IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA397/2020
[2020] NZCA 563

IN THE MATTER OF	SOLICITOR-GENERAL'S REFERENCE (NO 1 OF 2020) FROM CRI-2018-004-9139, CRI-2019-004-4556, CRI-2019-004-198, CRI-2019-004-10740, DISTRICT COURT AT AUCKLAND

CA491/2020

IN THE MATTER OF	SOLICITOR-GENERAL'S REFERENCE (NO 2 OF 2020) FROM CRI-2018-004-708, DISTRICT COURT AT AUCKAND

Hearing:	22 October 2020
Court:	Kós P, French and Gilbert JJ
Counsel:	C A Brook, R K Thomson and S E Trounson for Referrer T Mijatov as counsel assisting the Court
Judgment:	12 November 2020 at 3 pm

JUDGMENT OF THE COURT

A The application by the Solicitor-General to adduce affidavit evidence is declined.

B The answers to the questions referred are as follows:

Question 1: **Was the Judge in each case correct to find there had been non-compliance with ss 77(3)(a) and (3A) of the Land Transport Act 1998, by reason of the wording of Block J on the Police Procedure Sheet POL515 09/19?**

***Answer*: No.**

***Question 2:* If the answer to Question 1 is yes, was the Judge in each case correct to find as a result there had not been reasonable compliance with ss 77(3)(a) and (3A), in terms of s 64(2) of the Act, such that evidence of the Evidential Breath Test (EBT) result was inadmissible?**

***Answer*: Not answered.**

***Question 3:* Was the Judge correct to find that the evidential blood sample obtained following the procedure in Police Procedure Sheet POL515 09/19 was inadmissible by reason only of the wording of Block J?**

***Answer*: No, by reason of the answer given to Question 1.**

REASONS OF THE COURT

(Given by Kós P)

[1] The Land Transport Act 1998 requires that certain motorists who have returned a positive breath alcohol test result be given a warning before they elect whether or not to seek a further *blood* alcohol test.[1] The warning required by s 77 is that, if a blood test is not requested within 10 minutes, either:[2]

> … the positive test could of itself be conclusive evidence to lead to [your] conviction for an offence against this Act…

or:

> … the positive test could of itself be conclusive evidence that [you have] committed an infringement offence against this Act…

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1 Land Transport Act 1998 (the Act), s 77. Not all motorists returning a positive result are given the election and warning. If the motorist is 20 years or older and the breath test produced between 250 mcg per litre of breath and 400 mcg per litre of breath, no blood alcohol election is given. Nor is a warning: s 77(3B). We refer to this later as a "category 5 offence": see below at [10].

2 Sections 77(3A)(a) and (b).

Which formula is used obviously depends on whether the presumptive offence can be dealt with by infringement notice or not.[3]

[2] But the police used neither formula required by the Act. Instead they used these words:

> … the evidential blood test you have just undergone could, of itself, be conclusive evidence *in a prosecution against you* under the Land Transport Act 1998.

These words appear on a standard form called Police Procedure Sheet POL515 09/19, in the part entitled "Block J". They have become known as the "Block J wording".

[3] Initially a series of District Court decisions held the variance from s 77 was immaterial.[4] But in 2020 other Judges of that Court held that the breath test was inadmissible because the police had failed to comply with the warning requirements in the Act. No single consistent position has been reached.

[4] In August and October 2020 this Court granted the Solicitor-General leave under s 313 of the Criminal Procedure Act 2011 to refer three questions arising from certain adverse decisions in the District Court:[5]

(a) *Question 1:* Was the Judge in each case correct to find there had been non-compliance with ss 77(3)(a) and (3A) of the Act, by reason of the wording of Block J on the Police Procedure Sheet POL515 09/19?

(b) *Question 2:* If the answer to Question 1 is yes, was the Judge in each case correct to find as a result there had not been reasonable compliance with ss 77(3)(a) and (3A), in terms of s 64(2) of the Act, such that evidence of the Evidential Breath Test (EBT) result was inadmissible?

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3 If the motorist is less than 20 years old and the breath test produced an alcohol level of 150 mcg or less, an infringement offence only is committed. We refer to this later as a "category 4 offence": see below at [10]–[11].

4 See below at [23] n 15.

5 *Re Solicitor-General* [2020] NZCA 330; and *Solicitor-General's Reference (No 2 of 2020) from CRI-2018-004-708, District Court at Auckland* [2020] NZCA 466. The decisions the subject of the referrals are *Police v Stewart* [2020] NZDC 11392; *Police v Thakoor* [2020] NZDC 10980; *R v Yang* [2020] NZDC 10304; *Police v Taylor* [2020] NZDC 12166 (CA397/2020); and *Police v Neutze* [2020] NZDC 12815 (CA491/2020).

(c) *Question 3:* Was the Judge correct to find that the evidential blood sample obtained following the procedure in Police Procedure Sheet POL515 09/19 was inadmissible by reason only of the wording of Block J?

[5] The outcome of this reference does not affect the five motorists directly, and they were not represented. Mr Mijatov was appointed counsel assisting, to contradict the Solicitor-General's submissions. We express our appreciation to all counsel for the helpful submissions we received.

Statutory scheme

[6] The critical provision for present purposes is s 77 of the Act. It contains conclusive presumptions that breath and blood alcohol tests, if taken correctly, accurately indicate the level of alcohol in the motorist's breath or blood. However, where the motorist is entitled to seek a blood alcohol test, if police fail to provide the advice set out in s 77(3), the EBT result will not be admissible in proceedings for specified offending against the motorist.

[7] Previously the equivalent of s 77(3) simply provided that any motorist whose breath test was positive would be advised that if they did not request a blood test within 10 minutes their breath test "could of itself be sufficient evidence to lead to his [or her] conviction for an offence against this Act".[6] In 2001, the word "sufficient" was replaced by "conclusive" in the advice required to be given to a motorist under s 77(3).[7] In 2011, an infringement offence was introduced for motorists under 20 who returned an EBT result of up to 150 mcg of alcohol per litre of breath, and alcohol interlock and zero alcohol licences were now provided for.[8]

[8] In 2014, the maximum breath and blood alcohol limits were lowered.[9] A more extensive, "two-tier" regime of infringement and conviction offences was created. Different alcohol limits apply for motorists younger than 20 years of age, or those on

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6 Transport Act 1962, s 58(4) (as amended by the Transport Amendment Act (No 3) 1978, s 7).
7 Land Transport (Road Safety Enforcement) Amendment Act 2001, s 9(1)(b).
8 Land Transport (Road Safety and Other Matters) Amendment Act 2011, ss 25–26 and 38.
9 Land Transport Amendment Act (No 2) 2014, ss 4–5.

alcohol interlock and zero alcohol licences. There is no entitlement to elect a blood test for motorists in jeopardy of an infringement offence, unless they are younger than 20. Cost recovery for blood test collection and analysis fees was provided for.[10]

[9] Section 77 now provides (so far as relevant):

> **77 Presumptions relating to alcohol-testing**
>
> (1) For the purposes of proceedings for an offence against this Act arising out of the circumstances in respect of which an evidential breath test was undergone by the defendant, it is to be conclusively presumed that the proportion of alcohol in the defendant's breath at the time of the alleged offence was the same as the proportion of alcohol in the defendant's breath indicated by the test.
>
> …
>
> (3) Except as provided in subsections (3B) and (4), the result of a positive evidential breath test is not admissible in evidence in proceedings for an offence against any of sections 56 to 62 if—
>
> (a) the person who underwent the test is not advised by an enforcement officer, without delay after the result of the test is ascertained,—
>
> (i) that the test was positive; and
>
> (ii) of the consequences specified in subsection (3A), so far as applicable, if he or she does not request a blood test within 10 minutes; or
>
> (b) the person who underwent the test—
>
> (i) advises an enforcement officer, within 10 minutes of being advised of the matters specified in paragraph (a), that the person wishes to undergo a blood test; and
>
> (ii) complies with section 72(2).
>
> (3A) The consequences referred to in subsection (3)(a)(ii) are—
>
> (a) that the positive test could of itself be conclusive evidence to lead to that person's conviction for an offence against this Act if—
>
> (i) the test indicates that the proportion of alcohol in the person's breath exceeds 400 micrograms of alcohol per litre of breath; or

[10] Section 8.

(ii) the person is younger than 20 and the proportion of alcohol in the person's breath exceeds 150 micrograms of alcohol per litre of breath; or

(iii) the person holds an alcohol interlock licence or a zero alcohol licence:

(b) that the positive test could of itself be conclusive evidence that the person has committed an infringement offence against this Act if the person is younger than 20 and the test indicates that the person's breath contains alcohol but the proportion of alcohol does not exceed 150 micrograms of alcohol per litre of breath.

(3B) Subsection (3) does not apply if the result of a positive evidential breath test indicates that the proportion of alcohol in a person's breath (other than a person who is apparently younger than 20 or who holds an alcohol interlock licence or a zero alcohol licence) exceeds 250 micrograms of alcohol per litre of breath, but does not exceed 400 micrograms of alcohol per litre of breath.

…

[10] It is helpful now to set out the effect of s 77 in schematic form:

Category	**Section**	**Conviction/ Infringement**	**Blood election?**	**Warning**
1	77(3A)(a)(i)	Conv	Yes	77(3A)(a): "could of itself be conclusive evidence to lead to that person's conviction for an offence"
2	77(3A)(a)(ii)	Conv	Yes	As above
3	77(3A)(a)(iii)	Conv	Yes	As above
4	77(3A)(b)	Infrgt	Yes	77(3A)(b): "could of itself be conclusive evidence that the person has committed an infringement offence"
5	77(3B)	Infrgt	No	No

[11] So, for example:

(a) a category 1 offence involves a motorist of any age and an EBT result of at least 401 mcg of alcohol per litre of breath, cannot be dealt with by infringement notice, entitles the motorist to elect a blood sample and requires a warning in the form set out in s 77(3A)(a);

(b) a category 4 offence involves a motorist under the age of 20 years and an EBT result of less than 151 mcg of alcohol per litre of breath, is dealt with by infringement notice, entitles the motorist to elect a blood sample and requires a warning in the form set out in s 77(3A)(b); and

(c) a category 5 offence involves a motorist of 20 years or older and an EBT result of 251–400 mcg of alcohol per litre of breath, is dealt with by infringement notice, but does *not* entitle the motorist to elect a blood sample and does not require a warning regarding that non-existent election.

These three are the primary categories of offence we need to be concerned with.

[12] The police conduct over 1.5 million compulsory breath tests each year. The process is as follows.

[13] The police first administer a passive breath test, and then a more formal breath screening test at the roadside. If the motorist fails the breath screening test, they are read their rights, told they may speak to a lawyer and required to accompany the officer to a police or other station to take an EBT. The motorist is told there is a list of lawyers who may be spoken to for free, and "[i]f you wish to speak to a lawyer a telephone will be made available to you for that purpose as soon as practicable. You will be allowed a reasonable time to consult and instruct a lawyer from the time a telephone is made available to you."

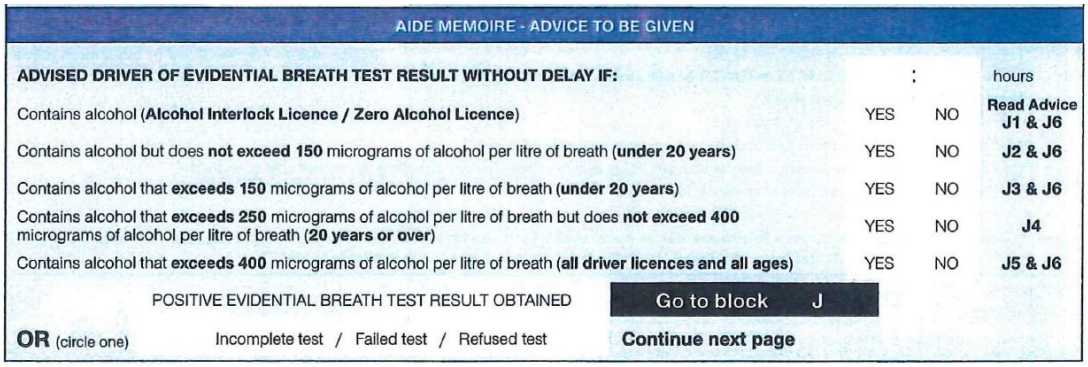
[14] At the testing station they are told they are being detained for the purpose of breath or blood alcohol testing, again read their rights, given the same advice about

the availability of a lawyer, and told they must undergo the EBT "without delay". They are also told that if they fail to do that, they will be required to give a blood specimen, and:

> If that blood specimen indicates the presence of alcohol, proceedings may be taken against you.

Curiously, they are not told the same about the EBT, at that point.

[15] Police Procedure Sheet POL515 09/19 sets out the following aide memoire for the police officer conducting the EBT:

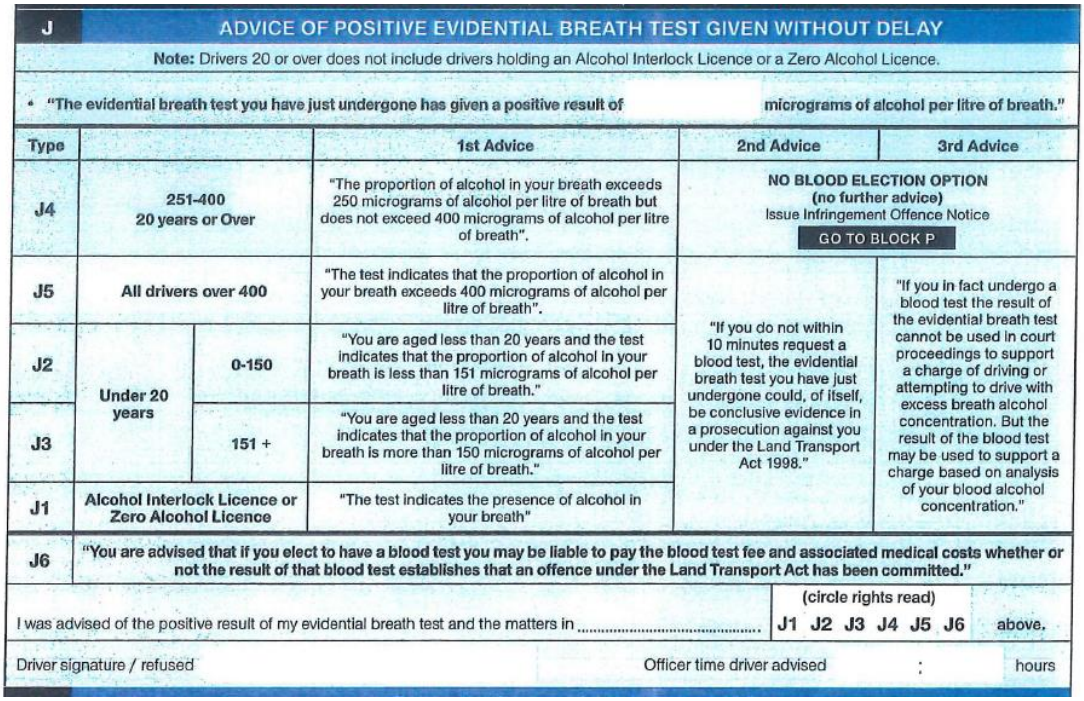


AIDE MEMOIRE - ADVICE TO BE GIVEN			
ADVISED DRIVER OF EVIDENTIAL BREATH TEST RESULT WITHOUT DELAY IF:	:		hours
Contains alcohol (**Alcohol Interlock Licence / Zero Alcohol Licence**)	YES	NO	**Read Advice J1 & J6**
Contains alcohol but does **not exceed 150** micrograms of alcohol per litre of breath (**under 20 years**)	YES	NO	**J2 & J6**
Contains alcohol that **exceeds 150** micrograms of alcohol per litre of breath (**under 20 years**)	YES	NO	**J3 & J6**
Contains alcohol that **exceeds 250** micrograms of alcohol per litre of breath but does **not exceed 400** micrograms of alcohol per litre of breath (**20 years or over**)	YES	NO	**J4**
Contains alcohol that **exceeds 400** micrograms of alcohol per litre of breath (**all driver licences and all ages**)	YES	NO	**J5 & J6**
POSITIVE EVIDENTIAL BREATH TEST RESULT OBTAINED	Go to block J		
OR (circle one) Incomplete test / Failed test / Refused test	**Continue next page**		

In terms of the categorisation we have adopted, line 1 relates to category 3, line 2 to category 4, line 3 to category 2, line 4 to category 5 and line 6 to category 1.

[16] In four of the five categories the motorist may then seek an evidential blood alcohol test, the result of which will supersede the EBT. The exception is category 5, where the motorist is 20 years or older and the breath test produced 400 mcg or less. In that case neither election nor s 77 warning is required.

[17] Block J of Police Procedure Sheet POL515 09/19 then provides:



J	ADVICE OF POSITIVE EVIDENTIAL BREATH TEST GIVEN WITHOUT DELAY				
Note: Drivers 20 or over does not include drivers holding an Alcohol Interlock Licence or a Zero Alcohol Licence.					
• "The evidential breath test you have just undergone has given a positive result of ..... micrograms of alcohol per litre of breath."					
Type			1st Advice	2nd Advice	3rd Advice
J4	251-400 20 years or Over		"The proportion of alcohol in your breath exceeds 250 micrograms of alcohol per litre of breath but does not exceed 400 micrograms of alcohol per litre of breath".	NO BLOOD ELECTION OPTION (no further advice) Issue Infringement Offence Notice GO TO BLOCK P	
J5	All drivers over 400		"The test indicates that the proportion of alcohol in your breath exceeds 400 micrograms of alcohol per litre of breath".	"If you do not within 10 minutes request a blood test, the evidential breath test you have just undergone could, of itself, be conclusive evidence in a prosecution against you under the Land Transport Act 1998."	"If you in fact undergo a blood test the result of the evidential breath test cannot be used in court proceedings to support a charge of driving or attempting to drive with excess breath alcohol concentration. But the result of the blood test may be used to support a charge based on analysis of your blood alcohol concentration."
J2	Under 20 years	0-150	"You are aged less than 20 years and the test indicates that the proportion of alcohol in your breath is less than 151 micrograms of alcohol per litre of breath."		
J3		151 +	"You are aged less than 20 years and the test indicates that the proportion of alcohol in your breath is more than 150 micrograms of alcohol per litre of breath."		
J1	Alcohol Interlock Licence or Zero Alcohol Licence		"The test indicates the presence of alcohol in your breath"		
J6	"You are advised that if you elect to have a blood test you may be liable to pay the blood test fee and associated medical costs whether or not the result of that blood test establishes that an offence under the Land Transport Act has been committed."				
I was advised of the positive result of my evidential breath test and the matters in ..... (circle rights read) J1 J2 J3 J4 J5 J6 above.					
Driver signature / refused			Officer time driver advised :		hours

[18] Here, then, is the contest before us. Section 77(3) requires the police to advise:

(a) persons falling within categories 1–3 that if a blood test is not elected, the positive EBT "could of itself be conclusive evidence to lead to that person's *conviction* under this Act";[11] and

(b) persons falling within category 4 that if a blood test is not elected, the positive EBT "could of itself be conclusive evidence that the person has committed *an infringement offence* against this Act".[12]

Instead, Block J is used to explain to persons within *all* above categories that the positive test "could, of itself, be conclusive evidence in a *prosecution* against you".

[19] In each of the referred cases in CA397/2020, the Judges found that the motorists' EBT results were inadmissible because the advice they were given

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11 Land Transport Act, s 77(3A)(a) (emphasis added).
12 Section 77(3A)(b) (emphasis added).

diverged from the language in s 77 of the Act.[13] In the referred case in CA491/2020, the Judge found that the divergence in the wording rendered not only the EBT inadmissible but also the blood test.[14]

Factual context: the five cases

[20] The essential factual context may be summarised concisely. All five cases are category 1 cases: Ms Stewart's EBT was 889 mcg of alcohol per litre of breath; Mr Yang's was 600 mcg; Ms Thakoor's was 576 mcg; Ms Taylor's was 1391 mcg; and Mr Neutze's was 791 mcg. Each defendant was over 20 years of age.

[21] Each received the Block J warning. Only Ms Taylor sought legal advice before her EBT. She attempted to speak to a lawyer immediately before the EBT was administered. Subsequently she elected not to undergo a blood test. The others sought legal advice after the Block J warning was given to them. Ms Stewart, Mr Yang and Ms Thakoor each spoke to a lawyer before electing not to undergo a blood test.

[22] Mr Neutze sought legal advice after the Block J warning was given. Following that conversation he alone elected to undergo a blood test. It returned a reading of 178 mg per 100 ml of blood, more than triple the permitted limit of 50 mg.

The five judgments

[23] As noted earlier, a series of decisions in the District Court in which the point was taken had held that the linguistic divergence was immaterial.[15] One of the first indications of another view appears to be the decision of Judge Thomas in *Police v Koliandr* in which the Judge observed:[16]

> The form refers to prosecution rather than conviction. There is a difference. There is also, of course, the additional element that not all offences may result

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13 *Police v Stewart*, above n 5; *Police v Thakoor*, above n 5; *R v Yang*, above n 5; and *Police v Taylor*, above n 5.

14 *Police v Neutze*, above n 5.

15 See above at [3]. Relevant decisions include, for example, *Police v Gagas* DC Auckland CRI-2014-004-12585, 10 November 2015 at [7]–[9]; *Police v Brodie* [2016] NZDC 11797 at [39]; *Police v Tolcher* [2016] NZDC 11890 at [59]; *Police v Mumford* [2016] NZDC 13408 at [42]–[46]; *Police v Durkin* [2017] NZDC 5138; *Police v King* [2017] NZDC 15166 at [46]; and *Police v Hipkins* [2018] NZDC 4465 at [42].

16 *Police v Koliandr* [2019] NZDC 14473 at [5].

> in prosecution, not all offences that are prosecuted may result in conviction, and that there are offences that can be proceeded against by infringement notice. The section itself draws that distinction in the wording of the two separate warnings. The section separately deals with the warning that is to be given when a reading would result in an infringement notice as opposed to a prosecution towards conviction. The section requires the police to give the warning depending on what reading is applicable.

[24] We turn now to the five cases before us. The first three, *R v Yang*, *Police v Thakoor* and *Police v Stewart* are all decisions of Judge Collins, delivered in June 2020.[17] *Stewart* is the decision in which the Judge sets out his reasoning most fully, and *Yang* and *Thakoor* cross-reference it.[18] The Judge had previously held, in *Police v Gagas*, that the linguistic difference was immaterial.[19] Now he took a different view, because *Gagas* had not addressed the two-tier offence regime written into s 77, using distinct language for conviction offences and (less serious) infringement offences:[20]

> [36] If there is no material difference between using the word prosecution instead of conviction Parliament's requirement has arguably been met. I found as such in *Gagas.* But contrary to my reasoning in *Gagas* there is a material difference between a prosecution and a conviction. There may be other reasons, as Mr Haskett contends, for a distinction. But, at the very least the two-tier offence regime produces a material difference. If an adult motorist has a reading between 250 micrograms and 400 micrograms they commit an infringement offence for which there is no conviction nor disqualification [here, a category 5 offence]. If a motorist records a reading over 400 micrograms they commit an imprisonable offence, they are convicted, have their criminal conviction on their record and except in the rarest of cases must be disqualified from holding or obtaining a drivers licence for six months [here, a category 1 offence].

[25] *Police v Taylor* and *Police v Neutze* are both decisions of Judge Gibson.[21] In *Neutze* the Judge said, referring to the Block J wording:

> [12] This is not the advice Parliament required be given to a defendant. The two concepts are not necessarily one and the same. Conclusive evidence in a prosecution does not necessarily lead in all instances to a conviction as a defendant can be discharged under s 106 of the Sentencing Act 2002 which is deemed in law to be an acquittal, not a conviction. Neither do the words adopted by the police say what part of a prosecution the evidential breath test

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17 *R v Yang*, above n 5; *Police v Thakoor*, above n 5; and *Police v Stewart*, above n 5.

18 See *R v Yang*, above n 5, at [7]; and *Police v Thakoor*, above n 5, at [14] (although the reference is not by name, as the decision had not yet been issued).

19 *Police v Gagas*, above n 15, at [7]–[9].

20 *Police v Stewart*, above n 5. See also at [28].

21 *Police v Taylor*, above n 5; and *Police v Neutze*, above n 5.

> result would be conclusive evidence of. Parliament wanted the police to warn the motorist of the consequences of not electing a blood test, namely the result of the evidential breath test would be conclusive evidence leading to a conviction for an offence under the Act. The words used by the police do not tell a defendant that.

Preliminary question: should the Solicitor-General be granted leave to adduce process evidence?

[26] The Solicitor-General seeks to adduce an affidavit by Christine Anne MacKenzie, legal counsel at Police National Headquarters. This sets out the process the police followed in devising the Block J wording. Mr Mijatov says we should decline to receive it.

[27] We deal first with jurisdiction. Neither s 314 of the Criminal Procedure Act nor r 32A of the Court of Appeal (Criminal) Rules 2001 make provision for the receipt of evidence on a Solicitor-General's reference. By definition the question is one of law,[22] but that does not mean evidence is per se irrelevant. There may be cases where evidence is necessary to illuminate that question. No explicit provision exists in the United Kingdom either, but the Court of Appeal of England and Wales held, on a similar reference process, that the power to receive evidence was simply inherent in the statutory power to refer.[23] It is however unnecessary to decide here whether the exact same limits for fresh evidence admitted under rule 12B of the Court of Appeal (Criminal) Rules (that the evidence be credible, cogent and fresh) apply.[24]

[28] That is because we are satisfied that the evidence, addressing the internal processes of a police working group in devising the Block J wording, is of no relevance to the essential questions we must address. If, however, there is an implicit criticism in the decisions below that the police were tardy in responding to the adverse decisions in the District Court, we would not join it. The police have faced divergent rather than united decisions, and this is the first occasion on which a senior court has had an opportunity to deal with the question.

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22 Criminal Procedure Act 2011, s 313(1).

23 *Attorney-General's References Nos 114–116 of 2002 and Nos 144–145 of 2002* [2003] EWCA Crim 3374 at [30].

24 See, for example, *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

Question 1: Strict non-compliance with ss 77(3)(a) and (3A) of the Land Transport Act 1998

[29] Question 1 asks:

> Was the Judge in each case correct to find there had been non-compliance with ss 77(3)(a) and (3A) of the Land Transport Act 1998 ("the Act"), by reason of the wording of Block J on the Police Procedure Sheet POL515 09/19?

Submissions

[30] For the Solicitor-General, Ms Brook submits that although there is a literal difference between the phrases used in s 77(3A)(a)–(b) and Block J, they are materially the same. Case law holds it is essential only to convey the "sense and effect" of the statutory language to a motorist, avoiding any real risk of misunderstanding, rather than requiring any specific formula.[25] Applying this test to the advice under Block J, in the context of the whole breath and blood alcohol interaction (and in particular, several repetitions of the motorist's rights and references to court proceedings, evidence against them and charges being laid), "conviction" and "prosecution" must convey the same meaning intended by Parliament: the EBT could be conclusive evidence in a process with serious criminal consequences.

[31] Ms Brook submits the distinction is subtle, and almost certainly lost on a layperson who has already failed a breath screening test and EBT (and is, by definition, intoxicated to at least some extent). Proceedings which lead to convictions and infringement offences are both prosecutions with criminal consequences. A proven infringement offence is not entered onto the motorist's criminal record, but serious consequences may still follow: liability to pay an infringement fee and costs, demerit points and the resulting suspension of a licence, and a licence stop order if the infringement fee and costs are not paid. Motorists are not required to be informed of the specific consequences that could follow conviction as opposed to infringement — ie disqualification, a higher fine and potential imprisonment — so it cannot be the specific gravity of what follows upon conviction that Parliament wanted motorists to

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[25] *Boyd v Auckland City Council* [1980] 1 NZLR 337 (CA) at 341–342; *Barr v Ministry of Transport* [1983] NZLR 720 (CA) at 722; *Sherry v Ministry of Transport* CA99/84, 28 September 1984; and *Suluy v Ministry of Transport* [1986] 2 NZLR 380 (CA).

be warned of under s 77(3A), but rather the fact of a criminal proceeding and the conclusive status their EBT result will have in that proceeding.

[32] Counsel assisting, Mr Mijatov, submits that the wording required by the Act conveys an important distinction introduced in 2014 with the Act's two-tier regime: depending on the amount of alcohol on the defendant's breath, the defendant will face either a conviction or an infringement offence. Some defendants who face an infringement offence can elect to take an evidential blood test to be admitted instead of their EBT (if they are under 20 years old), and the Act requires that police advise such defendants that "the positive test could of itself be conclusive evidence that the person has committed an infringement offence". The wording in Block J is used for both types of offending, but each regime has different consequences. Consequently, rather than signalling the most severe outcome that could flow from the test result being admitted (in the context of a conviction), the wording adopted is broader and more neutral. The key distinction is that the police's wording refers to a process (the prosecution), whereas the statutory wording refers to the outcome of that process and its severity.

[33] Although precise adherence to the language of the statutory provision is unnecessary,[26] here it cannot be said that the sense and effect of the subsection has been conveyed, because the meaning is different. The defendant will not know what consequence could result from the breath test result being admitted into evidence and whether they are facing an infringement offence or a conviction. It is no response to suggest that the distinction is likely lost on the (intoxicated) layperson — rather, greater care is required. Because of the difference between these two types of offending, it is critical that the defendant is properly advised of the consequence of the breath test before electing whether to take the blood test.

[34] Mr Mijatov submits that it cannot be said that the wording in Block J in fact means that motorists are "more accurately informed" than if the wording in the Act was used. It is not open to the police to assume for themselves that role, which is properly left to Parliament. Consequently, it must be the case that the words used by

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[26] Referring to *Barr v Ministry of Transport*, above n 25, at 722.

the police in Block J do not comply with the requirements of s 77 of the Act as a matter of text and purpose.

Discussion

[35] We consider the Block J wording does convey the sense and effect of the warning required in s 77(3A)(a), but that it does not do so in the case of the warning in s 77(3A)(b). To put it another way, it complies with the warning required for category 1–3 offending, but not category 4. We make five points.

[36] First, s 77(3) requires the police officer undertaking the EBT to advise the motorist "of the consequences specified in subsection (3A), so far as applicable, if he or she does not request a blood test within 10 minutes". Unlike, for instance, ss 7 and 24F of the Criminal Investigations (Bodily Samples) Act 1995, there is no prescribed form requirement.

[37] Secondly, it follows therefore that a degree of appreciation is available to the person exercising the statutory duty. Verbatim recitation of the statutory wording is not necessarily required for the law enforcement process itself to remain lawful. In *Barr v Ministry of Transport* this Court was dealing with the predecessor provision to s 77, s 58(4) of the Transport Act 1962. It required that the motorist be advised forthwith after the result of the test is ascertained, that the test was positive and that, if he or she does not request a blood test within ten minutes, "the test could of itself be sufficient evidence to lead to his [or her] conviction for an offence against this Act". The then-equivalent of Block J was also in terms different from the statutory wording. Woodhouse P, writing for the Court, said:[27]

> It will be seen at once that this form of notice does not follow either the precise language or the sequence of the subsection, and indeed it may be regarded as circuitous and perhaps inelegant. But when the final three sentences of the notice are related to the first part of it it becomes amply plain that the appellant was told that the evidential breath test had been positive and also that if he did not request a blood test within 10 minutes the breath result could itself lead to his conviction and that if he chose to undergo a blood test then the evidential breath test could not be used in Court to support a charge of driving with excess breath alcohol.

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[27] At 721.

[38] Woodhouse P went on to say:[28]

> Before leaving the case it is desirable to add that although it will be essential for an enforcement officer to communicate in a clear and sufficient form of words the nature of the advice contemplated by s 58(4), there is no specific formula that need be used, let alone precise adherence to the language of the statutory provision itself. In other words, once the sense and effect of the subsection has been conveyed there has been actual compliance with it and there is no need to go to s 58E, the reasonable compliance provision in the Act.

We follow that directly applicable reasoning in this case.

[39] Thirdly, the warnings in s 77(3A), of which the motorist must be "advised", convey two things. First, the present status of the motorist: either they face a criminal offence, or they face an infringement offence. Secondly, that unless they make the blood sample election, the EBT result could of itself be conclusive evidence against them. We address, next, what the second aspect actually means.

[40] Fourthly, we consider that the sense and effect of the s 77(3A)(a) warning is conveyed to motorists who fall within categories 1–3. It is sufficient to focus on the first category: a motorist who has returned an EBT of at least 401 mcg of alcohol per litre of breath and who cannot therefore be dealt with by infringement notice. That person should be informed that if a blood test is not elected, the positive EBT "could of itself be conclusive evidence to lead to [their] *conviction* under the Act". Instead they are told that the positive EBT "could, of itself, be conclusive evidence in a *prosecution* against you".

[41] In our view, in the case of categories 1–3, this is a distinction without a material difference. A motorist who has, as these defendants had, returned a result in excess of the limit could only reason:

(a) the EBT result is "evidence" against me;

(b) which could of itself be "conclusive";

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[28] At 722.

(c) in a "prosecution" against me;

and therefore:

(d) I am liable to be found guilty of an offence as a result of (a)–(c).

Point (d) is the natural and inevitable inference to be drawn from points (a)–(c). The recipient understands both status and risk; he or she is not misled as to any material particular. The absence of the word "conviction" makes no practical difference to the potential decision-making process ahead, because it is necessarily implicit in the wording used — in particular the word "prosecution" — and does not need to be made explicit. The motorist is not misled by the Block J wording into believing that the potential consequence of the situation they find themselves in is something other than a conviction. The Block J wording conveys, adequately, the sense and effect of the warning required to be given to motorists falling within categories 1–3.

[42] Fifthly, although the cases before us concern category 1 offending, we would not have held that the Block J warning conveys the sense and effect of the warning required by s 77(3A)(b) for motorists who fall within category 4. They should be told that the positive EBT result "could of itself be conclusive evidence that the person has committed an infringement offence". That indication of status is potentially important. It is a signal that the EBT result is low enough to divert the motorist from having committed a criminal offence, with the risk of criminal conviction, disqualification and potential imprisonment. But it is a diversion that may be lost if the motorist then elects to undergo a blood test, and that returns a result exceeding the relevant limit of 30 mg of alcohol per 100 ml of blood.[29] Some motorists may apprehend that consequence for themselves. Some may learn it by conveying the warning they have received to their lawyer. In either case, the word "prosecution" obscures the diversion.

[43] The "sense and effect" of s 77(3A) is not conveyed by the wording of Block J in a category 4 case because it does not make clear that the EBT result has given rise

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[29] That is the infringement offence limit for a driver under 20 years of age: Land Transport Act, s 57(2A) (equivalent to the breath alcohol limit of 150 mcg of alcohol per litre of breath: s 57(1A)).

only to an infringement offence, with considerably less rigorous consequences for the motorist than if he or she had triggered a criminal offence and conviction, and thus has the capacity to mislead.

Conclusion

[44] We consider the Block J wording does convey the sense and effect of the warning required in s 77(3A)(a), for categories 1–3, but that it does not do so in the case of the warning in s 77(3A)(b), for category 4.

[45] Formally the answer we give to Question 1 is "No", because the question references four cases involving category 1 offending.

Question 2: Reasonable compliance with ss 77(3) and (3A) of the Land Transport Act 1998

[46] Question 2 asks:

> If the answer to Question 1 is yes, was the Judge in each case correct to find as a result there had not been reasonable compliance with ss 77(3)(a) and (3A), in terms of s 64(2) of the Act, such that evidence of the Evidential Breath Test (EBT) result was inadmissible?

[47] This question falls away because of the answer to Question 1. It remains relevant in relation to category 4 offending only. No such case is before us, and we reserve for another occasion, where the issue arises directly, whether s 64(2) — applicable if there has been "reasonable compliance" with the relevant provision — can assist the Solicitor-General in a category 4 case.

[48] The principles identified by McMullin J in *Soutar v Ministry of Transport* will need to be considered in such a case: whether the degree of non-compliance causes a reasonable doubt about the correctness of the result, and may give rise to a risk of injustice and unfairness.[30]

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[30] *Soutar v Ministry of Transport* [1981] 1 NZLR 545 (CA) at 550; *Aualiitia v Ministry of Transport* [1983] NZLR 727 (CA) at 729–730; and *Police v Tolich* (2003) 20 CRNZ 150 (CA) at [25].

Question 3: Admissibility of evidential blood sample

[49] Question 3 asks:

> Was the Judge correct to find that the evidential blood sample obtained following the procedure in Police Procedure Sheet POL515 09/19 was inadmissible by reason only of the wording of Block J?

[50] The answer to this question must be "No", by reason of the answer given to Question 1, in the particular case, which concerned category 1 offending. The same would be so for category 2 or 3 offending. In the case of category 4 offending, the answer will turn on Question 2 and cannot be answered in the abstract.

Result

[51] The application by the Solicitor-General to adduce affidavit evidence is declined.

[52] The answers to the questions referred are as follows:

> *Question 1:* Was the Judge in each case correct to find there had been non-compliance with ss 77(3)(a) and (3A) of the Act, by reason of the wording of Block J on the Police Procedure Sheet POL515 09/19?
>
> *Answer*: No.
>
> *Question 2:* If the answer to Question 1 is yes, was the Judge in each case correct to find as a result there had not been reasonable compliance with ss 77(3)(a) and (3A), in terms of s 64(2) of the Act, such that evidence of the EBT result was inadmissible?
>
> *Answer*: Not answered.

Question 3: Was the Judge correct to find that the evidential blood sample obtained following the procedure in Police Procedure Sheet POL515 09/19 was inadmissible by reason only of the wording of Block J?

Answer: No, by reason of the answer given to Question 1.

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