Is it reasonable?

THE IMPOUNDMENT BY POLICE OF A MOTOR VEHICLE CAN ONLY PROCEED SUBJECT TO A REASONABLENESS TEST. **BY DAVID JOSEPH**

Section 84F of the *Road Safety Act 1986* (the Act) provides:

"If a police officer believes on reasonable grounds that a motor vehicle is being, or has been used in the commission of a relevant offence, he or she may . . . (b) impound or immobilise the motor vehicle for the designated period".

Section 84C stipulates that the "designated period" is 30 days, and that a "relevant offence" means a Tier 1 or Tier 2 relevant offence and these definitions go on to list a variety of driving offences, including offences against s49 of the Act, ie, driving under the influence, but not a refusal to undergo a breath test.

The Second Reading Speech introducing the Bill to parliament stated:

"It is disappointing that a small minority of drivers habitually engage in dangerous behaviour such as illegal drag racing, 'doughnuts', and 'burn outs' and high level speeding that needlessly places themselves, their passengers and innocent community members at risk of life and limb. These offenders are apparently undeterred by conventional licence sanctions and fines, and fail to grasp that the community considers unacceptable their selfish and antisocial behaviour. This bill will provide a potent, additional deterrent against 'hoon' driving by targeting what is nearest and dearest to the hoons' hearts – their vehicles. It will also deprive recidivist disqualified drivers of the instrument of their offending and, in removing their temptation, make our streets and roads safer for all".[1]

SNAPSHOT:

- Part 6A of the *Road Safety Act* provides a discretion for police to impound motor vehicles, or not to.
- Section 84M of the Act creates an obligation to review and confirm that the impoundment was on reasonable grounds.
- It is submitted that relief should be available to an accused pursuant to a reasonableness test, rather than on hardship.

The Bill was clearly directed toward dangerous driving, excessive speed and improper use (hooning), and related offences. Obviously too, driving while over the prescribed limit of alcohol might, in the specific circumstance, pose the necessary threat to public safety such that it would be reasonable to then and there impound the vehicle.

Section 49(1) of the Act creates an offence for driving, or being in charge of a motor vehicle, with a relevant blood alcohol reading. Being "in charge" of a vehicle is different from actually driving it. As a consequence, simply being in charge of a vehicle by an accused therefore subjects the vehicle to the provisions of Part 6A of the Act dealing with impoundments, seizures and immobilisations.

Section 84F provides police with a discretion as to whether or not to impound a vehicle. The police must first believe "on reasonable grounds" that a relevant offence has been committed. What this means is that there must be a factual basis, ie, "reasons", on which to found the relevant belief. This is directly related to the interpretation in s48 of the Act as to the meaning of being "in charge of a motor vehicle" as set out in s3AA(1)(a), (b), (c) or (d). This section states that a person is in such a position if, eg, (a) they are attempting to start or attempting to drive the vehicle, or (b) "a person with respect to whom there are reasonable grounds for the belief that he or she intends to start or drive the motor vehicle".

So, if the police believe, on reasonable grounds, that a person is in charge of a vehicle and they believe that a relevant offence is or was being committed, then they may impound the vehicle. This should not mean that the police think that the person has, for example, an intention to start or to drive the vehicle, but that they must actually have formed the relevant belief that such a state of mind existed in the accused at that time. The standard of satisfaction for the belief is certainly higher than a mere possibility, higher than a suspicion, but not so strict as to be beyond reasonable doubt. Whether the police actually, beyond reasonable doubt, were in possession of such a belief is another matter for the court to decide on the relevant facts and circumstances at the time.

It is submitted that the standard of satisfaction should be variable and relatable to the seriousness of the consequences. This submission is made bearing in mind the formulation as to balance of probabilities as set out in *Helton v Allen*.[2] As such, the relevant belief should, in certain circumstances, be obtained near the standard of beyond reasonable doubt, given that a finding of guilt, let alone the impoundment of one's car, can have most serious consequences for one's employment and relationships, particularly in regional areas. The relevant belief ought not to be attained lightly, even if founded upon a level of rationality.

The Act does provide some failsafe measures. Section 84M provides that if a vehicle is impounded then the senior police officer[3] must be informed within 48 hours and "must make inquiries into the circumstances of the impoundment or immobilisation and if, after making those inquiries, he or she is not satisfied that there were reasonable grounds to impound or immobilise the motor vehicle, must ensure that the motor vehicle is returned to the registered operator as soon as is practicable". Obviously the senior police officer must come to a decision and apply a discretion as to the reasonableness of the impoundment.

Accordingly, it is submitted that any impoundment can

only proceed consequent to a reasonableness test.

In this regard, could it be "reasonable" to impound a vehicle in circumstances where the police might believe, or think they believe, that the person was intending to drive a vehicle while over the limit? What reasons might be applied to come to a decision that the intention then existed, and that the impoundment was proper, given that the purpose of the impoundment legislation is essentially to deter hooning and like conduct?

Another purported failsafe measure is that the Act provides for an application to be made to the court for the release of the vehicle (and/or an order that the vehicle not be deemed to be abandoned) on the grounds of "exceptional hardship" pursuant to s84O(2B). This is a very high standard to prove, notwithstanding that "exceptional" simply means "unusual", not necessarily "extreme". But the courts seem to take a view as against the interests of the accused, notwithstanding the supposed presumption of innocence.

Despite s62 of the Act, which might otherwise appear to provide such avenue of relief, by subsection (2) it is clear that police may not impound a car under that section. Accordingly, there appears to be no recourse to the Magistrates' Court under the Act, where the apprehending police do not employ their discretion as to impounding the vehicle, or the senior police officer does not make the necessary inquiries as to the reasonableness of the impoundment.

Two cases presently before this office pose just this difficulty. In one case, the police had stated to the accused that they must impound the vehicle in the circumstances of a driver being merely alleged to have been in charge of it, as distinct from driving it. In the other, when asked by the accused if impoundment was necessary, the reply was "it's the law". In that case, the accused is a middle-aged business woman driving a modest Toyota Echo, hardly the kind of driver, or vehicle, contemplated by the legislation.

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It is clearly not the case that police are obliged, by law or otherwise, to impound vehicles – there is a discretion that must be applied. As such, due to the want of the application of the necessary discretion, these impoundments were illegal.

Further, upon written inquiries to the relevant senior police officer as to the reasonableness of these impoundments, it was stated by a police officer that it was their legal policy to apply an across the board consistency and that, therefore, the impoundment would remain. This position clearly avoids the legal obligation on the senior police officer to undertake the relevant inquiries and seek to come to a relevant decision, taking into account the specific circumstances of that particular impoundment. It is to be supposed that given the stated policy, many vehicles are impounded unnecessarily and simply as a matter of course, reasonably or otherwise.

The Act provides no recourse to these problems. There may be, however, relief pursuant to an injunction but one can only cringe at the idea of that being successful against the police. Or there are the provisions (and the expense of a Supreme Court application) of seeking to have the matter reviewed under s3 of the *Administrative Law Act*. It is unclear whether the senior police officer would be a "tribunal" for the purposes of that Act, requiring him to act "judicially". Another form of relief may be through the police complaints office, but it is doubted whether such would inspire broad public confidence. In any case, the cost of seeking relief can be prohibitive.

What this means for the accused in these cases is that the car is lost to the owner. To be sure, after a period of 30 days the car can be redeemed upon the payment of the relevant fee of $1700 plus a further $22 for each additional day. In one case, the car was a 1997 Commodore and worth nowhere near that money. The car is effectively forfeited and deemed to be abandoned. Added to this will be the expense and inconvenience pursuant to s84BL of the Act as to the completion of a mandatory safe driving program if found guilty of the substantive offence of being in charge of a vehicle while over the limit.

This problem would be by no means unique and, that the government is costing the community large sums of money in dealing with vehicles deemed under the Act to be abandoned, should be considered a significant social cost.

It is submitted that the purpose of the discretion under s84F of the Act and the obligations under s84M are to ensure that any impoundment is reasonable, and based upon cogent facts and not merely at the whim or malice of police, so that the difficulties related here do not arise. Surely, the letter of the law needs to apply to police just as strictly as they seek to apply it against the public. It is likely that the instant cases present a commonplace problem for people who are otherwise safe and conscientious drivers.

It is submitted, therefore, that the Act should provide relief under s84O pursuant to a reasonableness ground, because "reasonableness" is the legal basis upon which an impoundment can take place. Obviously, it would be reasonable to impound a car if it was engaged in hooning or dangerous and excessive speed. A vehicle impounded reasonably might nevertheless be released on the hardship ground, but it is submitted that such represents a significant hurdle for an accused to overcome.

It is further submitted that such a reasonableness ground of relief might also be applied to appeals under s51 of the Act in relation to immediate suspension of licences, instead of the ground of appeal of "exceptional circumstances". The provisions under the Act are essentially to provide for safety, and the concept of immediate impoundment, or licence suspension for that matter, should be seen as emergency measures only, and not as some sort of de facto summary justice. The present legislative regime effectively abrogates the presumption of innocence and the right to natural justice. ■

David Joseph is principal of David Joseph & Co Lawyers at Benalla.

1. Road Safety and Other Acts (Vehicle Impoundment and Other Amendments) Bill, Second Reading Speech, Hansard, 27 October 2005 at 1934.
2. *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 (2 September 1940).
3. "Senior Police officer" is defined to mean a police officer of the rank of Inspector or above, or in the position of Officer in Charge, Vehicle Impoundment Unit.