupils ARL. Pt refused treatment. Nil motor/neuro deficit. Nil respiration distress. Nil complaints of injury." Under the part of the Ambulance Report headed "Provisional diagnosis", the following notation is made: " ?? Post MVA Minor Trauma".

16. Ambulance Officer Palandri also gave evidence that the plaintiff told him his name was Michael, being Stuart Higgin's "brother". The Ambulance Report reveals the name "Higgins" is crossed out and Duminski is inserted. In cross examination Ambulance Officer Palandri agreed that people react to shock in different ways; that there were no obvious facial injuries; there was no bleeding and no pain; he agreed he had not initially described the smell of alcohol as being a smell of "spirits"; he said Mr Duminski didn't complain and didn't seem to be in pain; he agreed the plaintiff could have had a head injury or been intoxicated.

17. Dr Johnston-Leek who has charge of the medical records at Royal Darwin Hospital gave evidence of those records pertaining to the plaintiff. Dr

Johnston-Leek gave evidence that the records reveal Mr Duminski was admitted at 00.26am on fifth of May 2002 and discharged at 7.26 am on the same date. His evidence was that Mr Duminski was initially admitted as "Michael Higgins" but the records were "consolidated" under the name Michael Duminski at 1.23 am on the fifth of May 2002; those medical records contain the certificate of taking a blood sample of "Michael Higgins", (certificate 88609). Dr Johnston-Leek explained that when blood is taken at the hospital a certificate is made; two copies are made and two vials of blood are filled. One certificate is wrapped around a vial of blood and deposited in a locked container for police collection; another copy is wrapped around the second vial and given to the patient or placed with their effects. Dr Johnston-Leek's explanation for the certificate still bearing the name "Michael Higgins" is that the sample was taken prior to the records being consolidated. Dr Johnston Leek was cross examined on the point that he did not have personal knowledge of the matters in the records and that he is simply interpreting what he thinks happened with the records in question.

18. Other matters noted in the hospital records before the court are, (under the heading "Description of incident"): "Humpty Doo In a Ute? 80kph. Rolled the Ute. No head injury. Walking after crash. Self extracted. Acting Intoxicated" . The Emergency Department Registrar noted "This gentleman was involved in an MVA. He sustained only superficial abrasions to his knees. X-rays were normal. He was observed in ED until he was sober and discharged home."

19. After some arguments about the admissibility of Certificate No 88609 and my refusal to admit it on the basis of a *Business Record*, evidence was given by Dr Alistair MacNair (on the voir dire) about the certificate and the taking of blood. As was evident from both evidence in chief and cross examination, Dr MacNair understandably has no independent recollection of the matter, however he did acknowledge he completed the certificate in question with regard to taking blood from a person named in the certificate as "Michael

Higgins" and he would have taken the blood himself shortly before 0.30 am; he agreed he did not complete the part of the statement stating the time; that in accordance with procedure one vial and certificate would have gone to the forensic box and one would have gone to the patient's personal effects. In cross examination he agreed that he did not remember the patient "Michael Higgins"; he agreed he had no independent recollection of what occurred; he did not recall if any other person was delivered to the hospital as a result of the same motor vehicle accident; he confirmed it was his signature and that if he signed the certificate he would have taken the sample.

20. Ms Kathleen Poel, a forensic chemist gave evidence that three blood samples were received from the locked box at the hospital on fifth May 2002; that she analysed the three samples; that one sample in the name of "Stuart Higgins" gave a reading of .221; that one sample in the name of "Michael Higgins" gave a reading of .232 and a further sample taken in the afternoon of the same day gave a nil reading. In cross-examination Ms Poel was asked if there could have been five people whose blood was taken on fifth May 2002; she answered that she didn't know, she was reliant on documentation provided by the hospital.

21. I should also mention that neither party called Stuart Higgins, whom, it might be thought, might be able to enlighten the court on some of the issues. It is common ground Mr Higgins now lives inter-state. Before the court is *Exhibit D1*, a report made by an agent of the Territory Insurance Office in relation to an interview conducted with Mr Stuart Higgins. It is noted Mr Higgins is currently on compensation himself from the Territory Insurance Office; he advised he would not sign any authorities or give a statement to the agent on solicitor's advice; that he had "bigger claims pending" as a result of the same accident; he is reported as saying he had memory loss for four days after the accident; most of the report concerns his own injuries and current employment situation; he said he remembers that he and his friend Mr Duminski went to the Howard Springs for a couple of "Hahn Light" and

a few games of pool. The report then recounts what that Mr Higgins says he was told about how the accident occurred. The report also sates: "The witness implied that the Northern Territory Police made the "name error" and this could have arisen due to the fact of the vehicle being moved from the accident site and both occupants being transported to hospital. Our agent was told that the Insured and the Witness are still having contact with each other and are still good friends."

Evaluation of the Evidence

22. Leaving aside for a moment the question of the admissibility of the certificate evidence, I am dealing with competing probabilities. I have no problem accepting as firmly established that the plaintiff owned the vehicle; that it was insured by the defendant Territory Insurance Office; that he was involved in an accident at about 1.00pm on the fourth May 2002 at the intersection of Bastin and Findlay Roads. Without the exceptions in the Insurance Policy, he would ordinarily be entitled to have his claim processed.

23. In my view, looking at the evidence as a whole, the probabilities firmly favour the conclusion that the plaintiff was under the *influence of alcohol* as that phrase is commonly understood. I have come to this conclusion without reference to the reading on the disputed certificate. Although the exclusion clause does not require the added element of driving under the influence *to such an extent to be incapable of having proper control of the motor vehicle* (as required, by comparison, for the offence under the *Traffic Act NT)*, I take the view that implicit in the expression *under the influence* is the requirement that as a result of the consumption of alcohol, the mental or physical faculties of the driver are not in a normal condition: (*Noonan v Elson; Ex parte Elson [1950] SQR 215*).

24. For the defendant, Officer Whiting and Ambulance Officer Palandri combined give evidence of the defendant smelling of alcohol, being

unsteady on his feet, emotional, slurred speech, and agitation and being hard to understand. Against this, it is true that Officer Whiting's observations were not noted (as he admitted) in his earlier statement made concerning a possible criminal prosecution; however, his observations are confirmed in essential elements by Ambulance Officer Palandri. The evidence from these two perspectives is compelling, one from a law enforcement perspective, the other from health and first aid. There is the evidence of Mr Duminski senior of finding the alcohol in the vehicle. A possible inference from that is that the plaintiff smelt of alcohol because some of it could have tipped on him during the accident. Although possible, there is no direct or indirect evidence that that in fact occurred and this does not defeat the other observations made by Whiting and Palandri. It is true that the plaintiff may have been shocked and emotional due to the accident itself, but in my view it does not explain his actions and behaviour. The plaintiff claims no memory of what happened either prior to or at the accident. I find this to be lacking in credibility in circumstances where there is no head injury, mental injury or brain damage or injuries of any consequence at all. In any event, all the court is left with are the inferences that can be drawn from the evidence against the plaintiff with nothing coming from the plaintiff's case to counter them. The plaintiff was drinking for a number of hours (at least around 3 -4 hours). He says he was drinking "Light Beers", but when pressed agreed it was possible he could have drunk rum as well. I treat as a neutral fact the fact the plaintiff has previously served a prison term for drink driving. On the one hand, one always hopes that people are of course deterred from ever offending in that manner again and placing themselves at risk, however on the other hand, this plaintiff's level of resolve may have weakened on this occasion. The evidence of his sober or "light beer" habit is not very strong. It is noted as a matter of credit against the plaintiff's case that Mr Duminski senior said his son drinks nothing else but "Light Beer". That is clearly in conflict with the evidence of the plaintiff who says he sometimes drinks rum. When I add to this the fact that the hospital notes

refer to the plaintiff's intoxication, I am left with the firm conclusion he was driving under the influence of alcohol.

25. I agree with the defendant's submission that there has been no evidence to counter the evidence of driving under the influence. I would say that is save for the evidence that the plaintiff habitually drinks "Light Beer". However, that evidence is weak in the face of the plaintiff not having any recollection of what he drank and not having any recollection of whether he did in fact go on and drink rum as he on occasions does.

26. As to the circumstances of the accident, once again, I find it difficult to accept the plaintiff's version that he doesn't remember anything and yet he was prepared to reconstruct what he thought had happened for the purpose of reporting the accident and processing the claim. There is no evidence before me that the accident occurred for any reason other than a failure to negotiate the intersection at a time when the plaintiff was affected adversely by alcohol. There is no evidence of another cause. It must also be remembered that this accident occurred at an intersection that the plaintiff regularly uses. I find myself inevitably drawn to the conclusion that the plaintiff would have successfully negotiated the intersection had he not been under the influence of alcohol.

The Disputed Certificate Evidence

27. The plaintiff objected to the admission into evidence of a *Traffic Act (NT) Certificate* No 88609 of a "Michael Higgins" that showed that a blood sample taken and collected on 5 May 2002 recorded a blood alcohol level of .232. It will be recalled the evidence was that Mr Duminski was taken to hospital after the accident by Ambulance Officer Andrew Palandri; that Mr Duminski effectively told Officer Palandri his name was Michael Higgins (stating he was Stuart Higgins' brother) and that this record was corrected by Officer Palandri after Stuart Higgins corrected him. The certificate was initially sought to be tendered relying on the *Evidence (Business Records)*

Interim Arrangements Act (NT). Objection was taken by the plaintiff under *s.7(3) Evidence (Business Records) Interim Arrangements Act (NT),* namely, that: "A statement made in connection with a criminal legal proceeding or with an investigation relating or leading to a criminal legal proceeding is not admissible under section 5". The defendant argued that s.7(3) *Evidence (Business Records) Interim Arrangements Act (NT)* should be read in the light of s.7 as a whole that is referrable only to criminal proceedings, not to civil proceedings as is the case here. As mentioned to counsel, in my ruling in the voir dire, I rejected that argument as s.7(3) is concerned with *excluding* matters arising *during an investigation relating to a criminal legal proceeding* from the operation of the *Evidence (Business Records) Interim Arrangements Act.* I readily accept that hospital records are capable of being *Business Records* save for when the statements comprising those records fall foul of s.7(3). In *Gavin Yunupingu v The Queen,* No CA11 of 2002, 18 September 2002, the Court of Criminal Appeal made that matter clear concerning a post mortem report commenting on the cause of death in a homicide case. At the time the voir dire was argued, I accepted that broadly speaking, a blood test, in these circumstances, is made in relation to an *investigation.* Constable Michael Whiting who attended the scene of the accident referred to obtaining a blood test in the circumstances and had decided against a breath test. I ruled that the Certificate could not be admitted on the basis of a Business Record and I adhere to that decision, however the question of admissibility remained open throughout the hearing, there being possible other basis for admission.

The Relevant Traffic Act (NT) Legislation

28. Firstly, it is clear that the *Traffic Act (NT)* provides that a member of the staff of a hospital who is a medical practitioner may take or require a person to give a sample of blood when the person enters a hospital for examination or treatment of injuries which may have been received in a motor vehicle accident: (s.25(1) and 26 *Traffic Act (NT).* Clearly that is one legal basis for

taking the blood sample. I should also note that there is an alternative legal basis for the taking of blood being s.23(11) read with ss.25(1) *Traffic Act (NT),* namely a member of the Police Force who does not require that a person submit to a breath test as the member's belief is that it may be detrimental to the person's medical condition to submit to a breath test. I would readily infer from Constable Whiting's evidence that he entertained such a belief. In my view it is necessarily implicit from his evidence and from the steps he took at the scene and his observations of Mr Duminski. I consider it to be within the range of matters that can be properly inferred: (as in *Iskov v Matters* [1997] VIC 220). For completeness I note that *s.27 Traffic Act* allows evidence to be admitted by certificate *in any proceedings in a court,* this is clearly inclusive of civil proceedings such as these: (*Traffic Act Amendment Act 2003, ss.6 and 7*). Notwithstanding this amendment came into force after the events in question, this being a procedural matter of evidence, there is no presumption against retrospectively: (see eg Carlile v The Nominal Defendant [1978] Qld R 132). The relevant date is the date evidence is sought to be admitted.

29. The objections to the admission of the certificate concern various issues of non-compliance with the form of the certificate. On behalf of the plaintiff it is pointed out that the relevant cases indicate there should be strict compliance in *certificate evidence* cases, especially here where the contents of the certificate form *prima facie evidence* of the matters stated in the certificate and the facts on which they are based: (*Traffic Act; s.27).* As pointed out by the plaintiff, there are a number of cases that treat certain particulars pertaining to the certificate as conditions precedent to admissibility. For example, in *The Queen v Turner* (1975) SASR, the Supreme Court of South Australia (in Banco) found that a failure to provide, or a failure on the part of the prosecution to prove it did provide a sample of blood to a person from whom a sample was taken was fatal to its admissibility. The Court considered such a flaw to be the violation of a

condition precedent to admissibility. A similar result on a similar issue was reached in *The Queen v Little* [1976] 14 SASR 556.

30. In my view the deficiencies pointed out by the plaintiff do not amount to *conditions precedent* upon which admissibility stands or falls. The deficiencies concern certain matters of non-compliance with what is required on the face of the Certificate. I note that cases dealing with these points turn very much on their facts and the particular constructions of comparable statutes in different jurisdictions. I note also that the two South Australian cases provided to the Court on behalf of the plaintiff were decided prior to *Bunning v Cross* [1978] 141 CLR 54, itself a *drink driving* case, but where the High Court declared the existence of the public policy discretion to exclude evidence gathered through unlawful or improper means. Unless a statute is clear concerning a matter of *condition precedent*, it is far more likely that issues of non-compliance will nowadays be dealt under the *Bunning v Cross* discretion. The result may not in fact have been any different in the cases mentioned by the plaintiff but the judicial method used may now differ unless it is truly a condition precedent to admissibility.

31. In attempting to deal with the issues in this case, I have had regard to Mr Douglas Brown's book, *Traffic Offences and Accidents*, (Butterworths) 3rd edition, where he states at page 134:

> On the one hand the courts say that there must be 'strict adherence' *Novacik v Cooper* (1973 ACT R 99 at 111) to the procedural requirements. On the other hand the courts also say that the legislation should not be 'thwarted or frustrated by the application of theories of construction which submerge the true intention of the legislature and substitute it for a narrow and legalistic approach inimical in its effect to the true public interest': (*Smith v Brazendale* (1980) TAS R 83 at 88). Isolated or merely accidental non-compliance with statutory safeguards does not vitiate the process

(*Bunning v Cross* (1978) 141 CLR 54). The difficulty is to determine whether a breach of a procedural requirement is a minor error of no consequence or is a breach which is of consequence adversely affecting the rights of the defendant driver.

32. This is not so much a case where the authorities have failed to carry out an obligation under the *Traffic Act* that might affect the person's rights, (such as providing the person with their own sample). This is a case of acknowledged errors on the certificate. I note Brown concludes about this (at 166) as follows:

> In short the defendant driver needs to establish that the error is one of substance, that it is capable of misleading the driver or that it in some way prejudices him. In *Wojtasik v Cockburn (1990) 12 MVR 527 (SA)* the certificate omitted to certify that the driver tested had been informed of his right to have a sample of his blood taken and tested. It was held to be an omission of substance.

33. It has previously been held that an error in the name of the person submitting the certificate does not invalidate it: *Houston v Harwood [1975] VR 695.* Here however, the situation is more significant as the error is in the name, "Michael Higgins" instead of "Michael Duminski". This is in circumstances where the plaintiff himself gave the wrong name to the Ambulance Officer that was somehow transferred to hospital records and later corrected. The evidence clearly shows the certificate related to the plaintiff. All the evidence points to his blood test comprising one of the three taken at Royal Darwin Hospital on the day. We know from the other evidence that one reading was Stuart Higgin's reading, the other was a person whose sample was taken after the plaintiff's discharge and all of the evidence points to the sample being the plaintiff's but the name being wrongly recorded. I should add also Mr Duminski senior's evidence was that he was given a copy of the certificate with the sample in the name of

Michael Higgins. I accept the hospital records were corrected after the sample was taken. I have no doubt the sample relates to the plaintiff. I would not reject the certificate on that basis. It would be extremist to exercise a discretion to exclude a certificate when the source for the wrong information is from the plaintiff himself. To accept the other alternatives would mean accepting that someone else presented at the hospital with the name Michael Higgins in the time frame provided.

34. Nor would I reject it on the basis that the time is not properly filled out at paragraph (1) in circumstances where the evidence is that it is the doctor's practice to fill out the certificate upon completion of taking the sample which would have been shortly after 00.30. That time is noted in the certificate. I note that errors in date *(Nottle v Chaplin* (1988) 8 MVR 268) and time: *(Webb v Padman* (1989) 9MVR55) do not necessarily invalidate the Certificate. The Certificate does not nominate whether the plaintiff was brought to the hospital by police or entered for treatment or examination after a motor vehicle accident. In my view both of those paragraphs could apply here. The plaintiff more readily fits the category concerning examination or treatment following a motor vehicle accident. The point is, none of these errors are errors in procedure likely to affect the reliability of the test or the rights of The Plaintiff should he dispute the reading.

35. It is clear that on admitting the certificate the *prima facie evidence* of the certificate is that "Michael Higgins" had the reading noted in the certificate. It is clear however that evidence outside of the certificate may be received (see by analogy with breath testing cases *Alan William Peter Thomson v Harry Ernest Andrews (1992) 84 NTR 20)* and in my view the other evidence in this case establishes it was the plaintiff who possessed the relevant reading, evidence of which is in the Certificate. That reading also puts him in breach of the insurance policy. I confirm I have not had regard to the reference made that a charge was withdrawn against the plaintiff. That is a different matter. I would admit the Certificate.

36. I dismiss the plaintiff's claim and will hear the parties as to costs.

Dated this 19th day of October 2004.

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Jenny Blokland
STIPENDIARY MAGISTRATE