

LEGAL ASPECTS OF THE BREATHALYSER TEST

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LEGAL ASPECTS OF THE BREATHALYSER TEST
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The Amendment to the Road Traffic Act to allow for the breathalyser test has now been passed by both the Senate and the House of Representatives and before long it will be implemented on our roads. In many respects, the introduction of this amendment should be welcomed. Our roads are fast becoming deathtraps, they are being overtaken by aggressive and reckless drivers who have very little concern and regard for other users of the highway. It is quite possible that the high incidence of motor vehicle accidents and regular carnage on the roads are due to the indiscipline, heavy traffic flow and poor infrastructure, but we cannot deny that many accidents, some very serious, have been caused by intoxicated drivers. Similarly, there are far too many users of the roads who are highly inebriated and pose a real danger to life, limb and property. The Amendment is intended to deal with some of these dangers.

The effect of alcohol on the body varies with the weight, sex, age, tolerance level and eating habits of the user. What is tolerable to a regular drinker may well be disastrous to an occasional imbiber. But, there comes a point when alcohol definitely impairs the judgement, balance and reflexes of the user and makes it more likely that grave mistakes and errors of judgement will ensue. We are also aware that alcohol is used to relax the inhibitions, dull the senses and create a euphoria of well-being which are states of mind not to be encouraged on the roads. These states of mind tend to induce in the intoxicated driver a mistaken sense of awareness and command which so often

lead to unnecessary risk-taking and eventual loss of control.

The real issue at the outset therefore is whether any user of the highway should be allowed to drink and drive. Many countries have actually outlawed drinking and driving, and motorists are charged and convicted on proof that they drove with alcohol, however miniscule, in their breath or blood. Like most jurisdictions, we have opted to set a prescribed limit of alcohol use over which drivers are not permitted or face the criminal consequence. The Amendment defines the prescribed limit as, or in respect of-

- (a) breath alcohol concentration, 35 microgrammes of alcohol in 100 millilitres of breath; and
- (b) blood alcohol concentration, 80 milligrammes of alcohol in 100 millilitres of blood,

or such other proportion as may be prescribed

The discerning lawyer's sense for statutory interpretation is immediately awakened, and the question can reasonably be posed whether the prescribed limit requires a dual test or simply one test which shows either that the breath alcohol level or the blood alcohol level has been exceeded? I am not sure myself, and, at the present time, it is not clear whether either test will suffice or both are required. I am of the view that what is really required is a certificate to demonstrate that the blood alcohol concentration is over 80 mg. in 100 ml. of blood, and if this is shown then there will be a conviction. But, will this alone suffice? Perhaps it will, but how does one get to that stage, and what about those who are unable to provide a breath test and are therefore able to provide only a blood test? This is a matter which needs to be clarified.

I am not sure, at this time, whether there can be a conviction merely by showing that the breath alcohol level has exceeded 35 microgrammes of alcohol in 100 ml. of blood. This latter test is, I understand, a preliminary test which must be followed by a more detailed analysis to check the blood alcohol concentration. One gets the impression, however, looking at ss. 34C(6)(a) that a breath analysing instrument would be used to test the amount of alcohol in the person's breath rather than to determine the amount of alcohol in his blood-it should be noted that some machines can actually determine the amount of the blood alcohol concentration from a breath test- and that the definition of prescribed limit is disjunctive rather than conjunctive.

S.34A is the principal section which prohibits a person from driving or attempting "to drive or be in charge of a motor vehicle on a road or other public place if he has consumed alcohol in such a quantity that the proportion thereof in his breath or blood exceeds the prescribed limit" which clearly suggests that the measure is either of the breath or of the blood. What is disturbing is the possibility that if the breathalyser machine is not working or material or equipment is not available then the police constable may insist that a blood test be made to satisfy the provision of the Act. I would urge that the Act should only be operative if the motorist has the option of a breathalyser test. It should not be an option available to the police constable to insist on a blood test, there are many of us who fear a simple injection and abhor any insertion of a needle in our body. A blood test should only be necessary if the motorist is unable to undertake a breathalyser

test which seems to be the case: see SS.34D(1). Indeed, S. 34D(3) provides that " A constable shall not require a person to submit a specimen of blood for a blood analysis if a breath analysis has been carried out in respect of that person and the result is available."

The Amendment to the Road Traffic Act provides for four(4) types of offences, namely, driving under the influence of alcohol, failure to supply specimen of breath when so required by a constable, failure to submit to breath analysis and wilful alteration of the alcohol concentration in breath or blood. The Act also provides that a person who is in charge of a motor vehicle on a road or other public place can also be convicted if his blood alcohol level exceeds the prescribed level, but it also provides for a defence if the motorist can show that at the material time he did not intend to drive his motor vehicle while he is intoxicated: see SS. 34A(3). This is an important defence. The motorist may recognise that he has had too much to drink and decides to stop on the side, at a layaway or at some other public place thereby avoiding infringement of the Act. If he does so then it is only right and proper that he should not be convicted and the Act so provides. But, suppose he is found with his vehicle crashed against a wall, in a ditch or in such circumstances which suggest that he was not in control before the vehicle became stationary then he may have difficulty showing that he was not driving especially if the constable deemed that an accident has occurred: see DPP v. Corcoran (1993) 1 All ER 912.

Before the constable can administer a breathalyser test

however he has to have reasonable cause to suspect that a person is driving or attempting to drive or has been driving on a road or other public place then he can require the motorist to submit to a breath test. It is significant to note that the constable must have reasonable cause before he can detain and arrest the motorist. Does this mean that motorists can be stopped at random? It seems to me that the requirement for reasonable cause is superfluous and that motorist can indeed be stopped at random and asked to blow into a device from which a constable may conclude that a breath analysis is desirable. I have expressed my concern with this possibility for random testing and I wonder how can it be prevented.

To be sure, the officers can deliberately stop anyone. They are in possession of hand devices which can indicate whether or not the motorist has alcohol in his breath but it cannot accurately measure the amount of alcohol in one's breath or blood and hence the need for a breath analysis. What will prevent the constable from asking the motorist to blow into the hand device without reasonable cause? Suppose the motorist asserts that he has not been drinking, he doesn't drink and shows no sign of inebriation, can he come within SS. 34B(5) which provides for reasonable excuse to avoid conviction-I rather doubt it, he would have to demonstrate, in my opinion, medical grounds or reasonable grounds why he should not take the test, and his sobriety is definitely not reasonable excuse. It means therefore that random testing is quite possible and the freedom of movement of the individual is likely to be infringed. Can the motorist ask the constable to give reasons why he is being asked to blow into

the device? And, if the constable fails to give satisfactory reasons, can the motorist refuse to blow into it?

It is quite clear that it is dangerous to refuse to provide a specimen of breath even if the motorist is sure that he has no alcohol in his body since the Act provides that the constable, if he has reasonable cause to suspect that the person has alcohol in his breath or blood above the prescribed limit, may arrest him without warrant. The net consequence is that a motorist is unlikely to resist the request of a constable to give a breath test even if no reasonable cause exists for submission. I suspect however that many motorists may well challenge the authority of the constable to randomly test them without reasonable cause, and a body of case law may well develop to control random testing. It seems to me that before a constable can test a motorist then he should be able to show and articulate reasonable cause, and if he fails to do so then the motorist should not be compelled to submit to a breath test. In essence, it should be a good defence to a motorist charged for refusing to submit to a breath test to demonstrate that the constable failed to show reasonable cause why he should do so. But, what sanction exists to control constables who abuse the testing process? Will the average citizen be prepared to sue the constable and the State for failing to comply with the Act?

Interestingly, SS. 34B(3) of the Amendment provides that once there is an accident then a constable, without more, may require the driver to provide a specimen of breath for a breath test. Naturally, an accident has occurred and one can understand why

Parliament sees it fit to test the driver without showing reasonable cause, perhaps the accident itself provides reasonable cause. One can only hope that the Jamaica Constabulary Force will not use the breathalyser testing for corrupt, extraneous and invidious purposes.

SS. 34C provides for the breath analysis pursuant to SS. 34B. Subsection (1)(a) seems quite ridiculous, it requires a person to undergo a breath analysis where he has failed to yield to a breath test. Surely, if he has determined not to partake in any test, then the one that he is more likely to forego is the breath analysis. It does seem unlikely that he will surrender to the latter test having refused to take the breath test. Indeed, he would have committed an offence already: see SS. 34B(5).

The breath analysis is definitely the real test on which the court will rely for a conviction. The Act provides that it comes after the initial breath test, or failure to take it, and "shall be carried out at a police station by a member of the Constabulary Force..." An important concern which has not been addressed by the Act is what happens to the motorist's motor car once he is required to take a breath analysis or blood test?. Will it remain on the road? And, whose responsibility will it be if any lost, damage or destruction should ensue? One will readily admit that the Constable cannot allow the intoxicated driver to continue his journey to the police station, accordingly arrangements must be made to protect these vehicles until the owner can retrieve them.

Another factor which has not been dealt with by the Act is the question of bail or release after the motorist is arrested.

In many countries, the driver will be released after additional testing shows that his blood alcohol concentration has dropped and he is now below the prescribed limit-this may occur after a few hours detention. Or, will our constables lock up the citizen without giving him bail on his own recognisance? Isn't it likely that arrest without bail is the likely result of motorists who refuse to submit to a breathalyser test?

The Act requires that certain procedures are followed, and it is quite likely that the court will be very strict to ensure that the letter of the law is complied with: see sections 34C(6)(7)(8). I will outline three cases, below, to show how the courts in England have approached the breathalyser tests. Further, the Act also provides for a breath test to be taken at the person's place of abode if the person was involved in an accident during the preceding two hours or it was not feasible to take the test at the scene of the accident.

SS. 34C(4)(a) and (b) make refusal to submit to a breath analysis and wilfully doing anything to alter the concentration of the alcoholic content in the blood punishable. This may happen in several ways. The case in DPP.v. Carey (1970) A.C. 1072 below is a good example. Where the occupants of a car, other than the driver, are inebriated, they do not come within the provisions of the Act. One suspects however that attempts will be made to substitute a sober person as the "actual driver" of the car. Would this be an obstruction of the police? And, suppose the police insists that a passenger of the motor car was the driver? The court may well have to decide issues which have nothing to do

with the breathalyser test.

SS. 34D provides for a blood test where the person is unable, by reason of his physical condition, to provide for a sample of breath for a breath test. If a breath test has been conducted and the test is available then the person is not required to submit to a blood test. If the blood test becomes necessary then it is an offence to fail to give a sample of blood, and precautions are provided to ensure accuracy in the testing. One wonders why a urine test was not deemed desirable in lieu of or in addition to the other test?

There are many concerns with regards to the accuracy of the testing. The demonstrators of the equipment inform us that gas fumes, electronic devices and incorrect procedures may affect the accuracy of the test. These are matters which should be noted by attorneys who seek to impeach the tests. I expect that a body of case law will definitely develop. Most motorists are likely to plea not guilty because a guilty plea immediately involves revocation of his driver's licence. It seems to me the penalty for the first offence is too severe, and revocation of the licence should only come after a very serious offence or revocation should be at the discretion of the trial judge after hearing argument on sentencing which sentence can also be appealed.

As promised, I will refer to the judgments of three cases from England which are of interests, and I quote relevant and interesting portions of from them.
In DPP V. Carey (1970) A.C. 1072

VISCOUNT DILHORNE:

On October 10 the respondent when driving a motor vehicle in Sandridge Road had been stopped by a police officer. A breath test was carried out by means of a device of a type approved by the Home Secretary. The result was positive. He was arrested and taken to the St. Albans Police Station. There he was given the opportunity, as the Act requires, of taking another breath test. He did so and again the test was positive. He was then required to provide a specimen of his blood. That, as the Act requires, was submitted to a laboratory test and that test showed that the alcohol content in his blood was in the proportion of 206 mgs. of alcohol to 100 mls. of blood. The prescribed limit was greatly exceeded.

The justices dismissed the information and on appeal the Divisional Court upheld their decision. The justices held that the instructions for the use of the device had not been carried out by the police officer who stopped the respondent and that they had not been carried out by the police sergeant who carried out the test at the police station. The justices found as a fact that the police officer who had stopped the respondent had reasonable cause to suspect that he had alcohol in his body. The police officer was consequently entitled to require him to provide a specimen of breath, which means a sufficient quantity of breath to enable the test to be carried out A "breath test" is defined as meaning:

"a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood carried out, by means of a device of a type approved for the purpose of such a test by the Secretary of State, on a specimen of breath provided by that person"

By the Breath Test Device (Approval) (No. 1) Order, 1968, the Home Secretary on February 9, 1968, approved for the purpose of the breath test as defined in section 7 (1) "the type of device described in the Schedule" to the order. That Schedule reads as follows:

"The device known as the Alcotest, comprising an indicator tube (marked with the name 'Alcotest'), mouthpiece and measuring bag, and supplied to the police force in England and Wales in a container marked with the name 'ALCOTEST (R) 80.'"

On the inside of the lid of the container were pasted instructions for the use of the device and there was also in the container a leaflet giving instructions as to its use. The instructions pasted in the lid begin with the following words:

"At least 20 minutes should elapse between the consumption of alcoholic drinks and using the ALCOTEST (R) 80. Smoking during or immediately prior to the test should not be

permitted.

Then following instructions for the assembly of the device and these are followed by the words:

"The measuring bag must then be fully inflated by one single breath in not less than 10 and not more than 20 seconds."

The leaflet also stated that the measuring bag must be fully inflated by one single breath in not less than 10 and not more than 20 seconds. It went on to say:

"It is essential that at least 20 minutes should elapse between the drinking of alcohol and using the Alcotest (R) 80. This delay should also be observed if mouth sprays have been used or aromatic drinks consumed."

The justices found that police officer who carried out the first test had failed to comply with these instructions "in that he did not ascertain or endeavour to ascertain when the respondent had last drunk alcohol or whether he had been smoking immediately prior to the test and did not require the respondent to fill the bag within the period mentioned in the instructions."

They found that the police sergeant at the police station had also failed to comply with the instructions that the bag should be filled within the specified time, presumably because he also had not required the respondent to fill the bag within that time.

The justices also found that the respondent had drunk alcohol in two public houses in Sandridge, and that it was between 10 but less than 20 minutes between the last drink he had taken and the time of the first test, and that the respondent had been smoking shortly before the test was taken. They accordingly found that the test had not been properly carried out. Section 2 (4) of the Act is in the following terms:

"If it appears to a constable in consequence of a breath test carried out by him on any person under subsection (1) or (2) of this section that the device by means of which the test is carried out indicates that the proportion of alcohol in that person's blood exceeds the prescribed limit, the constable may arrest that person without warrant except while that person is at a hospital as a patient."

LORD DIPLOCK

My Lords, on October 10, 1968, the respondent was driving a motor vehicle in St. Albans. An analysis of a specimen of his blood taken subsequently while he was under arrest at the police station showed more than two-and-a-half times the limit of 80 milligrams prescribed under section 7 of the Road Safety Act, 1967.

He was charged with an offence under section 1(1) of that Act of driving a motor vehicle after having consumed alcohol in such a quantity that the proportion thereof in his blood as ascertained by a laboratory test for which he subsequently provided a specimen under section 3 of the Act exceeded the

prescribed limit at the time he provided the specimen. The St. Alban's Magistrates acquitted him upon the ground that the breath test which he had been required to take by a police constable prior to his arrest was not taken in accordance with the instructions issued by the breathalyser Alcotest (R) 80" approved by the Secretary of State and used for the purposes of the test. They were of opinion that the instructions issued with the breathalyser formed an integral part of the device, that as they had not been complied with there was no right to arrest under section 2 of the Act, and that there was accordingly no specimen provided under section 3 of the Act to render the respondent liable to conviction under section 1 of the Act.

The mischief against which it is directed is the risk of road accidents resulting from a person's driving, or attempting to drive or being in charge of a motor vehicle on a road or other public place after having consumed too much alcohol whether or not this can be proved in the particular case to have impaired his ability to drive properly. The criterion laid down by the Act as to what is too much alcohol is the proportion of alcohol in the blood as ascertained by analysis of a specimen of the person's blood. If that proportion exceeds the limit prescribed under section 7 of the Act he is guilty of an offence created by section 1 of the Act.

In order to determine whether the criterion of what is too much alcohol is satisfied, it is necessary to obtain a specimen of blood (or urine) of the person suspected of such an offence. Sections 2 and 3 of the Act deal with the procedure for obtaining such a specimen. The offence *ex hypothesi* is committed on a road or other public place which is unsuitable for obtaining a specimen of blood. Some machinery is therefore needed for compelling the accused person to go to some place where a specimen of his blood can be taken by a medical practitioner. The machinery provided is to empower a constable to arrest the suspect, and to take him to a police station where a specimen of his blood can be taken. Arrest and detention of a person innocent of any offence is a serious interference with the liberty of the subject, and the Act contains safeguards against the right of arrest being abused. As my noble and learned friend Viscount Dilhorne has pointed out, there may be an alternative power of arrest under section 6 (4) of the Road Traffic Act, 1960; but I do not propose to discuss this as it was not exercised in the instant case: compare **Christie v. Leachinsky** [1947] A.C. 573.

While it is possible for a constable by using his physical senses to form an opinion that a person has consumed some alcohol it is not possible for him without the aid of some instrument to form an opinion as to what is the resulting proportion of alcohol in his blood and in particular as to whether that proportion exceeds a specified limit. There does, however, exist a device commonly known as a breathalyser which is capable of providing an indication of whether or not the proportion of alcohol in his blood does exceed a specified limit. Its use requires the co-operation of the suspect in providing a specimen of his breath by breathing into it.

The first safeguard of the liberty of the subject provided by

section 2(1) of the Act is that a constable cannot require a person even to take a breath test unless he has reasonable cause to suspect him of having alcohol in his body or of having committed a traffic offence while the vehicle is in motion.

If the constable has reasonable cause to suspect the person of having alcohol in his body he then has a legal right to require the suspect to take a breath test. If the suspect, when so required, fails to take the breath test, he may be arrested under section 2(4) and if he has no reasonable excuse for failing to do so he commits an offence under section 2(3) for which he is liable to be fined. But if he does take a breath test, he cannot be arrested unless the breathalyser indicates that the proportion of alcohol in his blood exceeds the prescribed limit. This is the second safeguard against the arrest and detention of a person innocent of any offence under section 1.

The third safeguard is provided by section 2(7) of the Act. The suspect must be given an opportunity at the police station of taking a further breath test there. If he does so and the breathalyser does not indicate that the proportion of alcohol in his blood exceeds the prescribed limit, he is entitled to be released and no blood test can be required of him. It is only if either the second breath test at the police station also indicates that the alcohol in his blood exceeds the prescribed limit or he fails to avail himself of the opportunity to take the second breath test that he can be required to provide a specimen of his blood for a blood test. No doubt the reason for this additional safeguard is that there is less likelihood of error in the taking of a breath test in a police station than there may be on the road or other public place where the first breath test was administered.

If, after all these safeguards have been observed, the suspect fails without reasonable excuse to provide a specimen of blood for a blood test, he commits an offence under section 3(3) of the Act. If he submits to a blood test he is guilty of an offence if the analysis of the specimen of blood which he provided shows that the proportion of alcohol in his blood exceeds the prescribed limit. But unless it does so, no offence under section 1(1) of the Act has been committed and he is entitled to be released.

It is important to notice that the results of the blood test provide the sole criterion as to whether an offence under section 1(1) of the Act has been committed or not. If that test is negative, it matters not that each of the breathalyser tests had indicated that the proportion of alcohol in his blood exceeded the prescribed limit. A false indication in either of the breathalyser tests cannot put him in any peril of conviction. The sole purpose of the requirements for two breath tests before the suspect can be required to submit to a blood test is to avoid, so far as possible, the arrest and continued detention of a person who has not committed any offence under section 1(1) of the Act, and the enforced taking of a specimen of his blood.

While Parliament no doubt intended that these safeguards should be observed it can hardly have been intended that it should be so impracticable to observe them that the main purpose of the Act should be defeated because of the obstacles imposed on

the obtaining of a specimen of blood for a blood test. Yet a series of recent decisions of the courts have construed the requirements for the Act about the taking of a "breath test" so as to produce this result.

In DPP v. Warren 1992 4All E.R. 865

LORD BRIDGE

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The respondent was driving in Jermyn Street at 1.55 am on 11 May 1990 when he was stopped and given a roadside breath test which proved positive. He was accordingly arrested and taken to Vine Street Police Station where he duly provided two specimens of breath in the intoximeter. The police officer in charge found, however, on checking the calibration of the intoximeter, that it was not functioning correctly. This gave rise to the situation contemplated by s7 (3)(b) where 'a reliable device of the type mentioned in subsection(1)(a) above is not available at the police station' and accordingly permitted the officer to require a specimen of blood or urine pursuant to s7(4). Given the complexities of some of the procedures which police officers are required to operate under this legislation, it is not surprising to find that the Metropolitan Police, and no doubt many other forces as well, have issued a set of elaborate and detailed instructions which indicate to an officer precisely how he is to proceed in any one of the many contingencies that may arise and which are designed to ensure that he acts in accordance with the statute as interpreted by courts. The officer in this case addressed the respondent precisely in terms appropriate to the contingency which had arisen as indicated in the Metropolitan Police pro forma instructions which were current in May 1990. He said to him:

'The approved evidential breath testing device cannot be used on this occasion because the calibration check has proved unsatisfactory. Accordingly, I require you to provide an alternative specimen, which will be submitted for laboratory analysis. The specimen may be of blood or urine, but it is for me to decide which. If you provide a specimen you will be offered part of it in a suitable container. If you fail to provide a specimen you will be offered part of it in a suitable container. If you fail to provide a specimen you may be liable to prosecution. Are there any reasons why a specimen of blood cannot or should not be taken by a doctor?'

The respondent replied: 'No.'" The officer then asked him: 'Will you provide a specimen of blood?' to which the respondent replied: 'Yes.'" The doctor was called and the respondent provided a specimen of blood which on analysis proved to contain a proportion of alcohol substantially exceeding the statutory limit.

These facts were undisputed and one might have supposed the case to be a perfectly simple and straightforward one. But, when

the respondent appeared at the Bow Street Magistrate's Court to answer an information the he had committed the offence under s 5(1)(a) of the 1988 Act of driving with excess alcohol in the blood, pleaded not guilty and at the close of the case for the prosecution a submission was made that he had no case to answer on the ground that the officer's requirement at Vine Street Police Station that he provide a specimen of blood had not been validly made in accordance with s.7(4). The magistrate upheld the submission and, on the prosecutor's appeal by way of case stated, his decision was affirmed by the Divisional Court (Nolan LJ and Potts J) (see [1992] RTR 129). The prosecutor now appeals by leave of your Lordships' House.

The appeal was allowed on the basis that " Where the driver claims to have the breath specimen replaced under s. 8(2) the constable must fully inform him of the nature of the option open to him and what would be involved if he exercises it, i.e. he should be told that the specimen of breath which he has given containing the lower proportion of alcohol exceeds the statutory limit but does not exceed 50mg. of alcohol in 100ml. of breath, that in those circumstances he is entitled to claim to have that specimen replaced by a specimen of blood or urine if he wishes, but that, if he does so, it will be for the constable to decide whether the replacement specimen is to be of blood or urine and that if the constable requires a specimen of blood it will be taken by a doctor unless the doctor considers that there are medical reasons for not taking blood, when urine may be given instead.

R v. HINDLE (1984) 1 ALLE. R 770

ROBERT GOFF LJ.

The events in question occurred in Newcastle-upon-Tyne on the evening of 17 March 1982. A police officer, Pc Lamb, found a BMW car (which in fact belonged to Mr. Hindle) unattended, having come into collision with a brick wall. Shortly afterwards, Mr. Hindle arrived at the scene of the accident. He admitted being the driver of the car. The evidence of Pc Lamb was that Mr. Hindle was disheveled and smelt of alcohol; and, when the officer said that he wished him to provide a specimen of breath, Mr. Hindle replied: "I have just had a drink down the road when I contacted my wife, and had it not been for the fact that I wanted to collect some files in my car I would not have returned."

In response to an inquiry by the officer, Mr. Hindle said that it had been about two minutes since his last drink. The officer waited a further 20 minutes and then took a specimen of his breath which proved positive. Later that evening the remainder of the breathalyser procedure was followed, the specimens again proved positive, subsequent analysis showing that a blood specimen contained 101 mg of alcohol in 100 ml of blood. At the police station a series of questions was addressed to Mr. Hindle by Pc Lamb. A written copy of these questions and the answers given by Mr. Hindle was before the justices.

They culminated in the following exchange:

Q. Will you tell me briefly what you drank at the pub? A. Yes. I had a double brandy before the phone call and a brandy after the phone call

Q. Do you wish to make a statement under caution regarding this matter? A. I'm happy with the answers I have given you.

Q. Can I just ask why you took a drink when you knew that you may be required to provide a specimen of breath after having been involved in an accident? A. Well, to be quite frank, as you may have realised when you spoke to me it didn't even occur to me that you would wish to take a specimen of breath. If it had occurred to me I must be honest and state that I'm sure that I would have returned to the car.

Q. Had you had a drink prior to the accident? A. I'd had a very little to drink prior to the accident.

Q. I put it to you that you had a drink after the accident in an effort to conceal that fact that you had a drink prior to the accident. A. That's absolutely untrue. I could have gone home or anywhere else quite easily if I'd wanted to conceal anything.'

The justices concluded that the officer satisfied himself that Mr. Hindle had consumed alcohol since the accident.

On appeal, it was held inter alia that " Where, on a charge of driving a motor vehicle with a blood- alcohol concentration above the prescribed limit....., evidence was placed before the court to show that the accused had consumed alcohol after ceasing to drive but before takin the test, the prosecution had then to discharge the burden which resred on them to negative that fact..."

It can be concluded that the opportunity to impeach the breathalyser test exists, and I suspect that a body of case law will develop soon.

Delroy Chuck