

CITATION: *Brennan v Benjamin* [2007] NTMC 018

PARTIES: MICHAEL DAVID BRENNAN

v

DEBBIE BENJAMIN

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20609482

DELIVERED ON: 29 March 2007

DELIVERED AT: Darwin

HEARING DATE(s): 9 & 27 February 2007

JUDGMENT OF: Dr John Lowndes SM

CATCHWORDS:

Traffic Act 1987 (NT) – PRESCRIBED BREATH ANALYSIS INSTRUMENT –
NEED FOR INSTRUMENT USED TO CONFORM TO THE STATUTORY
DESCRIPTION – FUNDAMENTAL DIFFERENCE BETWEEN THE PRESCRIBED
INSTRUMENT AND THE INSTRUMENT USED – INSTRUMENT USED FOUND
TO BE PRESCRIBED INSTRUMENT

Traffic Act 1987 (NT), s 27; s9
Traffic Regulations, Regulation 56
Road Traffic Act 1961 (SA), s 47h

Police (SA) v Hemsley 20 MVR 124 distinguished
SA Police v Hemsley (2) unreported decision of the Full Court of the Supreme Court
of South Australia, 23/12/94, distinguished
R v Crown Court at Knightsbridge, ex parte
Dunn, Buck v DPP [1993] 4 ALL ER 491 considered

REPRESENTATION:

Counsel:

Prosecution:

Mr T Smith

Defendant:

Ms J Truman

Solicitors:

Prosecution:

Department of Public Prosecutions

Defendant:

Tooheys Chambers

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A

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[2007] NTMC 018

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69

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20609482

[2007] NTMC 018

BETWEEN:

MICHAEL DAVID BRENNAN
Prosecution

AND:

DEBBIE BENJAMIN
Defendant

REASONS FOR DECISION

(Delivered 29 March 2007)

Dr JOHN LOWNDES SM:

THE ISSUE

1. The remaining issue in this case is whether the breath analysis instrument, which was used to analyse the concentration of alcohol in the defendant's blood and which recorded a positive result, was a prescribed breath analysis instrument as defined in *Regulation 56* of the *Traffic Regulations*.

THE LEGISLATIVE SCHEME

2. In determining whether the instrument used was a prescribed instrument, the starting point is s 29 (1)(a) of the *Traffic Act*, which states that "the Regulations may provide that a device for the carrying out of a breath analysis is a prescribed breath analysis instrument".
3. In pursuance of that section Regulation 56 of the *Traffic Regulations* provides:

“For the purposes of section 29 of the Act and these Regulations, a device for the carrying of a breath analysis that is of a type known as a Drager Alcotest 7110 is a prescribed breath analysis instrument”.

4. Regulation 61 of the Traffic Regulations provides:

“For the purposes of section 27 of the Act, a form of certificate set out in Schedule 2 may be used by the person and on the occasion indicated in the following table”.

5. In the present case, prescribed Form 1 was tendered pursuant to s 27 of the Act, which allows evidence to be given by certificate. The Form 1 contained, inter alia, a statement that the instrument that was used to conduct the analysis was “a prescribed breath analysis instrument known as a Drager Alcotest 7110”. That statement constitutes prima facie evidence that the instrument used was a prescribed breath analysis instrument, namely a Drager Alcotest 7110.
6. It is an element of the offence, with which the defendant has been charged, that the instrument, by means of which the analysis of the defendant’s sample of breath was carried out, was a “prescribed breath analysis instrument”. As is the case with the other elements of the offence, the prosecution need to establish beyond reasonable doubt that the instrument that was used was a “prescribed breath analysis instrument”. The prosecution is able to rely on the certificate tendered in the present case. As stated above, that certificate provides prima facie evidence that the instrument that was used was a prescribed instrument, which in the absence of evidence to the contrary may be sufficient to establish that material fact beyond reasonable doubt. However, where evidence is elicited tending to raise a reasonable doubt as to the matter stated in the certificate, then the evidence contained in the certificate will not be sufficient to establish that the instrument that was used was in fact a prescribed instrument.

THE EVIDENCE TO THE CONTRARY

7. In the present case the defendant did not adduce evidence to the contrary. However, the prosecution called Mr Cheval, a technician who had worked with NT Police and Fire Services for about 18 years, and who was familiar with the operational aspects of the Drager Alcotest 7110 Mk 1, 11 and V. The defence sought to rely upon the evidence of that witness to show that the instrument that was used to analyse the defendant's breath/alcohol content was not a prescribed instrument.
8. Mr Cheval gave evidence that the instrument that was used was a Drager Alcotest 7110 Mk V, although there was no indication on the instrument itself that the device was a "Mk V" model. The device merely bore the description "Drager Alcotest 7110".
9. The witness gave evidence that the previous models, the Mk 1 and Mk 2 had been taken out of service and had been replaced by the Mk V.
10. Mr Cheval gave detailed evidence as to the differences between the Drager Alcotest 7110 Mk1 and 2 and the Drager Alcotest 7110 Mk V.
11. The witness explained that the Drager Alcotest 7110 Mk V employed two technologies or techniques to measure the concentration of alcohol in a person's blood. The first was by way of infra-red analysis, while the second involved a process of electro-chemical testing.
12. Mr Cheval gave evidence that during the first stage of the process – the infra red analysis – the person's breath enters the sample chamber. The person's blood alcohol concentration is measured by mathematically calculating the rate of absorption (presumably by alcohol or ethanol) of infra red beams transmitted and received through the chamber.
13. The witness stated that during the second stage the same sample of breath that was analysed during the infra red stage is subjected to a process of electrochemical testing, using an electro –chemical cell, with a view to

confirming or validating the analysis performed during the first stage of the breath analysis. At this stage of the dual process, an electric current flows through the electrochemical cell. The current either increases or decreases depending on the concentration of alcohol. Presumably, a high concentration of alcohol will produce a greater electrical current.

14. The witness explained that the Drager Alcotest 7110 Mk V compares the result obtained during the infra red analysis with the result of the electrochemical analysis. During that process, the instrument undertakes what was described by the witness as a “self check” and “zero check”. If the two results are within what Mr Cheval described as “the tolerance” it will give a result. By that I understood that the instrument would display the calculated blood alcohol concentration. Mr Cheval stated that if either one of the results was too far out it would inform “No” or indicate that one of the results was faulty. The witness went on to say that if there was any difference between the two results, following the comparative analysis, the instrument will not work.
15. Mr Cheval stressed that the electrochemical process was a secondary check to overcome any interference that might have occurred in the infra red chamber. The instrument checks against the result of the infra red analysis compared to the result of the electrochemical test. The witness said that the point of the dual process is to ensure that the reading is correct. In a similar vein, he said that the reason for the two stage process employed by the Mk V was to make sure the instrument is functioning correctly.
16. In explaining the differences between the earlier models and the Mk V, Mr Cheval stated that the Mk 1 and 2 models used only the infra red process, which is exactly the same as that used in the Mk V. However, he said that the two earlier models did not incorporate the secondary check provided by the electro-chemical process.

17. By way of further characterising the differences between the earlier models and the Mk V, the witness said that the fundamental change was “the self checking in the Mk V of the chemical analysis”. He said that the reason why the earlier models were no longer in use was that they “were not supported” because there had been “engineering changes within the instrument”, and the old machines represented “the old technology”. Moreover, the new technology was cheaper.
18. Mr Cheval went on to say that the Mk 1 and 2 models relied on “one technology”, while the Mk V “purely used two technologies to ensure that the machine is working correctly”.
19. The witness appeared to say that although the two earlier models did not incorporate the electrochemical process, they also performed a “tolerance check”. The two instruments then produced a result. The earlier models also undertook “self checks” and “zero checks”.
20. Mr Cheval stated that except for engineering changes or changes in technology, the voltage of the Mk 2 and Mk 5 models remained the same.
21. Mr Cheval gave evidence as to certain cosmetic or superficial differences between the two earlier models and the Mk V. He said that the Mk V had a lighter case than the Mk V, and a different hose fitting for the mouthpiece. The handle was also different on the Mk 2.
22. The witness stated that the motherboard was smaller in the Mk 5, though the technology in that regard was the same as that used in the Mk 2.
23. Mr Cheval gave the following evidence as to the similarities between the Mk 2 and Mk V models. The area in which the infra red analysis was performed was on the same on both models. The LCD display on the Mk 2 and Mk V models was no different; nor was the print out on either machine.

WAS THE INSTRUMENT USED A PRESCRIBED BREATH ANALYSIS INSTRUMENT

24. The question is: was the instrument that was used to analyse the concentration of alcohol in the defendant's blood of "a type known as a Drager Alcotest 7110"?

The South Australian Line of Authority

25. Ms Truman, who appeared for the defendant, relied upon a South Australia strand of authority – *Police (SA) v Hemsley* 20 MVR 124 and *SA Police v Hemsley (2)* (unreported decision of the Full Court of the Supreme Court of South Australia, delivered 23 December 1994) – in support of her contention that the instrument that was used to analyse the defendant's sample of breath was not a prescribed instrument.
26. The facts and circumstances in *Police (SA) v Hemsley* (supra) were that a police officer had used a breath analysis instrument known as a "Drager 7110" to analyse the defendant's sample of breath. A device called the "Drager Alcotest 7110" was approved for use by the Governor in the Government Gazette. There was evidence before the Court that the device that was used had replaced an earlier model. The charge of exceeding the blood alcohol level was dismissed by a magistrate on the basis that the instrument that was used – the later version – was not an approved instrument.
27. On appeal the Full Court overturned the decision of the magistrate on three grounds, namely that the differences between the two devices were not of substance, that both instruments bore the same model number and the instrument that was used conformed to the description of "Drager Alcotest 7110", which had been approved by the Governor.
28. Adopting that line of reasoning, Ms Truman submitted that the evidence in the present case disclosed substantive differences between the two

instruments – the Mk 2 and the Mk 5 – and accordingly the instrument that was used to analyse the defendant’s sample of breath could not be found to be a prescribed breath analysis instrument within the meaning of *Regulation 56* of the *Traffic Regulations*.

29. In order to fully appreciate the line of reasoning adopted by the Full Court, it is essential to set out the legislative scheme under the then South Australian *Road Traffic Act 1961*.

30. Section 47h of the Act provided:

1. The Governor may, by notice published in the Gazette:
 - (a) approve apparatus of a specified kind as breath analysing instruments; or
 - (b) approve apparatus of a specified kind for the purpose of conducting alcotests.
2. The Governor may, by subsequent notice, vary or revoke any such Notice.

31. The relevant gazettal notice read as follows:

“Pursuant to the provisions of the Road Traffic Act 1961...I, the Governor, do hereby approve the apparatus known as the “Drager Alcotest 7110” breath analysing instrument to be a breath analysing instrument pursuant to section 47 h(1) of the Road Traffic Act”.

32. Against that legislative background, Mohr J found that, apart from evidence of cosmetic differences between the two instruments, there was no evidence that the later device “differed in any way from the earlier machine in its operation”: *Police (SA) v Hemsley* (supra) at 127. His Honour went on to say:

“In my opinion the machine used in this case fitted the description of ‘an apparatus known as the Drager Alcotest 7110’. There are examples of this type of description in everyday use. Kelly J in *Godsen v Billerwell* (1980) 31 ALR 103 at 120 referred to a ‘Model T Ford’. That description fitted successive models of that vehicle produced over a period of some 20 years or so. Similarly to take an example from World War II, the Spitfire

aeroplane went through many ‘Marks’ but remained an aeroplane known as ‘the Spitfire’”.

33. In holding that there were only visual differences between the two instruments, and there was not “any difference of substance in which the [later] machine analysed the breath of the subject”, DeBelle J made the following observations at [129]:

“It is a matter of common knowledge that a machine or instrument bearing a particular name and model number may undergo modification and improvement, yet still bear the same name and model number. This is particularly so where improvements are effected but the machine or instrument operates in the same way. Where the modifications are extensive or where a different process is being used, the model name or model number might change indicating that the machine or instrument is not the same and no longer operates in the same way as the original”.

34. His Honour considered the approval provisions of the Act to be of critical importance to the issue:

“One of the reasons for requiring the approval of the Governor for breath analysing instruments is to ensure so far as possible the accuracy and reliability of the instrument. Given the potentially serious consequences for a person charged with the offence of driving with a blood alcohol level in excess of the prescribed limit, it is plainly in the public interest to have a safeguard of this kind. The safeguard is illusory if an instrument not approved by the Governor is used to detect offences. The Governor approved the Drager Alcotest 7110. He did not approve any other make or model of Drager Alcotest. Had the respondent established on the balance of probabilities that the breath analysis instrument used to test the respondent was a different model from the Drager Alcotest 7110 and analysed a sample of breath in a different manner or had a different model number, be it 7110/A or some other number, the position may well have been different. But the evidence falls short of establishing that the apparent differences in the two instruments are other than superficial”.

35. The process of reasoning in *Police (SA) v Hemsley* (supra) was elaborated upon by the same Court in *SA Police v Hemsley (2)* (supra).
36. Again the issue was whether the instrument used was an approved breath analysing instrument pursuant to s 47h(1) of the *Road Traffic Act*.

37. Debelle J made the following observation regarding s 47h(1) of the Act at [11]:

“It will be noticed that s 47h authorises the Governor to approve apparatus ‘of a specified kind as breath analysing instruments’. The reference to apparatus of a specified kind enables the Governor to refer to an instrument by name and model number: see *Godsen v Billerwell...*; *Rose v Livingstone...* and *Taylor v Daire*. In *Godsen v Billerwell*, the majority took the word “type” to connote inherent or essential features rather than superficial or inessential features. In this respect the word “kind” has the same connotation. Both refer to a class of or genus of instruments with common characteristics. In this context, they might be used as synonyms. In determining whether the instrument used to test the appellant’s blood was of the kind approved by the Governor, regard should, therefore be had to the inherent or essential features of the instrument rather than those which are superficial or external...

As there are differences between the breath analysis instrument approved by the Governor and the breath analysis instrument used on this occasion, the magistrate was required to determine whether the changes made to the instrument were of an inherent or essential nature or only superficial”.

38. Once again his Honour noted the importance of the approval process at [12]:

“In authorising the Governor to approve apparatus of a specified kind, s 47h recognises that from time to time there will be changes of a superficial type or long essential nature. However, once changes are made to essential features, the unit may no longer be the unit approved by the Governor and a fresh approval might be necessary. The fact that the instrument bears the same name or number may not necessarily be conclusive of the question whether it is the instrument approved by the Governor. The Court itself must determine the nature and extent of the changes. It will be a question of fact and degree whether the instrument is the same as that which has been approved. The requirement that the instrument be approved by the Governor is an important safeguard to ensure so far as possible the accuracy and reliability of the instrument. It is not possible to adduce evidence to challenge the accuracy of the analysis made by the instrument other than the type of evidence specified in s 47g (1) (a)... The evidentiary presumptions in s 47 have a draconic operation. It is, therefore, plainly in the public interest to have a safeguard of this kind, a safeguard which would be illusory if an instrument not approved by the Governor is used to detect offences”.

39. Mohr and Nyland JJ agreed with the observations made by Debelle J.
40. Ultimately the Court found that the changes made to the instrument were not such as to no longer render the instrument an approved instrument.

The Application of the South Australian authorities to the *Traffic Act* (NT)

41. The two South Australian cases and line of reasoning employed therein dealt with a specific legislative scheme, which is somewhat different to the legislative scheme established by the *Traffic Act* (NT). The question that arises is whether the South Australian authorities should be read as being confined to the *Road Traffic Act* (SA) or read more broadly as being equally applicable to the *Traffic Act* (NT).
42. The first difference between the two pieces of legislation is that under the *Traffic Act* (NT) there is no requirement for breath analysis instruments to be approved in the manner in which they were required to be approved under the *Road Traffic Act* (SA). Section 29(1)(a) of the *Traffic Act* (NT) provides that a breath analysis instrument may be prescribed for the purposes of the Act.
43. The second difference is that, unlike the *Road Traffic Act* (SA), which requires the instrument to be approved by the Governor, there is no requirement under the *Traffic Act* (NT) for the instrument to be prescribed by a specified person. The instrument is simply prescribed by force of *Regulation 56* of the *Traffic Regulations*.
44. The third difference – as just noted – is that the prescription under the *Traffic Act* (NT) is contained in a regulation, whereas under the *Road Traffic Act* (SA) the approval is given by way of a notice published in the Government Gazette pursuant to s 47(1) of the Act.
45. What, if any, is the difference between an instrument being approved by a specified person, such as the Governor, by way of a gazettal notice and an instrument being prescribed in a regulation, without the involvement of a specified person?

46. The word “approved”, as used in the context of the *Road Traffic Act (SA)*, carries the meaning of being authorised, endorsed or sanctioned. The word connotes authority having been given to the approved instrument. The status of the approved instrument is added to by the fact that the approval is given by the Governor. In approving the instrument, the Governor no doubt acts on advice that supports him in lending approval to the instrument.
47. Pursuant to *Regulation 56 of the Traffic Regulations, Traffic Act (NT)* a breath analysis instrument is prescribed for the purposes of the Act and Regulations. In the specific context of the Act, the word “prescribed” suggests exclusivity and compulsion: *Words and Phrases Legally Defined Supplement 2005* (Lexis Nexus, Butterworths) 585-586. More particularly, the word carries the meaning of “to lay down or impose authoritatively”: Oxford English Dictionary.
48. Although both pieces of legislation mandate the use of a specified breath analysis instrument, there is a material difference between the processes by which the instrument is mandated.
49. Under the South Australian regime, the Governor is empowered to “approve apparatus of a specified kind as breath analysing instruments”: see s 47h(1)(a). Any such approval is given by way of a notice published in the Government Gazette. In *Police (SA) v Hemsley (SA)*, the approval given by the Governor to the “Drager Alcotest 7110” was expressed in a such way as to relate back to the enabling provision:
- “I, the Governor, hereby approve the apparatus known as the “Drager Alcotest 7110” breath analysing instrument to be a breath analysing instrument pursuant to section 47(1)(a) of the Road Traffic Act 1961 (emphasis added)”.
50. The notice published in the Gazette does more than mandate the use of a particular instrument. When read in conjunction with s 47(1)(a) of the Act, the notice discloses that the instrument has been subjected to a process of

“approval”. As pointed out above,¹ “one of reasons for requiring the approval of the Governor for breath analysing instruments is to ensure so far as possible the accuracy and reliability of the instrument”: *Police (SA) v Hemsley* (supra) per DeBelle J at 130.

51. In my view, the process of prescribing a breath analysis instrument under the *Traffic Act* (NT) does not entail a process of approval. *Regulation 56* of the *Traffic Regulations* – read in conjunction with s 29 of the Act - simply mandates the use of the prescribed instrument, without incorporating the added dimension of the approval process undertaken under the *Road Traffic Act* (SA). That characterisation of the process is reinforced by the fact that no named person is responsible for prescribing a breath analysing instrument.
52. Another striking difference between the two pieces of legislation is that under the *Road Traffic Act* (SA) there is a non –statutory mechanism for approving new instruments - see s 47h (1) and (2) - whereas under the *Traffic Act* (NT) any change to the “prescribed instrument” would require an amendment to *Regulation 56*.
53. In light of the differences between the two statutes, the Court should be circumspect in applying the two South Australian authorities to the *Traffic Act* (NT).
54. However, the legislative differences between the two statutes is not by itself sufficient to lay a firm basis for confining the two South Australian cases to the specific legislation with which they dealt, and therefore distinguishing the present case from those two cases. But, there is a fundamental difference between the facts or circumstances of the present case and that of the South Australian cases that, when taken in conjunction with the legislative differences, provides a clear basis for distinguishing the present

¹ See above, p 8.

case from the South Australian line of authority and the reasoning processes adopted therein.

55. That fundamental difference relates to the mode of expression used in mandating the use of an approved or prescribed instrument.
56. The gazettal notice published pursuant to s 47h(1) of the *Road Traffic Act* approves of a specific breath analysis instrument by reference to a brand name and model number, namely, the “Drager Alcotest 7110”. Section 47h(1) recognises the existence of a pool of different breath analysing instruments from which the Governor may approve a specific kind of instrument.
57. Although s 29(1)(a) of the *Traffic Act* (NT) also recognises such a pool of instruments, *Regulation 56* describes the “prescribed instrument” in less specific terms than the approved instrument described in the gazettal notice published in accordance with s 47h(1) of the *Road Traffic Act* (SA). *Regulation 56* refers to the “prescribed instrument” as being “of a type known as a Drager Alcotest 7110”. That descriptive phrase is to be read as being “of a type (of instrument) known as a Drager Alcotest 7110”. The use of the preposition “of” and the use of the indefinite twice in the phrase implies a sense of plurality and connotes a class of instruments of a certain type. Paraphrasing, the effect of *Regulation 56* is:

“For the purposes of section 29 of the Act and Regulations, a device for the carrying out of a breath analysis that is of a class of instruments known as a Drager Alcotest 7110 is a prescribed breath analysis instrument”.

58. Significantly, the description of “the prescribed instrument” in *Regulation 56* does not employ the definite article, so as to read “that is of the type known as the Drager Alcotest 7110”. If the description was along those lines, then it would have a similar effect to the description contained in the gazettal notice, which was considered in the two South Australian cases. The use of the definite article would have made it clear that the “prescribed

instrument” was an instrument which was presently in existence and possessing a definite and specific character. If the description had been to the effect “of the type known as the Drager Alcotest 7110”, then that would have been tantamount to stipulating the apparatus known as the “Drager Alcotest 7110” as the prescribed breath analysing instrument for the purposes of the *Traffic Act* (NT).

59. The Regulation does not strive to confine a “prescribed instrument” to a specific kind of instrument, defined by reference to a brand name and model name, as did the gazettal notice published in accordance with s47H(1) of the *Road Traffic Act* (SA). *Regulation 56* of the Traffic Regulations (NT) envisages that more than one type of breath analysis instrument – indeed several instruments - may meet the statutory description of the “prescribed instrument”. The recurrent use of the indefinite article in the description implies indeterminacy, and indicates that the class of instruments, which is the subject of the prescription, is not closed and is continuous. Furthermore, the use of the indefinite article envisages that some of the instruments belonging to the class may not yet be in existence. The only defining characteristic of the prescribed class of instruments is that the instrument must be known as “a Drager Alcotest 7110”.
60. The Court received evidence to the effect that at the time *Regulation 56* came into effect the Drager Alcotest 7110 Mk 1 (as it is colloquially referred to) was in use by the Northern Territory Police Force. Although the prosecutor, Mr Smith, had some initial reservations about the Court acting on that evidence, he was ultimately agreeable to the Court determining this matter on the basis that the Drager Alcotest 7110 Mk 1 was in usage at the time the regulation was enacted.
61. However, the fact that the instrument that was used to test the defendant’s breath sample was the Drager Alcotest 7110 Mk V (as it is also colloquially referred to) – and not the Drager Alcotest 7110 Mk I – is immaterial, as the

description of the prescribed instrument is couched in sufficiently broad language to encompass any generational development of the Drager Alcotest 7110 Mk 1 and include any progeny of that prototype, such as the Drager Alcotest 7110 Mk V. The description is broad enough to fit successive models of the Drager Alcotest 7110 in much the same way as the descriptions “Model T Ford” and “Spitfire” fitted successive models or “Marks”.²

62. The legislative scheme of the *Traffic Act* (NT), as compared to the legislative scheme of the South Australian statute, supports this analysis of the description of “prescribed instrument” in *Regulation 56* of the *Traffic Regulations*. The fact that a breath analysing instrument is prescribed, rather than approved, coupled with the fact that its prescription is ensconced in a regulation, supports such a broad interpretation of the phrase “that is of a type known as a Drager Alcotest 7110”. The legislature has deliberately employed such language so as to obviate the need to amend *Regulation 56* as and when modifications – even extensive ones – are made to the prescribed breath analysing instrument.
63. For the above reasons, the two South Australian cases are distinguishable from the present case, and it is therefore not apposite to apply the line of reasoning that was adopted by the Full Court in both of those cases.
64. In my opinion, the instrument that was used to test the defendant’s sample of breath fitted the description of a device that is “of a type known as a Drager Alcotest 7110”, and was therefore a prescribed instrument within the meaning of *Regulation 56*.
65. If, however, I have erred in the conclusion I have reached concerning the effect of the description of the prescribed instrument in *Regulation 56*, then I consider that there is an alternative basis for finding that the instrument

² See the judgement of Mohr J in *Police (SA) v Hemsley* (supra), which was discussed above at p 7.

that was used to test the defendant's sample of breath was a prescribed instrument.

66. That alternative approach also rests on a wide meaning being accorded to the description of the prescribed instrument in *Regulation 56*. Whether or not the instrument that was used to analyse the defendant's sample of breath fitted the statutory description is a question of fact and degree. It is a matter of determining whether the characteristics of the instrument that was used substantially conformed to those of an instrument known as "a Drager Alcotest 7110" or, to use the words of Glidewell LJ in *R v Crown Court at Knightsbridge, ex parte Dunn*,; *Brock v DPP* [1993] 4 ALL ER 491 at 498, if that instrument "amounted to, was near to, or had a substantial number of the characteristics" of an instrument known as "a Drager Alcotest 7110".
67. In my opinion, the broad description of the prescribed instrument in *Regulation 56* would countenance such an approach, having particular regard to the fact that one of the ordinary meanings of the word "type" is "a class of things with common characteristics". It is noteworthy that a comparable approach was taken in *R v Crown Court at Knightsbridge, ex parte Dunn; Brock v DPP* (supra); though the phrase under consideration there - "of the type known as the pit bull terrier" - was of wider import than the phrase contained in *Regulation 56*.
68. On the basis of the evidence given by Mr Cheval the instrument that was used to analyse the defendant's sample of breath had most of the characteristics of a Drager Alcotest 7110 (Mk 1 or 2). The characteristics of the instrument that was used substantially conformed to the characteristics of "a Drager Alcotest 7110" - Mk 1 or Mk 2- or "amounted to, was near to, or had a substantial number of the characteristics" of those two devices.
69. Although the evidence given by Mr Cheval indicated that there is a fundamental difference between the infra red/electro-chemical process employed by the Drager Alcotest 7110 Mk V to analyse a sample of a

person's breath and the purely infra red process employed by the Mk 1 and II models, that difference does not result in the instrument used ceasing to be a prescribed instrument. In my opinion, the manner in which the prescribed instrument is described in *Regulation 56* does not require – indeed does not permit – the Court to engage in the rigorous examination and comparison of instruments that the Full Court undertook in the two Australian cases. The comparative analysis undertaken by the Full Court was peculiar to – and dictated by - the manner in which the approved instrument was described in the gazettal notice, published in accordance with the enabling provision. At its highest, *Regulation 56* only requires the Court to be satisfied that the characteristics of the instrument used substantially conformed to those of the prescribed instrument.

Dated this 29 day of March 2007.

Dr John Lowndes
STIPENDIARY MAGISTRATE