Filmer v DPP

[2006] EWHC 3450 (Admin), [2007] RTR 28, 1 November 2006, QBD (DC)
On the facts of this case, the defence had been given sufficient notice of the issues to be tried and was not entitled to an adjournment to seek further evidence.

A motorist had been charged with driving, on the parking area of commercial premises, with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. He at first pleaded guilty, but was then allowed to vacate his plea to enable him to argue that the parking area was not a public place.

The magistrates heard evidence from a police officer that the car park had an entrance and exit without barriers, and was, outside normal trading hours, used as a pedestrian shortcut, a turning circle, and for parking. At the close of the prosecution case, the defendant submitted there was no case to answer. When that submission was rejected, he sought an adjournment to gather more evidence about the parking area, claiming "prosecution by ambush". In fact, the advance disclosure had included a statement from the witness that, "the forecourt itself is an open area of tarmac which is accessible to vehicles at two points but which has a brick wall partially across the front". The magistrates refused the application to adjourn and convicted the motorist. He appealed.

Question(s) for the Court: Whether (a) refusing the adjournment was a proper exercise of discretion; (b) it was *Wednesbury* unreasonable to accept the police evidence that the area in question was a public place.

Held: "… [The appellant] cited authority for two generally accepted propositions which relate to the fundamental preconditions of a fair trial. First, the requirement that criminal proceedings should not proceed by way of ambush … and second, the concomitant requirement that the prosecution must normally serve written versions of the evidence they propose to adduce in sufficient time before the hearing to enable the defendant fairly to deal with it …

"[The Crown] argues that the appellant had clear prior knowledge of the issues in the case such as to enable him to prepare his case fully for trial, and that the evidence called by the Crown was sufficient to justify a conviction …

"The central complaint as regards disclosure is that the appellant had received no sufficient notification of the details of the respondent's case that the car park was a public place so as to enable him to anticipate it and to gather evidence in rebuttal. I am unable to accept that argument. The appellant's guilty plea was vacated in order for this very issue to be resolved, and the appellant knew full well that it was the prosecution's submission that this was a public place for the purposes of this legislation.

"Additionally, [the] statement which was served in advance of trial, had revealed the essential elements of their case. … The additional evidence given [at the trial] was no more than … examples of how the public, to [the witness's] knowledge, had utilised this car park. The appellant was fully aware

that he had the option of calling witnesses if any could be found who were in a position to rebut the prosecution assertion that this was private land to which the public had access at the time in question."

The answer to (a) was "yes'; the answer to (b) was "no"; appeal dismissed.

Carter v DPP

[2006] EWHC 3328 (Admin), [2007] RTR 22, 8 November 2006, QBD (DC)

In the absence of challenge supported by evidence, the prosecution need not prove the presence of preservative in a blood specimen. In a case based on a blood specimen, the district judge was entitled to take into account the breath analysis when judging a defendant's credibility.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. The lower of two breath analyses was 49 µg alcohol in 100 ml breath. The officer administering the procedure therefore offered the motorist the option, under s 8(2), Road Traffic Act 1988 (lower of two breath readings no more than 50 µg alcohol in 100 ml breath), of replacing the breath specimen with an alternative specimen. The motorist provided a blood specimen, analysis of which revealed excess alcohol.

At the trial, expert evidence was given to the effect that if the defendant had drunk only what he claimed to have drunk, then by the time the blood was taken, there would have been no alcohol left in his body.

The district judge, taking into account, *inter alia*, the breath analysis reading, did not accept the defendant's version of the amount he had drunk. Nor, in the absence of any evidence-based challenge, did she accept an argument that the prosecution was required positively to prove that there was preservative in the blood phial. She convicted. The defendant appealed.

Question(s) for the Court: 1. Whether the district judge misdirected herself as to the law in any respect. 2. Whether the decision to convict was *Wednesbury* unreasonable.

Held: "… Unless there is something in the material before the court to suggest to the contrary, … the court is entitled to presume that the procedures laid down for the preparation of [blood testing] kits such as the ones we are concerned with here have been carried out correctly. In those circumstances the district judge was clearly entitled to come to the conclusion that she did, having heard the evidence of [the officer who conducted the procedure] that the procedures were properly carried out at the police station and the evidence of [the analyst of the blood specimen] which did not suggest in any way that he concluded or considered that the sample might have been contaminated or otherwise affected by any failure to place in the phials the appropriate preservatives and other substances …

"[It is argued that] the district judge … 'used' the reading taken at the police station as part of the evidence, and accordingly she breached the prohibition in section 8(2) which provides that such a specimen shall not be used in the course of the trial …

"… All she did was to add it as a third reason for concluding that she could not accept the defendant's evidence as credible. It formed no part of her conclusion as to the reliability of the analysis … of the blood sample. …

"… [The district judge] used it together with other material, as she was entitled to …, as a means of helping her to determine whether the appellant's evidence before her was capable of belief. That seems to me to be a wholly proper use to be made of this material. It is relevant. It is admissible and it does not seem to me that Section 8(2) is worded in such a way as to preclude its use in that context. I therefore have no doubt that the district judge was entitled to take that piece of evidence into account in the way she did in coming to her conclusion as to credibility."

Appeal dismissed.

Watson v DPP

[2006] EWHC 3429 (Admin), unreported, 8 November 2006, QBD (DC)

On the facts of this case (including an earlier appeal to the Administrative Court), prosecution evidence was not unfairly admitted. The investigating officer is not obliged to allow the full three minutes for the motorist to provide two breath specimens.

A motorist had been charged with, *inter alia*, failing without reasonable excuse to provide two specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. There had been a road traffic accident. He had left the scene but was later arrested. At the police station he provided a first specimen of breath, but declined to provide a second, saying he needed to use the lavatory. He was warned that the procedure could not be delayed, but persisted in refusing to provide a second specimen.

The trial was set for 1 March 2004. On 27 February 2004, the prosecution sought an adjournment on the grounds that two of its witnesses (Ms Bulman, an employee of the defendant's insurance company, who was to give evidence about an insurance claim made by the defendant, in which he stated he was the driver of the vehicle on the occasion in question), and a police officer (PC Hall) would not be available. The application was refused on 27 February, but renewed on 1 March, when it was allowed. The defendant challenged the latter decision. In May 2005, the Administrative Court quashed the decision to allow the adjournment, ruling that the prosecution could adduce evidence of the two witnesses under ss 117 and 134, Criminal Justice Act 2003 but could not call them to give oral evidence, and that the prosecution should not be unjustly fettered.

At the trial (in October 2005), the magistrates' court admitted hearsay evidence of the insurance claim. They found that while no warning of the consequences of failure to provide specimens had been given before the first specimen, the warning was given before the defendant failed to provide the second specimen and that that satisfied s 7(7), Road Traffic Act 1988. They further found that he had no reasonable excuse for failing to provide the second specimen and convicted him. He appealed.

Question(s) for the Court: Whether the justices were correct (1) in rejecting as frivolous arguments that the hearsay should not have been admitted, and that there was a reasonable excuse; (2) in finding that s 7(7) had been met by giving the warning after the first specimen had been given and the second refused.

Held: [On an argument that evidence which had not been available in March 2004 should not have been admitted at the trial in October 2005,] "[t]he only limitation [imposed by the Administrative Court in its judgment on the first appeal] on the evidence that the prosecution could call was … that they should be denied the opportunity of calling live evidence from Ms Bulman and PC Hall. That limitation aside, the judge made it clear that no greater restriction should be placed on the evidence that the respondent could introduce…

"… during the trial … the Crown called Linda Wilson, a claims superintendent from the insurers, although the justices had indicated that the relevant documents which she produced were admissible hearsay evidence. She was cross-examined … for the appellant … previously the appellant had declined to agree the statement of Ms Bulman. In those circumstances counsel for the respondent had concluded the fairest approach … was … to call this witness, who could be cross-examined about the documents the prosecution were seeking to rely on and which they had permission to introduce.

"… Those factors reveal the appellant's arguments in this regard to be without merit. The prosecution did not breach the restrictions that this court in the earlier appeal had indicated should be imposed; they gained the justices' consent to introduce the documents as hearsay under Section 117 of the Criminal Justice Act 2003; and thereafter, in a spirit of fair play, they called a relevant witness who could be questioned by the appellant about this area of the case.

"I reject, therefore, the suggestion that natural justice, the ingredients of a fair trial or "general fairness" – still less the earlier judgment of this court – required the justices to restrict the respondent in the case they could present at trial to the evidence available to them on 1 March 2004.

"[On (2)] Essentially [the appellant] is seeking to reverse … *Cosgrove v DPP* [page 184, in which] this court held there was no principle of law that a person must necessarily be allowed the full three minutes to provide the breath specimen … if the administering officer concluded that a person was failing to provide a specimen before the three minutes expired, he was entitled, as a matter of law, to stop the procedure. … there is no basis for us to depart from the decision of this court in *Cosgrove* …

"… In this case, given the appellant had already provided the first breath specimen and was insisting that rather than give a second specimen, which would have taken less than a minute, he wanted first of all to use the lavatory, the administering officer indicated – in my view wholly sustainably – that if he did not immediately provide the second specimen, his refusal to do so would constitute a failure to complete the test. That decision of the officer and the subsequent endorsement of it by the justices … were unimpeachable."

Appeal dismissed.

DPP v Mullally

[2006] EWHC 3448 (Admin), unreported, 9 November 2006, QBD (DC)

On the facts of this case, the defence of duress was not made out.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. In the past she had suffered serious domestic violence. On the day in question she feared for her sister's safety at the hands of her sister's partner, and so drove to their home, with her daughter. There, she was assaulted and threatened by the sister's partner; she called the police, then left with her daughter. The police arrived just as they got to their car. The motorist nevertheless drove away; when she was stopped half a mile further on, a breath test was positive and breath analysis later showed 77 µg alcohol in 100 ml breath.

The defendant pleaded the defence of duress applied and was acquitted. The prosecutor appealed.

Question(s) for the Court: Whether: (i) the respondent was impelled to act as she did as a result of holding a reasonable belief of an imminent threat of serious physical harm; (ii) from an objective viewpoint, the threat ceased to exist prior to the respondent being required to stop by the police.

Held: "… the defence, once raised, involves the court determining two questions (the burden, in those circumstances, resting on the Crown): first, was the accused … driven to act as they did because they genuinely (even if mistakenly) believed that if they did not do so death or serious injury would result to themselves or someone [for] whose safety they would reasonably regard themselves as responsible? Second, if so, [would] a sober person of reasonable firmness, sharing the characteristics of the accused, have been driven in that situation into acting as he or she acted? If the answer to both those questions is yes, then the court must acquit … so long as the threat was effective at the time when the crime was committed and there was no available escape route or other means of dealing with the situation that a reasonable person in the defendant's situation would have taken …

"The justices found that the respondent's fear was genuine and at an appropriately high level, namely she feared imminent serious violence. Accordingly … [the] first (subjective) part of the ingredients of duress/necessity was not disproved by the prosecution. However … the court below fell into error as regards the second question, namely whether, from an objective standpoint, the respondent's response to the threat was reasonable. … from the moment she was aware that the police had attended at the premises, it ceased being necessary for her to continue to drive whilst over the limit in order to avoid a serious assault. Once a reasonable person knew that the police were at [the sister's] home … the only sustainable and reasonable reaction was to conclude that they would be given appropriate protection by the police.

"… there was no suggestion that [the sister's partner] was armed or that police officers would not be able to handle the situation. Accordingly … the

only proper conclusion was that the threat of immediate and serious violence had been removed. Therefore, the half mile or so drive to the respondent's home fell demonstrably outside the response of a reasonable person. The only sustainable finding, in my view, was that the prosecution had disproved this (objective) element of the defence."

Appeal allowed.

Rothon v DPP

[2006] EWHC 3330 (Admin), unreported, 27 November 2006, QBD (Admin)

In the circumstances of this case (prosecution adducing expert evidence based on certain documents relating to the breath analysis device), the defendant's application for disclosure of those documents should have been allowed.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. Intending to take expert advice on the reliability of the breath analysis device used in the case, he had sought disclosure of documents, in the possession of the prosecution, concerning the device. That application had been refused.

At the trial, the motorist called an expert witness (Dr Makin) who dealt generally with the workings of breath analysis devices, but said that he would need to see certain records in order to advise on the reliability of the device in question. It was again argued for the motorist that documents relating to the device, in the possession of the prosecution, should be disclosed to the defence, pursuant to 8, Criminal Procedure & Investigations Act 1996 and article 6, European Convention on Human Rights. The prosecutor called an expert (Dr Rudram), who said that he had seen documents relating to the machine, and that there was nothing in them to suggest the machine in question was outside its type approval or unreliable; and that it had a self-checking system.

The motorist was convicted, and appealed.

Question(s) for the Court: Whether the magistrates were correct in refusing the application for disclosure, given their acceptance of the evidence of the prosecution's expert that the machine was working correctly and was approved, even though the records, the subject of the motorist's application, were in the possession of the prosecution and not a third party.

Held: "… given the situation prior to the calling of Dr Rudram, there was no basis for disclosure and the justices would have been perfectly entitled to refuse the application for disclosure. But the implication of the [question for the court] is that they were not necessarily of that view until they had heard Dr Rudram, despite the indication elsewhere in the stated case that they were relying on the presumption [that the instrument was reliable]. If they were going to hear Dr Rudram, it suggests that, but for his evidence, they might not have been satisfied as to the proper working of the machine. … Logically they should have ruled on the application for disclosure one way or the other before hearing Dr Rudram. Once they had heard Dr Rudram, it seems to me that

natural justice, Article 6 considerations and common sense indicate that they should have acceded to an application for disclosure of the material. …

"[It was submitted] that out of a sense of fairness the prosecution were going further than they needed to go. In one sense that is true. Nevertheless, what eventually happened was that on the application for disclosure the justices relied on expert evidence, without any opportunity for the defence to … cross-examine that expert. That seems to me on any view to be contrary to principle. If the prosecution had relied on the statutory assumption and had argued that there was no basis either for displacing it or for disclosing the records, they would in my view have been on solid ground. But once Dr Rudram was called, in that unusual situation the magistrates should have acceded to the application for the records to be disclosed. Indeed, in that situation, if the prosecution were going to call Dr Rudram, it is extremely difficult to see why those records were not disclosed. They had them and they could have disclosed them."

The answer to the question was "no"; appeal allowed.

DPP v Darwen

[2007] EWHC 337 (Admin), unreported, 24 January 2007, QBD (Admin)

A motorist is guilty of failing to provide breath specimens for analysis if the specimens are insufficient to enable the analysis to be carried out, or provided in such a way that the objective of the analysis cannot be satisfactorily achieved.

A motorist had been charged with failing to provide specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. He had blown into the breath analysis device eight times, over two cycles, each time providing insufficient breath and removing the mouthpiece. The device recorded that the specimens were insufficient, but nevertheless analysed them, showing excess alcohol.

The magistrates found that the motorist had provided specimens and dismissed the charge. The prosecutor appealed.

Question(s) for the Court: Whether the magistrates were correct in deciding that the specimens which were rejected as incomplete were nonetheless sufficient to meet the requirements of s 11(3), Road Traffic Act 1988 [a person does not provide a specimen of breath for analysis unless the specimen is sufficient to enable the analysis to be carried out, etc], and so were specimens as required by s 7(1)(a) of the 1988 Act.

Held: [After quoting s 11(3)] "If a full and proper specimen is not provided even though some of the readings may exceed the prescribed limit those are not readings which can be used as admissible evidence for an offence under section 4 or 5 of the Road Traffic Act 1988…

[On the argument, based on *Zafar v DPP* (page 38) that, "as 'breath' has this ordinary dictionary definition then … the respondent had provided breath; that had been analysed and there was no offence committed' … I cannot accept that argument … The issue … turns essentially upon the meaning of section 11(3) … reading section 11(3) and asking … 'had a specimen of breath been

provided in accordance with it?' the answer is plainly 'no'. The respondent did not provide a specimen for the analysis to be carried out and he did not provide it in such a way that the analysis could be satisfactorily achieved. There were two reasons: first, the respondent did not provide a specimen of breath as directed, and secondly, the machine itself made clear that the amount of air produced was insufficient for its purposes … was the breath to be provided, taking the ordinary definition of that words as set out in *Zafar*, sufficient for the purposes set out in section 11(3)? The answer is plainly 'No'."

The answer to the question was no; appeal allowed.

Ng v DPP

[2007] EWHC 36 (Admin), [2007] RTR 35, 26 January 2007, QBD (Admin)

Elevated mouth alcohol caused by eructation (belching) is capable of amounting to a special reason for not disqualifying.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. He argued that the breath analysis was affected by eructation (belching) and that if the reading had thereby been artificially inflated, that would amount to a special reason for not disqualifying under s 34(1), Road Traffic Offenders Act 1988. The district judge found that the presence of elevated mouth alcohol could not amount to a special reason because it was connected to the offender and not the offence. She convicted the motorist; he appealed.

Question(s) for the court: "(1) Whether it was right to conclude that the elevated mouth alcohol was a circumstance special to the offender and not the commission of the offence and thus not capable of amounting to a special reason. (2) Following *Zafar v DPP* [page 381], whether the district judge was bound to conclude that evidence of mouth alcohol could not amount to a special reason in any event as no distinction could be made between deep lung breath and any other breath or air exhaled for the purpose of the specimen.

Held: [On (2), following *Woolfe v DPP*, page 382], "the question should be answered in the negative. …

[On (1) and the argument that an increased concentration of alcohol in the appellant's breath as a consequence of eructation could not amount to a special reason because it was a circumstance peculiar to the offender rather than the offence], "I do not agree. The evidence upon which the appellant sought to rely went directly to the commission of the offence. If accepted it could provide an explanation as to why the level of alcohol in the appellant's breath exceeded the prescribed level, notwithstanding that on his case the alcohol that he had consumed would not have had that effect. The case is analogous to the line of authority arising out of cases in which … 'the drinks consumed immediately before the offence had, without the knowledge of the offender, had been laced or combined with some extraneous substance (drugs or chemicals), or affected by some extraneous incident without the offender being aware of the potential effects', see *R v Jackson* [page 433]."

The answers to both questions were no; appeal allowed; case remitted back to the magistrates' court for consideration of special reasons.

Smith (Stephen John Henry) v DPP

[2007] EWHC 100 (Admin), [2007] 4 All ER 1135, [2007] RTR 36, 30 January 2007, QBD (DC)

The prosecution is not obliged to disclose a breath/alcohol reading obtained from a preliminary breath test, although it is good practice to do so.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. He had been stopped and required to provide a preliminary breath test using a device which is capable of providing a breath/alcohol reading in figures, although such a reading was not obtained. At the police station, breath analysis showed excess alcohol.

At the trial, it was contended that, pursuant to s 15(2), Road Traffic Offenders Act (evidence of the proportion of alcohol in a specimen of breath to be taken into account) the prosecution was obliged to adduce in evidence the results in figures of the roadside breath test. The district judge dismissed the argument, finding that the word "specimen" in s 15(2) referred only to a specimen taken at a police station for evidential purposes. He convicted the motorist, who appealed. .

Question(s) for the Court: Whether it was right to hold that the prosecution did not have to adduce in evidence the result in figures of the roadside breath test.

Held: "… [The appellant] submits that the prosecution were obliged to adduce in evidence the breath/alcohol reading obtained at the roadside breath test in figures. Alternatively, he submits that, on a request from the defence, they are obliged to disclose the figure. Had the figure been disclosed, it may have supported the case that the device used at the police station was not working satisfactorily so that the figure on which the conviction was based was unreliable.

"As a matter of statutory construction, I cannot accept that submission. The specimens of breath which establish whether or not a defendant has committed an offence under Section 5(1) of the 1988 Act, are those which may be required of a defendant at the police station under Section 7 of the Act, the two specimens of breath mentioned in Section 7(1)(a) …

"… the use in the current Section 6 and 6A of the Act of the expressions 'preliminary test' and 'preliminary breath test' confirm the purpose of the roadside test. The roadside procedure, as Section 6A provides, is a procedure by which an 'indication' whether the prescribed limit is likely to be exceeded is obtained, and the specimen has no greater status.

"Further, the assumption in the last part of Section 15(2) [that the proportion of alcohol in the breath, blood or urine at the time of the offence was no less than in the specimen] plainly applies to the Section 7 specimens which provide the evidence for the Section 5 offence. It would defeat the

scheme of the Act (often to the detriment of defendants) if the assumption were to be based upon the roadside breath test.

"When the 1988 Acts took effect, the device used in the roadside test provided only a threshold test. Technology has advanced and a reading in figures can, with modern equipment, readily be obtained. That change in technology has not, in my view, affected the statutory procedure to the extent that the prosecution are obliged to put that figure in evidence in every case.

"I would, however, consider it to be good practice, where equipment is in use which permits it easily to be done, for the reading in figures obtained from the roadside breath specimen to be disclosed to the defence. We are told that that has become general practice. It is a sound practice and one which may be required by Section 3 of Criminal Procedure and Investigations Act 1996, which deals with the prosecution's duty to disclose material. While in most cases, the evidence, if adduced, is likely to support the prosecution case, there may be cases in which it can provide a basis for a challenge to the accuracy of the Section 7 specimens obtained."

The answer to the question was yes; appeal dismissed.

Malcolm v DPP

[2007] EWHC 363 (QB), [2007] 1 WLR 1230, [2007] 2 Cr App R 1, [2007] RTR 27, 27 February 2007, QBD (DC)

On the facts of this case (defence raising, in its closing speech, whether the warning under s 7(7) had been given), magistrates were right to exercise their discretion to allow the prosecution to recall a witness to give evidence of the procedure, even though they had started to consider their verdict.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988.

At the hearing, the officer who conducted the breath analysis procedure gave evidence but was not cross-examined. The defendant argued the defence of duress. In her closing speech, counsel for the defendant submitted that the warning required by section 7(7), Road Traffic Act 1988 (of the consequences of failing to provide) had not been given and that there was therefore no admissible evidence of the breath analysis or that the correct procedure had been followed. The magistrates retired to consider the submissions. They returned to court and announced that they accepted there had been no evidence that the s 7(7) warning had been given. They had made no decision on the defence of duress, assuming the case would be dismissed on the ground that there was no admissible evidence of excess alcohol.

The prosecutor then asked to recall the police officer to give further evidence of the procedure, arguing that there would be no prejudice since the officer had not been cross-examined. The magistrates allowed the witness to be recalled and heard further evidence from him. They went on to find that the motorist had been properly warned and that the evidence of excess alcohol was therefore admissible; and that the defence of duress was not made out. They

convicted the motorist but found special reasons for not disqualifying her. She appealed against conviction.

Question(s) for the Court: Whether the magistrates were right to exercise their discretion to admit further evidence after they had started to consider their verdict and had returned to court and started to announce their decision on the point of law concerning section 7(7).

Held: "… magistrates have a discretion to receive further evidence after they have retired to consider their verdict, but special circumstances are required if the discretion is to be exercised …

"It is the duty of the defence to make its defence and the issues it raises clear to the prosecution and to the court at an early stage … That was not done in this case. At no time before her final speech did [defence counsel] raise any issue as to the police's compliance with section 7(7). [The officer] was not cross-examined on the point … If there was an issue as to whether the warning required by section 7(7) had been given, and she contended that as a result the officer's evidence of the proportion of alcohol in the appellant's breath was inadmissible [counsel] should have objected to the admission of the officer's evidence as to the proportion of alcohol in the appellant's breath. [Counsel] did neither of these things … in these circumstances she should not have been permitted to raise the issue under section 7(7) in her final speech unless the prosecution was given the opportunity to call evidence to deal with the point.

"To take the section 7(7) point in the final speech was a classic and improper defence ambush of the prosecution …

"… the matters referred to [above] were special circumstances justifying the recall of [the police officer] notwithstanding the fact that the justices had retired and had partially announced their decision … The appellant was available to be recalled to dispute the officer's evidence, if it was disputed. In fact it was not. There was no injustice … the magistrates were fully entitled to exercise their undoubted discretion as they did."

The answer to the question was yes; appeal dismissed.

DPP v Harrison

[2007] EWHC 556 (Admin), unreported, 1 March 2007, QBD (DC)

On the facts of this case (defendant who had been subjected to harassment by youths, and followed them by car after an incident in which his patio doors were smashed), there were no grounds to find special reasons.

A motorist had pleaded guilty to driving with excess alcohol, contrary to section 5(1)(a), Road Traffic Act 1988. He submitted there were special reasons for not disqualifying under s 34(1), Road Traffic Offenders Act 1988. He had suffered harassment from a gang of youths which took the form of verbal abuse, damage to his vehicle and bottles being thrown into his property. On the evening in question, he had been drinking at home and was in bed. At about 12.30 a.m., he was awakened by the sound of breaking glass and verbal abuse. He saw youths attacking a neighbour's property. He telephoned the police who told him to stay at home. The youths then went to the defendant's property, broke the back gate and threw a brick through his patio doors. The

police had not arrived. The defendant got dressed, took a baseball bat, and went outside. The youths were going away. The defendant got into his car and drove after the youths; he stopped and got out, seeking to identify the youth who had smashed his patio doors. He was hit in the face, and went back to his vehicle for the baseball bat. A passing police car approached, and the youths scattered. The defendant was arrested on suspicion of driving with excess alcohol and breath analysis later showed 54 µg alcohol in 100 ml of the defendant's breath.

The magistrates accepted the special reasons argument and did not disqualify. The prosecutor appealed.

Question(s) for the Court: Whether a reasonable bench, having heard the evidence and applying the proper considerations, could have found special reasons in law under s 34 for not ordering disqualification.

Held: "In my judgment … the Justices did reach a conclusion that was not properly open to them. First, there is the very length which the respondent actually drove; some 446 yards … this is a significantly greater distance than could in itself justify a finding of special reasons. Moreover … the driving took place on the A666 road, a major arterial road between Bolton and Manchester. … there inevitably would have been a real prospect of danger to other users of that road predictably out even at that late hour of night …

"Further, … the Justices found that this particular respondent exceeded the breath limit by quite a significant amount, [but] made no mention of the general principle that exceeding the breath limit by the amount in question here of itself would disincline Justices to exercise discretion.…

"In addition, there were in fact alternatives open to this respondent … He could have asked … one of the neighbours to drive him; but he did not do so. He could have perhaps chased after the youths by foot, but again decided not to do so. It cannot be said that the only option available to him was simply to pursue them driving in his car. Moreover … this respondent had been advised by the police to stay in his house. That was advice he elected … to ignore.

"… having regard to the facts as found and whether one takes those facts individually or cumulatively, the Justices could not properly find that special reasons existed in this case."

The answer to the question was no; appeal allowed.

Rainsbury v DPP

[2007] EWHC 1138 (Admin), unreported, 26 April 2007, QBD (Admin)

Where the statutory option was offered and accepted, the defendant then objecting to the taking of the specimen by a nurse, and the officer threatening to charge failure to provide, the blood analysis remained admissible. The court rejected expert evidence to the effect that the blood may have been contaminated.

A motorist had been charged with driving with excess alcohol, contrary to section 5(1)(a), Road Traffic Act 1988. The lower of two breath analyses was 50 µg alcohol in 100 ml breath. The officer administering the procedure

therefore offered the motorist the option, under s 8(2), Road Traffic Act 1988 (lower of two breath readings no more than 50 µg alcohol in 100 ml breath), of replacing the breath specimen with an alternative specimen. The motorist agreed to provide a blood specimen and a nurse was called to take it. For some 25 minutes, the motorist insisted that a doctor, rather than the nurse, should take the specimen. The officer eventually said that if he did not let the nurse take the blood, he would be charged with refusing to give a blood sample. He then agreed and the blood was taken. It revealed excess alcohol.

At trial, the defendant adduced expert evidence that the vials should have been shaken for 30 seconds, not 10 to 15, to ensure adequate mixing of the blood with the preservative. It was also argued that the fact that the alcohol concentration revealed by the blood analysis was almost the same as that shown by the breath analysis an hour earlier, rather than having fallen, suggested contamination of the blood.

The motorist was convicted and appealed.

Question(s) for the Court: (1) Whether the officer's statement to the driver, that if he refused to give a blood sample he would be charged with refusing to give a specimen for analysis, invalidated the blood option procedure and rendered inadmissible the evidence of the blood specimen; (2) (as recast in the judgment) whether the blood sample taken was capable of being relied on as evidence of the level of alcohol.

Held: "… there was in fact consent … to give a blood sample. There remained throughout consent to give a blood sample, although there was a qualification as to how it was to be performed. The 'threat' made him accept a nurse operator, but that did not touch his continuing choice of blood sample as the means by which his level of ingested alcohol should be assessed. … Consent was never vitiated. There was never such a technical problem with the way this procedure was followed so as to render inadmissible the blood sample, which had been taken and upon which the conviction depended.

[On (2)], "… a fact-finding Tribunal is fully entitled to differ from an expert, but only if there is a rational basis for doing so. The learned district judge did differ from him. He had evidence that the relevant consideration was: were the vials adequately mixed or adequately shaken, so that the liquid was adequately mixed? The evidence came from [the nurse who took the blood]. There was no evidence that forced the learned district judge to differ from that. He was entitled, in my judgment, to rely upon the absence of any authoritative stipulation that 30 seconds was a minimum, and to rely upon the absence of crystals, as evidenced by [the nurse], as meaning that there had been adequate mixing."

The answer to question (1) was no; the answer to question (2) was yes; appeal dismissed.

CPS v Sedgemoor Justices

[2007] EWHC 1803 (Admin), unreported, 3 July 2007, QBD (DC)

The requirement that the analyst of a blood specimen be authorised applies only in the context of proof by means of the production of a certificate; other written, or oral, evidence may be given by an expert who is not authorised.

A motorist had been charged with driving with excess alcohol, contrary to section 5(1)(a), Road Traffic Act 1988. The prosecution proposed to rely on the evidence of an analysis of the motorist's blood carried out by a forensic toxicologist employed by a private firm of analysts, who was not an "authorised analyst" within the meaning of s 16(7), Road Traffic Offenders Act 1988. The justices ruled her evidence inadmissible. The prosecutor sought judicial review of that decision.

Question(s) for the Court: Whether the effect of s 16 is that evidence of blood analysis can be given only by an authorised analyst, or whether the effect is that a certificate of analysis, rather than oral or (if accepted) written evidence must be given by an authorised analyst only.

Held: [After a review of the general principle that proceedings in a magistrates' court are not generally susceptible to challenge at an interlocutory stage, and finding that, exceptionally, the court could deal with the application because the proceedings were in effect over – without the evidence of analysis, the prosecution could not proceed], "… Section 16(1) [Road Traffic Offenders Act 1988] is plainly permissive. It does not stipulate the only manner in which evidence of analysis can be given. Rather [it provides] for one means by which evidence of analysis be given, namely by mere production of certificate, provided that the analyst is authorised and subject to the right of the accused under sub-section (4) to require the attendance of the analyst. …

"It would be surprising if the effect of Section 16 were to limit evidence of analysis to an authorised analyst because, if it did, the accused himself would be able to have his specimen examined only by such a person. Often, of course, he may do so, but there is no reason why he should not go to a reputable analyst who has not sought authorisation from the Minister. …

"… the evidence which the Crown advanced of the professional toxicologist by way of statement tendered under section 9, with the witness to attend if required by the defence, was evidence which was admissible."

The case was remitted to the justices to continue the hearing in the light of the judgment.

CPS v Thompson

[2007] EWHC 1841 (Admin), [2008] RTR 5, 12 July 2007, QBD (DC)

The fact that the defendant did not intend to drive until he was below the limit was not, of itself, sufficient to establish the defence in s 5(2) in the circumstances of this case.

A motorist had been charged with being in charge of a motor vehicle whilst unfit through drink, contrary to section 5(1)(b), Road Traffic Act 1988. Police had found him asleep across the front seats of his van; the reversing

lights were illuminated but the engine was not running; the keys were in the ignition; the heater fan was on; the gear stick was in the reverse position; an opened bottle of wine was on the front passenger seat. Breath analysis later revealed 106 µg alcohol in 100 ml breath.

The magistrates accepted the defendant's argument that he had had no intention of driving when he got into the vehicle, or when he was woken by the police officers; they dismissed the charge. The prosecutor appealed.

Question(s) for the Court: (1) Whether the justices were correct in dismissing the case. (2) Whether the intention of a driver at the time of getting into his vehicle would ever be enough to establish the defence under s 5(2), Road Traffic Act 1988.

Held: "… Section 5(2) is not primarily concerned with the person's intentions. They may be a factor to be considered, but the questions to be addressed are: whether a defendant has shown that there is no likelihood of his driving the vehicle whilst the alcohol in his body remains likely to be above the prescribed limit.

"The Justices have simply not asked those essential questions. They have stopped short. They have merely found what Mr Thompson's intentions were at particular times. A defendant's subjective intention cannot be decisive in circumstances such as these where he is: (1) affected by drink; (2) well above the prescribed level; (3) intends to drive when he feels 'alright'; (4) would have no way of knowing when his blood/alcohol level would fall below the prescribed limit; and (5) has put forward no scientific evidence to indicate when that point might be reached.

"I would answer the first question posed in the negative. I would answer the second question posed by holding that there might be circumstances in which the evidence of the driver's intention could satisfy the statutory defence. I would envisage them as most likely to arise where that evidence is accompanied by other compelling circumstantial evidence, or by expert scientific evidence. However, I can envisage circumstances where the evidence of the defendant alone might suffice if it showed that he would not drive until he was in fact below the prescribed level. That would be a matter for a court to consider in the individual circumstances of any given case, and no general answer to the question that has been proposed by the Justices can be given."

Appeal allowed.

DPP v Tooze

[2007] EWHC 2186 (Admin), unreported, 24 July 2007, QBD (DC)

The magistrates applied the wrong burden of proof in respect of s 15(3), which is on the defendant.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. He had driven home, where he had been drinking; there was a gap of two and a half to two and three quarter hours between the time he drove and the time his breath was analysed. The lower reading was 90 µg alcohol in 100 ml breath.

The magistrates found that, although it was likely the motorist had been over the limit when he drove, the assumption in s 15(2) Road Traffic Offenders Act 1988 (that the proportion of alcohol in the breath, blood or urine at the time of the offence was no less than in the specimen) should not be made because of the large amount of alcohol consumed since driving, together with the considerable length of time before the breath analysis; and that the analysis could not be an accurate reflection of the alcohol in the defendant's system at the time of driving. They concluded that they were not sure beyond reasonable doubt that the motorist had been over the limit and acquitted him, but later accepted that this was the wrong standard of proof. The motorist was acquitted and the prosecutor appealed..

Question(s) for the Court (as rephrased in the judgment): Whether the justices applied the incorrect burden of proof when assessing the application of section 15(2).

Held: "… Clearly, first of all, the assumption would have been applicable … by virtue of section 15(2). And also in view of the nature of the defence the assumption required the accused to prove the matter set out in Section 15(3), in other words, the burden of proof passed to him. … the justices simply … had the burden of proof wrong. There can therefore be no doubt that an error of law was made and that the appeal must succeed. …"

The answer to the question was yes; appeal allowed. The case was remitted to the magistrates with a direction to convict.

Breckon v DPP

[2007] EWHC 2013 (Admin), [2008] RTR 8, 22 August 2007, QBD (DC)

The motorist's arguments that the breath analysis device was not an approved device, and that the result of the roadside breath test should be before the court, were rejected.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. The district judge rejected his arguments concerning the type approval of the breath analysis device, and that the reading from the roadside breath test should have been put before the court, and convicted the defendant. He appealed.

Question(s) for the Court: Whether the district judge erred in law in holding (1) that the breath analysis device was an approved device; (2) that the prosecutor did not have to adduce the alcohol level revealed by the breath test carried out at the roadside.

Held: [On the argument that the breath analysis device was not an approved device because it had a manual change-over valve rather than an automatic change-over valve as specified in the Home Office's *Guide to Type Approval Procedures*, referred to in an agreement between the Home Office and the manufacturers of the device] "The device which is approved is set out in the Schedule to the Approval document dated 25 February 1998. There is no reference, express or implied, in this schedule to either the Agreement with the manufacturer or to the Guide, and I see no reason why those documents should

be incorporated within the Approval or why the Approval should be read as being subject to them. …

"The device must receive Type Approval but that is precisely what the Schedule to the Approval achieves. … there must be room to make sensible modifications without having to seek a new approval every time this is done. The test must be whether after such modification or alteration the machine remains one to which the description in the schedule still properly applies. If it does not, then the device is no longer an approved device; but if the description does still properly apply to the device it will remain an approved device even though modifications or alterations have been made. Thus the removal of one cylinder, which did not affect the operation of the device, did not take it out of the Approval. Nor in my judgment, would the supply of a device with a manual change-over valve, rather than an automatic change-over valve when the machine had two cylinders, render it no longer an approved device. It remained an Intoximeter EC/IR with a gas delivery system.…

[On (2)] "Section 15(2) of the Road Traffic Offenders Act 1988 does not … apply to preliminary tests under section 6 of the Road Traffic Act 1988 or indeed to preliminary breath tests under its amendment by virtue of section 6A. The purpose of the preliminary test is to obtain an indication of whether the proportion of alcohol was likely to exceed the prescribed limit. It is not to determine whether the limit has in fact been exceeded, which is the function of the specimens taken for analysis under section 7. The latter part of section 15(2) clearly applies to section 7 specimens … and there is no basis for believing that the earlier part of the section refers to a different type of specimen. It cannot have been intended that the roadside breath test, which does not determine whether an offence has been committed, and is not subject to safeguards for the accused such as warning of the risk of prosecution, could be the specimen which has, under the assumption, to determine the lowest level of alcohol in the accused's breath or urine.

"It would in many instances … be to the serious disadvantage of the Defendant that the roadside breath test figures are adduced. They will often be greater than those later obtained."

The answers to both questions were no; appeal dismissed.

Mckeon v DPP

[2007] EWHC 3216 (Admin), [2008] RTR 14, 19 December 2007, QBD (DC)

On the facts of this case, discarding the mouthpiece did not amount to an abuse of process, but the justices applied the wrong standard of proof in respect of "reasonable excuse".

A motorist had been charged with, *inter alia*, failing without reasonable excuse to provide two specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. He had provided incomplete specimens. He was asked if there was any medical reason why he could not provide a specimen and he replied that he had "no more puff". The officer administering the procedure concluded that he was not trying. The breath testing instrument prompted the officer to keep the mouthpiece for forensic examination, but he did not do so,

because he had seen the suspect's breath go through the mouthpiece and had seen it working properly.

The magistrates convicted the motorist, who appealed.

Question(s) for the Court: (1) Whether it was *Wednesbury* unreasonable to refuse to stay the case as an abuse of process because the mouthpiece had not been retained; (2) whether it was *Wednesbury* unreasonable to have found the defendant guilty; (3) whether the reasons given for convicting the defendant were adequate, or whether they contravened article 6 of the European Convention on Human Rights.

Held: [On (1)] "The justices held … that the appellant had not shown on the balance of probabilities that [the absence of the mouthpiece] has caused prejudice to his right to a fair trial … [the officer] had felt the appellant's breath go through the mouthpiece and had seen that the mouthpiece was working properly. This is to be combined with the fact that the appellant did not blow for any long periods but only for the very short periods recorded. This would not have been caused by the mouthpiece being faulty. Thirdly, the appellant had called medical evidence that he had a chest condition which could have caused him not to blow for longer. That is in reality inconsistent with a faulty mouthpiece being to blame. [The justices'] approach to the issue of abuse of process was correct as a matter of law.

[On (2)] "…the burden under section 7(3) as to reasonable excuse is on the defendant to raise the issue on the evidence and once that is done it is for the prosecution to prove the absence of reasonable excuse to the criminal standard. Here the appellant had raised the issue by the medical evidence … the sentence in the case sated 'We were of the opinion that the appellant had failed to make out a reasonable excuse …' … clearly suggests that the justices considered there was a burden on the appellant to make out, that is to prove, a reasonable excuse … by reason of this, the decision to convict the appellant should be quashed.

[On (3)] "[the justices' reasons] were not so inadequate as to leave the appellant in doubt as to why the justices had found against him on the main points."

Appeal allowed.

Kelsey v DPP

[2008] EWHC 127 (Admin), unreported, 17 January 2008, QBD (DC)

The test under section 7(3)(b) (reliable device not available or not practicable to use it) remains a subjective test and, where the officer was told by the custody sergeant that the device was not available because of a technical fault, the test was met.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. The officer conducting the procedure was told by the custody sergeant that the breath analysis device was not available because of a technical fault. The officer therefore required a urine sample,

which was provided, and revealed excess alcohol. The motorist was convicted, and appealed.

Question(s) for the Court: Whether the requirement for a urine sample was lawful.

Held: [It was contended for the appellant] "that … section 7(3)(b), in the light of amendments … made … by the Criminal Procedure and Investigations Act 1996 [the insertion of subsections 7(3)(bb) and (bc)], should now be construed as meaning that the question of whether a reliable intoximeter device was available had to be answered by reference to objective fact; that is to say, the prosecution had to demonstrate that the machine at the police station was not reliable or not available. …

[After reviewing the authorities, which establish a subjective test] "… the interpretation of section 7(3)(b) as consistently maintained … and which has never been doubted remains the way in which section 7(3)(b) should be interpreted.… [Parliament] saw no need to make an amendment, content with the way in which that provision consistently and authoritatively had been interpreted.

[It is submitted that] "the forming of a reasonable belief can only be done by someone who has some personal knowledge of what the fault is thought by him to be. As an alternative, [it is argued] that even if the officer can rely upon what he is told by another, what he is told by that other person has to include what the nature of the fault is believed to be. … A reasonable belief can be formed as a result of information provided by another. I regard that as self-evident. It is also evident that giving evidence as to the basis for one's belief does not involve giving inadmissible hearsay evidence.

"… I can see neither principle nor statutory provision which precludes reliance, in forming a reasonable belief, upon what an officer is told. …

"As to [the argument] that a specific cause had to be assigned, … there is nothing as a matter of principle, which is the basis upon which this case has been argued, to show that some such cause must actually be adduced, whether the fault referred to is truly the fault or not.

"The court in deciding whether the belief is reasonably held is also entitled to consider the position of the person who provides the information, which is the basis of the constable's belief, and to consider whether it was reasonable for the officer to rely upon what was said in reaching that belief."

The answer to the question was yes; appeal dismissed.

Longstaff v DPP

[2008] EWHC 303 (Admin), [2008] RTR 17, 31 January 2008, QBD (DC)

A motorist failed to provide a breath specimen, saying he could not breathe properly because of back pain; the officer therefore required a blood specimen, but the doctor found no medical reason for not supplying a breath specimen and the requirement for a blood specimen was abandoned. The motorist's conviction for failing to provide a breath specimen was upheld. On the facts, the motorist was not prejudiced because the mouthpiece had not been kept.

A motorist had been charged with, *inter alia*, failing without reasonable excuse to provide specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. He had been arrested and, at the police station, failed to provide a satisfactory breath specimen after three attempts. When asked if there was a medical reason why he could not provide a breath specimen, he said he was unable to breathe properly because of back pain. The officer conducting the procedure therefore required a blood specimen and a doctor was called. The officer and the doctor agreed that the doctor should ascertain whether there was a medical reason for the failure to provide a breath specimen; the doctor examined the motorist and said there was not. The officer therefore told the doctor he did not require him to take a blood specimen. The motorist was convicted of failing to provide a specimen of breath and appealed.

Question(s) for the Court: 1. Whether it was wrong in law not to complete the procedure and take a blood specimen; whether the fact that a blood specimen was not taken caused prejudice to the motorist and deprived him of a fair trial. 2. Whether the motorist was deprived of a fair trial because the mouthpiece used on the breath analysis device was not retained by the police. 3. Whether the case should have been stayed on the ground that it was an abuse of the court's process.

Held: "… It [was] said that, once the [procedure to require a specimen of blood commenced], the sample of blood should have been obtained. … Nothing in the Act states that this conclusion follows from the premise. …

"… it was said that … there could be no reliance on the failure to provide breath when the provision for taking blood was engaged. … I do not see anything in the statute to suggest that the mere fact that the officer later sought a blood test debars the prosecution from asserting that there was a failure to provide a specimen of breath without reasonable excuse.

"… The mere fact that at a time after the failure to provide a specimen of breath the procedure for obtaining a blood sample had been put in motion does not give rise to a legitimate expectation that no complaint would be made about the failure to supply a specimen of breath. …

"… I would answer question 1: 'The failure to complete the procedure for taking a specimen of blood was not wrong in law, did not cause prejudice to the appellant and did not deprive him of a fair trial. Even if it had been wrong in law, that would have had no bearing on the question whether the appellant was guilty of an offence under section 7(6).'

[On questions 2 and 3] "The starting point … is that Form [MG/DD/A] states that the mouthpiece should be retained … where there is to be a charge of failing to provide a specimen where an attempt to use the device was made in case there is a need for forensic examination. In the present case, … the mouthpiece appears to have been lost. That gave rise to a submission … that the case against the appellant should be dismissed for abuse of process. … There may well be cases where it is important to have the mouthpiece available for forensic examination. In my view this case is not one of them. The Magistrates accepted the custody officer's evidence that the appellant was

deliberately failing the breath test. There had been no suggestion by the appellant that there was anything wrong with the mouthpiece. … Moreover, the appellant gave his reason at the time for failing to provide a satisfactory specimen, namely that he suffered from back pain. …

"Accordingly, I would answer question 2: 'The appellant was not deprived of a fair trial; in the particular circumstances of this case, there was no need to have the mouthpiece available for inspection by the defence'. My answer to question 3 would be: 'No'."

Appeal dismissed.

Piggott v DPP

[2008] EWHC 305 (Admin), [2008] RTR 16, 8 February 2008, QBD (DC)

There is no requirement that a suspect communicate a reasonable excuse for failing to provide a breath specimen, although failure to do so may lead the court to conclude that an excuse belatedly proffered was not a reasonable one because in reality there was a wilful refusal or failure to provide.

A motorist had been charged with failing without reasonable excuse to provide specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. She had been arrested and, at the police station, failed to provide a satisfactory breath specimen after four attempts. When asked if there were any medical reasons, she replied "no". At her trial, a medical report was adduced, in which it was said she suffered from asthma and hyperventilation syndrome. That report was accepted. She also said she had told the arresting officer she suffered from asthma but did not think it necessary also to tell the investigating officer.

She was convicted and appealed.

Question(s) for the Court: (i) Whether the justices were correct to find that it was essential for the motorist to inform the officer requiring the specimens of breath whether she suffered from any medical condition which could prevent her providing the specimens, or (ii) should the justices have found that the motorist informing another officer who witnessed the breath test procedure was sufficient.

Held: [After a discussion of the contents of the case stated] "… it is clear that the justices did not convict the appellant because they believed that there was no medical reason for her failure or because they believed that she had not genuinely tried to give a sample. She was convicted because she had told the wrong officer, … the arresting officer, rather than … the officer responsible for obtaining the specimens, about the medical problem that was the reason for her failure to give a specimen …

"… the statutory question is whether there was a reasonable excuse for the failure, not whether that reasonable excuse has been communicated to the officer requiring the provision of a specimen or indeed to anybody else. A failure to mention an excuse at the time when the specimen is required will be a highly relevant, and may well be a decisive factor against the defendant, when the justices are deciding whether or not the excuse belatedly proffered for the failure was a reasonable one. If a defendant says nothing about a

medical condition of which he or she is well aware, it is highly likely that the justices will reach the conclusion that the failure to produce the specimen was wilful and that the defendant had not made a genuine attempt to provide a specimen. However, that is a matter of evidence to be considered on a case by case basis and I can see no justification for importing an additional legal requirement that there should be notification into subsection (6)."

The answer to question (i) was "no". The answer to question (ii) was "sufficient, yes, but not necessary".

Appeal allowed.

Rweikiza v DPP

[2008] EWHC 386 (Admin), unreported, 30 January 2008, QBD (Admin)

The case of Darwen (a motorist is guilty of failing to provide breath specimens for analysis if the specimens are insufficient to enable the analysis to be carried out, or provided in such a way that the objective of the analysis cannot be satisfactorily achieved) was properly decided, and was applied in this case.

A motorist had been charged with failing without reasonable excuse to provide specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. He had been arrested and, at the police station, at each of four attempts, he provided less than the 1.2 litres of breath required by the breath analysis device to produce a satisfactory analysis of deep lung air. The partial specimens were analysed but the printout showed the words "specimen incomplete". He was convicted by magistrates and his appeal to the Crown Court failed. He appealed further.

Question(s) for the Court: (i) Whether a reasonable bench, on the evidence adduced, could have held that the appellant had failed to provide two specimens of breath for analysis. (ii) Whether it was *Wednesbury* unreasonable to have held that the appellant had failed to provide two specimens of breath, when he had provided four specimens of breath, all of which had been accurately analysed. (iii) Whether the meaning of "breath" as defined in *Zafar v DPP* (page 381) has any effect on the meaning of "specimen" as defined by section 11(3) of the Road Traffic Act 1988.

Held: "… the present case is not distinguishable from the case of *Darwin* (*sic*, [2007] EWHC 337 (Admin), 24 January 2007]. [Counsel for the appellant] does not suggest otherwise. His submission is that *Darwin* was wrongly decided. This court will generally follow previous decisions of the Divisional Court, unless satisfied that they were plainly wrong. In my judgment, *Darwin* was not plainly wrong; … it was plainly right. Section 5 defines the offence. Section 11(3) [a person does not provide a specimen of breath for analysis unless the specimen is sufficient to enable the analysis to be carried out, etc] is concerned with the way in which the offence may be proved. It was not a prerequisite to the commission or proof of the offence that the excess alcohol found in the sample had come from deep lung air. It was not a prerequisite that the police used a device that concentrated on deep lung air.

However, that is the device that they chose to use. That was a lawful choice. The device was one of the type approved by the Secretary of State. …

"Plainly the purpose of the test, through the operation of the Intoxilyser 6000 machine, is to measure a minimum volume of breath – 1.2 litres – and to continue to measure it until the reading reaches a plateau and produces a complete specimen. … this appellant, having been properly instructed on how to activate the machine, and having had the method demonstrated to him, deliberately failed to comply with the instructions. He chose not to cooperate, but deliberately to frustrate the objectives of the test."

The answer to question (i) was "yes"; the answers to questions (ii) and (iii) were "no". Appeal dismissed.

CPS v Brown (Christopher)

[2007] EWHC 3274 (Admin), unreported, 20 December 2007, QBD (DC)

Where the driver drove for longer than was necessary to escape a threat, the defence of duress was not available.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. He had invited three men to his home, where he lived with his parents; his parents were away. He had just met the men. One of them began to flirt with the motorist's girlfriend and he asked them all to leave. They did, but later the motorist received a threatening telephone call. He was afraid and decided to drive to his grandmother's home. As he left his house, he saw the three men but believed they did not see him; they did not follow him. He was stopped by police having covered about three miles, and was found to have 89 µg alcohol in 100 ml breath.

He pleaded the defence of duress. The magistrates accepted that it was reasonable for him to have driven away rather than call the police. They found the defence made out and dismissed the charge. The prosecutor appealed.

Question(s) for the court: Whether, in the light of the findings of fact, the magistrates were right to acquit.

Held: [After referring to the decision in *DPP v Jones (David Alan)* (page 418) that the defence of necessity is not available to a defendant who drove for a longer period than was necessary] "I do not think that we need to consider whether the magistrates were right to conclude on the facts they found that the defence of duress was available in respect of the situation when the respondent first got into his car … [but] it is quite plain that the defence ceased to be available … long before he was stopped by the police. He was not being pursued and he had no grounds to think that he was being pursued, nor did he think that. … Despite the efforts of [counsel] to persuade us that the magistrates were justified in finding that the respondent was still acting under duress with regards to his driving when he was stopped, it is plain that that was not the case."

Case remitted to the magistrates with a direction to convict.

DPP v Cove

[2008] EWHC 441 (Admin), unreported, 14 February 2008, QBD (DC)

On the facts of this case (motorist drove 250 metres to avoid paying an excess parking charge), the magistrates should not have found special reasons.

A motorist had pleaded guilty to driving with excess alcohol, contrary to section 5(1)(a), Road Traffic Act 1988. The reading was 60µg alcohol in 100 ml breath. She had driven 250 metres, from a car park, to avoid incurring an excess parking charge. She submitted there were special reasons for not disqualifying under s 34(1), Road Traffic Offenders Act 1988. The magistrates found that 250 metres was not an excessive distance; the vehicle was unlit; the state of the car was not an issue; there was no intention to drive further; the road was not busy; the weather was dry; there were other road users in the vicinity but they were few; and that the vehicle was driven to avoid paying an excess parking charge. They found special reasons not to disqualify. The prosecutor appealed.

Question(s) for the Court: Whether the magistrates correctly applied the case law concerning shortness of distance driven, bearing in mind the totality of the evidence; in particular, whether the magistrates gave appropriate weight not only to how far the vehicle was driven and whether the defendant intended to drive further, but also to the manner in which the vehicle was driven, the reason for the vehicle being driven and whether there was a possibility of danger by coming into contact with other road users and pedestrians.

Held: "… The events occurred at about 3 o'clock in the morning … But given the location, the prospective presence of other road users, including pedestrians, was still a real one. The respondent drove, and was seen to drive, for some 250 metres. That included driving around a roundabout, and it was a journey taken throughout without lights. The respondent had drunk a significant amount of alcohol.

… it is apparent that the magistrates focused, not on what prospectively the usage of the road would have been … but on what the usage actually was on the evidence. That seems to me to indicate a departure from the approach required by *Chatters v Burke* and the other authorities, recalling that the sixth of the matters referred to … was 'whether there was any possibility of danger by contact with other road users'.

To that extent, it seems to me that the magistrates misdirected themselves. However, that is not the only concern. In acceding to the points made on behalf of the respondent in relation to the distance driven, the lack of lights and the reason for driving, namely in order to avoid the possibility of a car park surcharge, it seems to me that the magistrates reached a decision which no reasonable bench of magistrates could have reached on that evidence. This was not a case of emergency."

The answers to the questions were no; the case was remitted to the magistrates for the imposition of disqualification.

Roberts v DPP

[2008] EWHC 643 (Admin), unreported, 19 March 2008, QBD (DC)

On the facts of this case, the prosecution's failure to produce a video recording of the custody area was not an abuse of process, but the magistrates should not have dismissed as frivolous a request to state a case on whether the place in question was a "road or other public place".

A motorist had been charged with failing without reasonable excuse to provide two specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. Disputing that the MG DD/A form had been completed in his presence or that he had been warned under section 7(7) (of the consequences of failing to provide), he sought disclosure of a video recording of the custody area. By the time the prosecutor became aware of the request for the video, the recording had been over-written. The justices found that there was no abuse of process and declined to stay the proceedings.

The officer who had conducted the procedure gave evidence that he had completed the form in the presence of the defendant, and the justices took note of a number of initialled responses; in particular, the defendant's response to the warning under section 7(7) had been initialled. They accepted the police evidence and convicted the defendant.

He appealed against the refusal of the justices to stay the prosecution as an abuse of process. He also applied to extend the case to require the justices to deal with the question whether there was any evidence on which a reasonable bench, properly directing themselves, could have held that the road the subject of the proceedings was a "road or other public place" for the purposes of the Road Traffic Act 1988. The justices declined to do so on the ground that the application was frivolous.

Question(s) for the Court: Whether it was *Wednesbury* unreasonable to hold that there was no abuse of process when a video recording of the breathalyser procedure had, deliberately and contrary to the codes of practice and a defence request, been re-used by the police, and which recording would have conclusively proved whether or not the correct procedures had been followed at the police station?

Held: "… It was open to the Justices, having heard the sergeant, to accept that he performed his responsibilities accurately. Equally, it was open to the Justices to accept the evidence of the appellant that this task had not been done in the way the sergeant did it. Although the officer asserted that this procedure had been conducted in the custody area, if that material was not on the tape it would not have established that the procedure was not conducted properly, merely that it was not conducted in the place where it was believed to have been conducted.

"… it was entirely open to the Justices to conclude that this prosecution was not an abuse of process … We do not accept that such a recording would necessarily conclusively have proved whether or not the correct procedure had been followed at the police station.

[On the question of the road] "… in the light of *Deacon v AT* [1976] RTR 244, it seems to me that it is quite wrong to conclude that the request to state [a case on whether or not the place in question was a road] was frivolous."

The answer to the question was no. The case was remitted to the magistrates to state a case.

Hussain v DPP

[2008] EWHC 901 (Admin), [2008] RTR 30, 19 March 2008, QBD (DC)

Where valid breath specimens had not been provided, the device registering "ambient fail" after a single specimen in each of two cycles, an officer was entitled to require two further breath specimens, at a different police station.

A motorist had been charged with failing without reasonable excuse to provide two specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. At the police station, he provided a first specimen of breath, but the breath analysis device would not allow a second specimen to be provided, the words "ambient fail" appearing on the screen. A second cycle was commenced but the result was the same. The officer conducting the procedure believed the device had not produced a reliable indication, and took the suspect to another police station, where another officer asked the motorist to provide specimens into the machine there. The motorist refused.

The district judge found that the first officer had reasonable cause to believe that the device had not produced a reliable indication of the proportion of alcohol in the breath; that the specimens had not been provided so as to enable the objective of the analysis to be carried out, as required by section 11(3) of the Road Traffic Act 1988 [a person does not provide a specimen of breath for analysis unless the specimen is sufficient to enable the analysis to be carried out, etc]; and that the second officer was entitled to require further specimens of breath. He convicted the motorist, who appealed.

Question(s) for the Court: (1) Whether the specimens provided at the first police station constituted valid specimens for the purposes of section 11(3); (2) where the officer had reasonable cause to believe that the breath testing device had not produced a reliable indication of the proportion of alcohol in the breath, whether another officer could require that person to provide further specimens of breath.

Held: "… the machine indicated during the course of each of the cycles that there was an ambient fail. That seems to me to provide a clear indication that the readings provided during the course of the cycle could not be relied upon for the purposes of section 11(3)(b). They were not reliable readings. Moreover, it is a striking feature of this case that the ambient fail was indicated by the machine not on one occasion but on two occasions. Those two occasions were only minutes apart. The fact that on each occasion the machine indicated "ambient fail" before the second reading could be taken demonstrates to my mind that there was something wrong with this machine which rendered the readings unreliable.

"… I consider that the second question posed is not in fact an appropriate question, because it is directed to whether the officer had reasonable cause to believe that the device was not producing a reliable indication. … I make clear that in the circumstances of this case, where no valid specimens of breath have

been provided, the officer was entitled to require the appellant to provide two further specimens of breath. His refusal to do so constituted the offence of which he was convicted."

The answer to question (1) was no; appeal dismissed.

McNeil v DPP

[2008] EWHC 1254 (Admin), [2008] RTR 27, 28 April 2008, QBD (DC)

The fact that a breath specimen might have been affected by eructation did not give the investigating officer grounds to require a blood specimen.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. At the police station, before providing specimens of breath, the investigating officer asked a standard question, from the contemporaneous record form MG DD/A, about whether or not the suspect had brought up anything from his stomach; the reply was no. After providing the specimens, on being asked a further question from the standard form – whether he had burped since the earlier question had been asked – he replied that he had. The officer therefore required a specimen of blood under s 7(3)(bb), Road Traffic Act 1988, as advised in the notes to form MG DD/A. The motorist was convicted on the basis of the blood analysis. The motorist appealed.

Held: "It is the appellant's case that the taking of the blood sample was unlawful because [the officer] had not had reasonable cause to believe that the Intoximeter had not produced a reliable indication. … First, [it is submitted] that the officer did not believe that the Intoximeter had produced an unreliable indication. Secondly, [it is submitted] that even if he did so believe, or if his subjective belief is immaterial, there was in fact no reasonable cause for any such belief.

"It is convenient to take the second question first. It may at first sight be attractive to say that there was plainly reasonable cause for [the officer's] belief because it was based on what he was told on an official form. However, it is not as straightforward as that. [The appellant] submits that the note in the form … incorporates a view of the law which has been shown to be wrong by the decision of this court in *Zafar v Director of Public Prosecutions* [2004] EWHC Admin 2468, since endorsed in other cases, in particular *Woolfe v Director of Public Prosecutions* [2006] EWHC Admin 1497. On the basis of those authorities it is now settled that a specimen of breath affected, or potentially affected, by reflux or regurgitation from the stomach is not to be treated in any way differently: it is simply 'breath' within the meaning of the statute. [It is argued] that it follows that a sample cannot be treated for the purpose of Section 7(3)(bb) as an unreliable indication of the proportion of alcohol in the appellant's breath simply because it may have been so affected. The same must apply to the case of specimens potentially affected by burping or, to give it a more dignified name, eructation. *Zafar* had not been decided at the time the form used in this case] was drafted …

"I can see no answer to that submission. No blame attaches to the officer personally for following the procedure specified by the form. But the fact

remains that the cause which he thought that he had to believe that the breath samples tested on the Intoximeter did not give a reliable indication of the proportion of alcohol in the appellant's breath namely having been told that the appellant had recently burped was not in law capable of rendering that indication unreliable. In those circumstances the subsequent request for a blood sample was not one which the officer was entitled to make. The conviction based on that sample cannot be sustained.

"Having reached that point, I need not consider [the] first ground as advanced before us."

Appeal allowed.

Plackett v DPP

[2008] EWHC 1335 (Admin), unreported, 15 May 2008, QBD (DC)

Where a suspect had initially refused to provide breath specimens then changed his mind, and the investigating officer led him to believe he would be allowed another opportunity, a full cycle three-minute cycle should have been allowed.

A motorist had been charged with failing without reasonable excuse to provide two specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. A police officer had found him sitting in his car in a car park; he refused to take a roadside breath test and was arrested. At the police station, he at first refused to provide specimens of breath for analysis; he then left the room to speak by telephone to the duty solicitor, and while he was out of the room, the investigating officer began the operating cycle of the breath analysis device. The suspect returned to the room and indicated that he now wished to provide specimens. There was about one minute of the cycle left. At the first attempt to provide specimens, the mouthpiece came off; at the second, the amount of breath provided was insufficient. No further opportunity to provide specimens was given. The justices convicted the accused; he appealed.

Question(s) for the Court: (1) whether the justices were entitled to convict when the officer had begun the operation in the absence of the appellant; (2) whether the justices were right to find that the appellant had a proper opportunity to provide a specimen given that the officer allowed him only one minute instead of the usual three.

Held: " … it may well be that the appellant having refused to provide a specimen of breath and left the room, albeit with the permission of the officer, to speak to the duty solicitor, the officer would have been entitled to treat the refusal as the commission of the offence and not to offer any further opportunity to the appellant to provide a specimen. However … he chose not to do that, and, having commenced the operating cycle … whilst the appellant was out of the room, for whatever purpose, gave the appellant the opportunity to provide a specimen when the appellant returned to the room and indicated that after taking advice he wished to take the breath test. …

" … the officer having decided that he would give the appellant the opportunity, it was incumbent on him to give an opportunity to take the test in the normal way, using a full cycle …

" … the justices were of the view that the appellant was given the expectation by the officer that he would be able to take the breath test and that what occurred within the remainder of the cycle of the machine satisfied that expectation. In my judgment, it did not."

On (1), "I do not consider that the fact that the officer administering the test began the operation of the machine in the absence of the appellant would necessarily be a bar to conviction. But in the circumstances of this case, where the appellant subsequently expressed the wish to take the test and the officer by his conduct agreed to the request, the offence was not … made out where the normal procedure with the approved machine running full cycle was not carried out." The answer to question (2) was no.

Appeal allowed.

Gearing v DPP

[2008] EWHC 1695 (Admin), [2009] RTR 7, 16 June 2008, QBD (DC)

A 22-minute delay in contacting the duty solicitor call centre breached section 58, PACE; the fact that it then took 23 minutes to obtain legal advice did not provide grounds for excluding evidence of refusal to provide under section 78, PACE.

A motorist had been charged with failing without reasonable excuse to provide two specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. She failed a roadside breath test and was taken to the police station. On a number of occasions, she said she wished to speak to a solicitor before providing breath specimens. Some eighteen minutes after her first request, she declined to provide specimens, and four minutes later an officer telephoned the duty solicitor call centre. The duty solicitor spoke to the suspect and, some 23 minutes after the call centre had first been contacted, told the officer than the motorist was willing to provide specimens. She was not given a further opportunity to do so. She was convicted of failing to provide. She appealed, seeking an extension of time for filing notice of appeal.

Question(s) for the Court: (1) Whether the court below was entitled to conclude that there had been no breach of section 58(4) of PACE (right to consult a solicitor as soon as is practicable etc); (2) whether the court below was entitled to exercise the discretion to refuse to exclude the evidence of the breath test procedure pursuant to section 78, PACE (discretion to exclude evidence which would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it).

Held: " … there is a breach of section 58 here by the failure to deal with the matter as soon as was practicable once the request had been made at 1.31, when the procedure then continued without the call being made.

[On the argument that the evidence of the refusal to provide should therefore be excluded under section 78] "[t]he important features are the public interest … the fact that the procedure carried with it its own safeguards, the

practicability of obtaining prompt legal advice, the extent of the delay, and whether it is significant … This appellant knew that she had been drinking. … She knew she had failed the roadside breath test …

" … the delay … between first seeking a solicitor at the call centre and the receiving and giving of advice on the decision made was some 23 minutes … a substantial period when set against the need for prompt testing in the public interest, and one which on these particular facts in the circumstance would certainly persuade me that it was the correct decision to say that the evidence of the breath test conclusion taken at the police station should not have been excluded."

The answer to question (1) was no; the answer to question (2) was yes. The appellant's application for an extension of time to file notice of appeal was refused; the appeal itself would also have been refused.

R v Bryan

[2008] EWCA Crim 1568, [2009] RTR 4 , 22 July 2008, CA (Crim)

Where the judge erred in directing the jury, but the errors did not go to the point at issue, which was whether or not the motorist had been warned of the consequences of failing to provide a specimen, the errors were immaterial.

A motorist had been charged with, inter alia, causing death by careless driving while over the limit, contrary to s 3A(1)(b), Road Traffic Act 1988. His vehicle had overturned, killing one of his two passengers. He was taken to hospital where a blood specimen was taken by a police surgeon, which showed excess alcohol. At his trial, the motorist said that he had not been warned of the consequences of failing to provide a blood specimen, as required by s 7(7). The hospital doctor gave evidence that he could not remember being asked, on this or any other occasion, whether a person was fit to provide specimens. On the basis of this, the defence argued that if the officer had not obtained the doctor's consent, it was likely that he had not properly followed the procedure and had not warned the motorist. Breach of s 9 was not argued. The judge directed the jury that the prosecution did not have to prove that the hospital doctor's consent was obtained before a specimen of blood was taken; while it was good practice to do so, if it was not done, it was more likely that there had been no warning. The defendant was convicted and appealed.

Ground(s) of appeal: That the judge misdirected the jury in telling them that the prosecution did not have to prove as a matter of law that the medical practitioner in immediate charge of the appellant had been notified of the proposed statutory requirement to give blood and had been asked for his consent.

Held: " … The judge's observation to the jury that the prosecution do not as a matter of law have to prove [the consent of the doctor having charge of the suspect], that the consent required is that of the doctor who took the sample and that obtaining the hospital doctor's consent was good practice only, was erroneous in two respects. In the first place the requirement is mandatory and not mere good practice. Secondly, what is required is not the treating doctor's

consent but that he should have been notified of the proposal to take blood and not have objected. … It is implicit in the jury's verdict that they accepted the [investigating officer's] evidence; they were satisfied he complied with the requirement of s 7(7). In these circumstances, … the judge's errors were immaterial.

Appeal dismissed. The appeal against sentence was also dismissed.

Morris v DPP

[2008] EWHC 2788 (Admin), unreported, 14 November 2008, QBD (Admin)

The prosecution is not automatically required to retain CCTV evidence which might record the giving of the warning under section 7(7), Road Traffic Act 1988; on the facts (issue of giving of warning not raised in advance, doubt that CCTV would have picked up conversation, video tape not requested and not disclosed), it was not Wednesbury unreasonable to have found no abuse of process.

A motorist had been convicted by magistrates of driving with excess alcohol in blood, contrary to s 5(1)(a), Road Traffic Act 1988. He appealed to the Crown Court. At a pre-trial review he said the issue at trial would be a challenge to the statutory procedure and to the reliability of the blood analysis; no further details were given. At trial, he argued that the statutory warning under section 7(7), Road Traffic Act 1988 (of the consequences of failing to provide) had not been given and that the blood analysis was therefore inadmissible. The investigating officer, who had completed the form MG DD/B, on which was recorded the section 7(7) warning, mentioned in cross-examination that there was CCTV in the custody suite. In accordance with usual procedure, the video tape had been kept for three months, then, in the absence of anyone wanting to look at it, it had been destroyed; nobody had thought it relevant or significant. The Crown Court thought it highly unlikely that the precise detail of what had been said would be apparent from the tape, finding that a fair trial was possible and there was no abuse of process. It concluded that the procedure had been correctly followed and dismissed the appeal. The motorist appealed further.

Question(s) for the Court: (1) Whether the prosecution is automatically required to retain CCTV evidence in every case where it might record the administering of the statutory warning under section 7(7), regardless of whether or not the defence raises the giving of the warning as an issue before trial; (2) whether it was *Wednesbury* unreasonable to have refused to allow the appeal on the grounds of abuse of process.

Held: [On (1), after reviewing the Attorney General's Guidelines on Disclosure and the Code of Practice pursuant to section 23, Criminal Procedure and Investigations Act 1996, the appellant's] "agreement that in certain cases there is no requirement on the prosecution to retain CCTV evidence where it might record the administering of the statutory warning … necessarily leads to his acceptance that the answer to the first question … is 'No' and I so find. …

[On (2), after reviewing the authorities, the appellant] "did not indicate before trial whether he accepted or contested that the … warning … had been given …. The case therefore falls within the middle ground as to which there are competing contentions by the parties as to the circumstances in which there is an obligation to retain and disclose material. … it was not apparent nor were the prosecution put on notice that the giving of the … warning was to be challenged. … there was considerable doubt as to whether any CCTV recording in the custody area would have picked up conversation between the officer and [the appellant].

"The Crown Court gave proper consideration to the appropriate question 'can the Appellant have a fair trial in these particular circumstances?' … It considered whether there was a requirement to preserve the CCTV evidence pending the outcome of the case. On the evidence before it the Crown Court observed 'nobody, apparently, thought this video tape was relevant or significant at all.' The Court was entitled to take into account the fact that the defendant's legal advisors had been involved in a substantial number of such cases and that with all 'of that experience and knowledge nobody thought this was a significant feature of the case until the cross-examination of the officer at trial.'"

The answers to both questions were no; appeal dismissed.

McClean v DPP

[2009] EWHC 189 (Admin), [2009] RTR 19, 23 January 2009, QBD (DC)

On the facts of this case (sergeant's words to motorist, "are you sure …", following the close of the breath analysis procedure), the suspect had been offered a second opportunity to provide a replacement blood or urine specimen under s 8(2) (lower breath reading no more than 50). But as he had not taken up the offer, his conviction on the basis of the breath analysis would stand.

A motorist had been convicted of driving with excess alcohol in blood, contrary to s 5(1)(a), Road Traffic Act 1988. At the police station, the lower of two breath analyses showed 45 µg alcohol in 100 ml breath. Accordingly, the motorist was offered the option of providing an alternative specimen under s 8(2), Road Traffic Act 1988 (lower of two breath readings no more than 50 µg alcohol in 100 ml breath). The motorist declined. The constable then took the motorist to the custody desk, and advised the custody sergeant that the motorist had declined the option. The sergeant then said, "Are you sure a blood test is more accurate?" The constable told the motorist that the purpose of a blood test would be to corroborate the breath test, and there was some further conversation between the police officers about blood and breath specimens. The sergeant then charged the motorist.

At the trial, it was argued that the sergeant had given the defendant another opportunity to exercise the option and should have allowed him to do so. The justices found that the procedure had been correctly carried out; the sergeant had not reopened the procedure; and the motorist had not been misled

into thinking he was being given a further option to replace the breath specimen. The justices convicted him; he appealed.

Held: "I have some difficulty with the proposition that the appellant had not been given a further option to replace the breath specimen. … the words 'are you sure a blood test is more accurate?' were an invitation to the appellant to reconsider the decision he had previously made … [but] the appellant said or did nothing in response. He made no claim to have specimen of breath replaced by blood or urine.

"The statutory provisions demand that a person arrested be informed of the nature of the options open to him in the event that his breath reading is less than 50 … That was done on any view. … there is no obligation on the officer … to give … advice upon the desirability, one way or another, of exercising his choice. Although, therefore, … the words spoken to the appellant by [the sergeant] were capable of being taken by the appellant as an invitation to reconsider his decision not to claim a blood or urine test, the appellant did not take up the invitation at any time. On this basis … the magistrates were quite entitled to conclude, as they did, that the breath test procedure had concluded in the intoximeter room."

Appeal dismissed.

Brett v DPP

[2009] EWHC 440, unreported, 16 March 2009, QBD (Admin)

A certificate of the analysis of a blood specimen could be admitted under s 116, Criminal Justice Act 2003 (hearsay provisions – witness not available), even though notice had been given under s 16(4), Road Traffic Offenders Act that the attendance of the analyst was required. On the facts, there was a change of circumstances for the purposes of s 8A, Magistrates' Courts Act such that a pre-trial ruling by justices did not bind the trial court.

A motorist had been convicted of driving with excess alcohol in blood, contrary to s 5(1)(a), Road Traffic Act 1988. At a pre-trial hearing, the prosecutor successfully applied for the evidence of the analyst of the blood specimen to be given under the hearsay provisions in s 116, Criminal Justice Act 2003 (admissibility of hearsay evidence – witness unavailable), on the grounds that she was living abroad, had not been warned, and that it was not practicable to secure her attendance. The trial was listed for the following week, but did not take in fact place until some months later. At the trial, the deputy district judge considered himself bound by the decision of the magistrates on the question of hearsay and refused to hear further argument on the point. The motorist was convicted and appealed.

Question(s) for the Court: (1) Whether it was correct to admit in evidence a certificate of analysis served under s 16, Road Traffic Offenders Act 1988 when notice had been given under s 16(4) that the attendance of the analyst was required; (2) whether the district judge was bound by the decision of the justices on this point.

Held: On (1) "The possibility that the certificate might be admitted through some [route other than pursuant to s 16] is underlined by the words of

s 16(1) … which is permissive rather than obligatory and s 16(4) which does no more than provide that if appropriate notice is given, … the certificate is not so admissible, that is to say admissible by this route … I would reject the contention that s 16 … provides an exhaustive process for the proof of the proportion of alcohol … the justices were entitled to admit [the certificate] through the mechanism provided by the CJA 2003 notwithstanding that notice had been given pursuant to s 16(4) … requiring the analyst to attend.

On (2), "Section 8A of the Magistrates' Courts Act 1980 provides that a pre-trial ruling is binding … unless there has been a material change of circumstances since the ruling was made such that … it is in the interests of justice to discharge or vary the earlier ruling … When the case came before the justices the trial … was due to take place six days later. The justices found that the appellant had failed to comply with the directions of the court and failed sufficiently to identify the issues relating to the analyst's evidence. … there was simply insufficient time to make those enquiries and to consider arrangements for the attendance of the analyst … and equally understandable that the justices would not wish further to adjourn the trial. After that trial had been adjourned, however, the position was different and it is unarguable that there was a material change of circumstances. A period of some months were available when it was open to the prosecution to make enquiries of the analyst … or otherwise discover what could be done to secure the evidence other than the use of section 116. … there is no question of the decision in August binding the deputy district judge in relation to a trial in December and no basis upon which he should have prevented [counsel] from arguing the question of admissibility."

The conviction was quashed.

DPP v Bolton

[2009] EWHC 1502 (Admin), unreported, 4 June 2009, QBD (Admin)

Expert evidence is normally required to establish the exception in section 15(3), Road Traffic Offenders Act 1988.

A motorist had been charged with driving with excess alcohol in blood, contrary to s 5(1)(a), Road Traffic Act 1988. The analysis showed 155 mg alcohol in 100 ml blood. He was unrepresented at his trial. He said he had drunk three pints of lager topped up with lemonade over a period of almost six hours before driving, and one a half pints of cider, and a cup of tea with a small whiskey in it, after driving. He argued that it would be obvious that the amount drunk before driving would not be sufficient to put him over the limit when he ceased driving, and that the matter was so obvious that medical evidence was not necessary. The justices accepted this argument and acquitted him. The prosecutor appealed.

Question(s) for the Court: [Not recited in the judgment.]

Held: "… the Crown contended before the Magistrates that the evidence given by the accused could not, on its own, make out the defence on the balance of probabilities under section 15 … [I]t is submitted [that the

Magistrates] fell into error in that they did not examine the defendant's evidence against the background of scientific evidence which would have either supported or worked against the … defendant; in particular the key questions as to whether he had taken alcohol after he had finished driving and whether the alcohol he took after he had finished driving had taken him over the prescribed limit.

"I find the submissions of the Crown persuasive and hold that the magistrates did fall into error in jumping to the conclusion they did."

The case was remitted to the magistrates with a direction that they allow the unrepresented respondent the opportunity to reopen his case and calling further evidence, failing which, the magistrates were to convict.

R v Coe (Christopher Steven)

[2009] EWHC 1452 (Admin), unreported, 14 July 2009, CA(Crim)

Where the offence under section 3A(1)(c), Road Traffic Act 1988 is charged (causing death by careless driving having failed without reasonable excuse to provide specimens required under section 7), the prosecution needs prove only driving without due care and attention and failure without reasonable excuse to provide specimens.

A motor cyclist had been convicted of causing death by careless driving, contrary to s 3A(1)(c), Road Traffic Act 1988, on the basis that he had failed without reasonable excuse to provide specimens for analysis. He had hit and killed a pedestrian who was crossing a dual carriageway at a pelican crossing. The motor cyclist was injured and was taken to hospital. Blood specimens were taken for medical purposes. The doctor in charge of the case told police that there was no reason why the motor cyclist could not give specimens. The police required the motor cyclist to provide breath specimens but he did not reply, and did not react when the mouthpiece of the device was place against his lips. The doctor said that the motor cyclist might have been "in and out of consciousness", so the officer decided to proceed under section 7A (specimens of blood from persons incapable of consenting) and called for a police surgeon. When the police surgeon arrived, the motor cyclist opened his eyes and refused to provide a specimen, despite being warned that it would be an offence to refuse without a reasonable excuse. The police later obtained an order for production of a blood specimen taken by the hospital, which showed 210 mg alcohol in 100 ml blood. The blood analysis was admitted in evidence. The motor cyclist appealed against conviction.

Held: "… Given that the offence charged was contrary to section 3A(1)(c), the prosecution had to prove only that the defendant was driving without due care and attention (it not being disputed that the impact caused [the victim's] death) and that the appellant had no reasonable excuse for his failure to provide specimens of breath and blood. The prosecution did not have to prove that the appellant had taken drink or how much drink he had taken, as they would have had to do if the charge had been contrary to section 3A(1)(a) or (b) ….

"… there was ample evidence of both … matters … independently of the blood sample analysis. In relation to driving without due care and attention there was clear evidence … the appellant did not see [the victim] until he was some 20 feet away. The appellant clearly failed to keep a proper lookout and braked far too late. In relation to failing to provide the specimen, there was evidence … from which the jury was perfectly entitled to conclude that the appellant was conscious at all relevant times, was doing his best to avoid giving a specimen, and that he had no reasonable excuse for failing to do so.

"…It follows that had the evidence of the analysis of the blood sample been admitted in error, it would not … have affected the safety of the conviction."

Appeal dismissed.

Mason v DPP

[2009] EWHC 2198 (Admin), unreported, 15 July 2009, QBD (Admin)

The act of opening the car door was merely preparatory to driving and did not amount to attempting to drive.

A motorist had been convicted of attempting to drive with excess alcohol in blood, contrary to s 5(1)(a), Road Traffic Act 1988. Knowing he could be over the limit, he opened the car door to get in and drive home, but was approached by a man with a knife who demanded the keys from him and drove off in the vehicle. The motorist appealed against conviction.

Question(s) for the court: Where a person with excess alcohol expresses an intention to drive and opens the door of the vehicle, whether opening the door is more than merely preparatory to the act of driving to justify a conviction of attempting to drive.

Held: " … section 3 of the [Criminal Attempts Act 1981] applies to the offence of attempting to drive a motor vehicle under section 5(1)(a) of the 1988 Act. The [question] was therefore … whether the facts as found were more than merely preparatory to the commission of the full offence of driving with excess alcohol.

" … The line is fine, … the appellant admitted his intention to drive the car, but *mens rea* absent sufficient *actus reus* is not enough to constitute guilt … the acts of the appellant … were not capable of being characterised as more than merely preparatory. The appellant could not properly be convicted of an offence under section 5(1)(a)."

Appeal allowed.

Cowper v DPP

[2009] EWHC 2165 (Admin), unreported, 18 March 2009, QBD (DC)

The advent of the Criminal Defence Service Direct telephone advice scheme does not make any difference to the principle that a suspect may not wait for legal advice before providing specimens.

A motorist had been convicted of failing without reasonable excuse to provide two specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. At the police station, he asked to speak to a solicitor. About three minutes later the custody sergeant telephoned the Defence Solicitor Call Centre, which referred the case to the Criminal Defence Service Direct telephone service. The motorist was taken into the Intoximeter room and the testing procedure began five minutes after his request to speak to a solicitor. The CDS solicitor telephoned the police station just after the motorist had gone into the Intoximeter room and was told he could not speak to the suspect; the solicitor telephoned a number of times and finally spoke to the suspect some forty-four minutes after the initial request. The justices found that he had received legal advice as soon as practicable and that there had been no breach of s 58(1) (person held at a police station entitled to consult a solicitor privately at any time) and (4) of the PACE Act 1984. The motorist appealed against conviction.

Question(s) for the court: Whether the justices were correct in concluding that there had been no breach of section 58, PACE in the light of the commencement of the Criminal Defence Service Telephone Advice Service.

Held: " … The appellant's case seems to be that because of the advent of the new Criminal Defence Service Direct Line Telephone Advice Scheme, the custody officer should have waited for the return call, as [that] should not cause a significant delay because it is a dedicated computerised legal advice service.

"… The alternative submission … is that when the solicitor did phone some two minutes later, … the custody officer should have interrupted the … procedure …

"… Whilst it may be true that the new phone advice system is more efficient than the previous system, at the time of the request to that service, it was not known how long it would take for a solicitor to be available …

"… As is clear from the authorities, there is no duty on the police to delay the taking of a specimen of breath pending a suspect receiving legal advice.

"… The justices found that it was (a) not practicable to delay or interrupt the procedure … when the duty solicitor phoned and (b) not in the public interest for the procedure to be interrupted for legal advice. … they were … entitled to reach those conclusions."

Appeal dismissed.

Williams v DPP

[2009] EWHC 2354 (Admin), unreported, 24 July 2009, QBD (DC)

Amending the charge, out of time, from failing to provide breath to failing to provide urine, was permissible in that both offences arose from the same facts, but, in the absence of any compelling reason, an adjournment following the amendment was not, on the facts, in the interests of justice.

A motorist had provided insufficient breath for analysis, saying he suffered from bronchitis. He was then asked if there was any medical reason why a specimen of blood could not be taken, and he said he was afraid of

needles. When asked to provide a urine specimen, he failed to do so. He was charged with failing to provide specimens of breath, contrary to section 7(6), Road Traffic Act 1988. Following a case management hearing at which the question of the charge was not raised, and some seven months after the date of the offence, the CPS wrote to the defendant indicating that it would, on the date set for trial, seek to amend the charge from failing to provide a specimen of breath to failing to provide a specimen of urine. On the date set for the trial, the justices allowed the amendment and adjourned the trial for a further three and half months.

Question(s) for the Court: [Not recited in the judgment]

Held: "… [Citing *R v Scunthorpe Justices ex parte Kerry McPhee and ex parte Gallagher* (1998) 162 JP 635, an information can be amended out of time if] the different offence or offences allege the 'same misdoing' as the original offence, and the amendment can be made in the interests of justice. … The phrase 'same misdoing' [is understood] to mean that the new offence should arise out of the same (or substantially the same) facts as gave rise to the original offence. …

" … The offence created under s.7(6) is one that covers in one sub-paragraph the failure to provide a specimen of breath, and in the second sub-paragraph, the failure to provide a specimen of urine. … the offences do arise out of the same, or substantially the same, facts. …

"Modern case management, set out in the Criminal Procedure Rules, requires a proper attention to case management duties. There was no excuse whatsoever … for the failure to raise the application to make the amendment at the case management hearing on 3 July 2007, given that was over 5 months after the charge and the case was a simple one. Even if that could be excused, there is no excuse for the failure to apply to the court for a short hearing to determine the question of the amendment once the point was appreciated on 7 August 2007. …

"… the condition for allowing the amendment … was not met in relation to the interests of justice condition. The interests of justice under our modern procedural code required the amendment to have been refused, if (as we must assume to be the case) there would have been an adjournment [from 19 October 2007] to February 2008. In fact, it transpired that the adjournment was for an even longer period, until 19 March 2008. Why that happened is … not clear, but there can have been no way in which the case should have been allowed to proceed in the circumstances set out, given the assumption on which we must proceed, that an adjournment was required."

Case remitted to the justices with a direction to refuse leave to amend the charge.

DPP v Wilson

[2009] EWHC 1988 (Admin), [2009] RTR 29, 21 July 2009, QBD (DC)

The fact that a person was arrested while at hospital as a patient (which is prohibited by section 6D(3), Road Traffic Act 1988) did not invalidate the subsequent procedures.

A motorist had been charged with driving with excess alcohol in blood, contrary to s 5(1)(a), Road Traffic Act 1988. He had been involved in a road traffic accident and was taken to hospital. With the consent of the doctor in charge, a breath specimen was taken and was positive. An officer then arrested and cautioned the motorist. The officer was unaware that section 6D(3) of the Road Traffic Act 1988 prohibits the arrest of a person being treated at hospital. Again with the consent of the doctor in charge, a blood specimen was taken. The motorist was later discharged from hospital and the officer took him to the police station. Analysis of the blood specimen revealed 133 mg alcohol in 100 ml blood. The justices found the specimen had been taken unlawfully and dismissed the charge.

Q*uestion(s) for the Court:* Whether the justices were wrong to decide the blood specimen had been taken unlawfully because the defendant had been arrested while at hospital, even though he remained there until his treatment was concluded.

Held: "… the only issue relates to the consequence of the statutory provision, which states that a person may not be arrested whilst a patient in hospital. The issue in this case is what the effect is in relation to subsequent blood tests. …

"[It is argued for the motorist] that the fact that the arrest was prohibited means that all procedures subsequent to the arrest are not valid. In my view this is not correct. There is nothing in the statutory provisions which requires there to be a valid arrest for subsequent procedures to be so valid. Furthermore, there is no logical reason or any principled reason as to why evidence obtained after an unfair or an unlawful arrest should be admissible, but not that obtained after a prohibited arrest. The fact that an arrest is prohibited does not have the effect of invalidating subsequent procedures provided they are carried out in accordance with the other statutory requirements. …"

The answer to the question was yes; case remitted to the magistrates with a direction to convict.

Writtle v DPP

[2009] EWHC 236 (Admin), [2009] RTR 28, 20 January 2009, QBD (DC)

Justices were right to refuse to admit expert evidence served after the close of the prosecution case, that evidence not being relevant to the issues in the case and raising wholly new issues.

A motorist had been charged with failing without reasonable excuse to provide two specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. At the police station, she failed to provide specimens of breath, and a forensic medical examiner found no medical reason why not. At the case management conference, the court had before it a letter from the defendant's solicitors indicating that no novel or complex issues arose; the defence would be factual and the intention was to put the prosecution to proof of its case.

At the trial, the court heard the prosecution witnesses, and watched a CCTV recording of the procedure. The prosecution closed its case and the hearing was adjourned for lack of time to hear the defence.

Some six weeks later, the defence served an additional report from a Dr Trafford; he had seen the CCTV recording and was critical of the handling of the investigation, and suggested the machine user log should be examined and the service history requested.

At the resumed hearing, the justices decided not to admit Dr Trafford's report on the basis that it was not relevant to the issues in the case and sought to introduce wholly new issues. The defendant appealed.

Question(s) for the Court: Whether the justices were wrong in law to refuse to admit Dr Trafford's evidence.

Held: "… Rule 24(1) of the Criminal Procedure Rules sets out the requirement to disclose expert evidence as soon as is practicable and rule 24(3) states the party that seeks to adduce expert evidence and failed to comply with rule 24(1) may not adduce the evidence without the leave of the court. …

"… either the defence knew the nature of the defence which was later set out in Dr Trafford's opinion and failed to raise it appropriately; or it did not, and contrived the defence after the prosecution case had closed. … in either case the approach is to be deplored. … the Justices were right in saying that the evidence was inadmissible since it did not relate to an issue which had been raised at the appropriate stage. The appropriate stage would have been a reasonable time before the cross-examination of [the police sergeant who conducted the procedure] so that he and the prosecution had an opportunity to consider it. Equally, it was … open to the Justices to refuse the application as a matter of discretion. The evidence on which Dr Trafford commented, the CCTV recording, had been disclosed at a very early stage. If the late application to adduce further expert evidence had been allowed, delay would undoubtedly have occurred. The prosecution would have needed to consider whether to call its own expert evidence in answer and whether to recall [the sergeant]. Doctor Trafford's opinion also raised possible doubts about the reliability of the equipment used, all of this after the prosecution had closed its case some months before.

" … the present regime of case management should in general ensure that the issues in the case are identified well before a hearing. There will, of course, be cases where something occurs in the course of a trial which may properly give rise to a new issue, but this was not such a case. The days when the defence can assume that they will be able successfully to ambush the prosecution are over."

The answer to the question was no. Appeal dismissed.

R (on the application of the DPP) v Chorley Magistrates' Court

[2006] EWHC 1795 (Admin), unreported, 8 June 2006, QBD (DC)

On the facts of the case, justices should not have declined to state a case. (Obiter): the Criminal Procedure Rules effected a sea change.

A motorist had been charged with driving with excess alcohol in blood, contrary to s 5(1)(a), Road Traffic Act 1988. A number of hearings took place at which the defendant was not represented and at which he did not indicate a defence. He was, however, represented at the trial. The prosecution sought to adduce the evidence of the certificate of analysis of the blood. The defence objected on the basis that service could not be proved. The justices accepted that the certificate had been sent, and the defendant said he had received the package in which the certificate was said to have been included. But they acceded to a submission of no case to answer and later refused the prosecution's request that they state a case.

The prosecutor appealed against the refusal to state a case.

Held: "… [After referring to section to 16(3), Road Traffic Act 1988 (certificate admissible only if a copy has been served)], the Justices accepted that the certificate had actually been sent. It is clear … from the evidence of [the motorist] that [he] accepted having received the package. Unfortunately, there is no finding by the Justices as to whether the package … contained the certificate.

"… In the circumstances … we have no doubt at all that the justices must be directed to state a case.…

"… I do wish to add some observations … In April 2005 the Criminal Procedure Rules came into effect. … They have effected a sea change in the way in which cases should be conducted … The rules make clear that the overriding objective is that criminal cases be dealt with justly; that includes acquitting the innocent and convicting the guilty, dealing with the prosecution and the defence fairly, respecting the interests of witnesses, dealing with the case efficiently and expeditiously, and also, of great importance, dealing with the case in a way that takes into account the gravity of the offence, the complexity of what is in issue, the severity of the consequences to the defendant and others affected and the needs of other cases. …

Rule 3.2 imposes upon the court a duty to further that overriding objective by actively managing the case.

The pertinent part relevant … in this case is the early identification of the real issues. … what should have happened is that at the first hearing … the defendant should have been asked first what was in issue. … he should then have been asked what witnesses did he need. … [He] should, thirdly, have been asked what issues were taken by the defence. … The days of ambushing and taking last-minute technical points are gone. They are not consistent with the overriding objective of deciding cases justly, acquitting the innocent and convicting the guilty."

Taylor v DPP

[2009] EWHC 2824 (Admin), unreported, 20 October 2009, QBD (DC)

Where the breath analysis readings were 63 and 52, and the device recorded "breath difference", the officer was entitled to require a blood specimen. On the facts (matching names, matching police station, but a minor discrepancy in transcribing the serial number), the justices were right to find that the blood specimen analysed was that taken from the defendant.

A motorist had been charged with driving with excess alcohol in blood, contrary to s 5(1)(a), Road Traffic Act 1988. At Leamington Spa police station, evidential breath specimens showed 63 and 52 μg alcohol in 100 millilitres of breath, and the device registered "breath difference". The officer administering the procedure thought this was because the motorist had blown too hard and two fast when giving the second specimen. Following the guidance on the MGDDA form, he decided that, although the device appeared reliable, it may not have produced a reliable indication of the proportion of alcohol. He therefore required a specimen of blood under s 7(3)(bb), Road Traffic Act 1988 (officer having reasonable cause to believe that the device has not produced a reliable indication). A specimen was taken, the vial was marked with the motorist's name (Martin Taylor) and a serial number, and placed in the fridge. The person who took the specimen from the fridge later the same day and sent it for analysis recorded the serial number, but made an error in one of the digits. The blood specimen showed excess alcohol and the motorist was convicted. He appealed.

Question(s) for the Court: (1) Whether the officer was entitled to ask for a blood specimen on the basis that (a) although the machine appeared to be working properly, it may not have given a reliable indication of the alcohol concentration because the printout said "breath difference", and (b) he thought the reason for the "breath difference" was that the appellant had blown too hard on the second analysis. (2) Whether there was admissible evidence that the blood analysed was that of the motorist.

Held: "[On (1)]… the officer's evidence as to why a wide breath difference may have occurred, namely that the appellant had been blowing too hard or too fast, would not of itself constitute reasonable grounds for doubting the veracity of the test results. …

"… The discrepancy [between the two breath readings] is …in the region of 20 per cent in a period of some three or four minutes … that fully entitled the Justices to conclude that this factor, coupled … with the fact that the printout … referred to breath difference, constituted reasonable cause for the officer to determine that the blood test should be taken.

"[On (2)] … the question is whether on the information available to them the Justices could properly be satisfied to the criminal standard of proof that the blood provided was the sample that ultimately was tested. … There were three factors … which seem to me to support that conclusion. First, … the sample bore the appellant's name. There was not just the name of Taylor but it was identified with the name Mark [*sic*] Taylor. Second, it was taken from the Leamington Spa Police Station. Third, the sample that was sent was taken from the fridge only some eight hours - probably less than that in fact - after a

sample had been taken from the defendant, and both bore the name Martin Taylor. Plainly in such a short period it is highly unlikely that there would be a confusion resulting from there being two samples with exactly the same name.

"… although the serial number was not identical, it was very similar. The Justices did not specifically rely on this but … the discrepancy of the kind demonstrated here is the kind of every day error of transcription that will arise when individuals are putting down strings of numbers. Had the serial number been markedly different, then that might have raised greater doubts and it would have been a different case."

[On (1)], "the Justices were entitled to find that [the officer] had reasonable cause to believe that the device had not produced a reliable indication of the proportion of alcohol in the appellant's breath."

[On (2)], the justices "were entitled to conclude that the specimen analysed was that provided by the defendant."

DPP v Dukolli

[2009] EWHC 3097 (Admin), unreported, 30 October 2009, QBD (DC)

Where the credibility of the defendant is in question, expert evidence concerning alcohol said to have been taken after driving is essential.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. He had been driving and police found him at 3.15 am, standing by his car in a lay-by. He said he had had a lager at 11 pm. A preliminary test was positive and, at the police station, breath analysis showed excess alcohol. When giving the breath specimens, the motorist said he had not had a drink after he had stopped driving. In interview, he said he had had a shot of vodka at 6 pm the previous evening, and a bottle of lager at about 11 pm, and repeated that he had not drunk since he stopped driving. At the trial, he gave evidence that, in addition to the first shot of vodka and the lager, he had a second shot of vodka after stopping in the lay-by and getting out of the car. He swallowed it as the police approached. He said he had been afraid to admit this earlier. The justices found that it was the alcohol consumed after the defendant stopped driving that had caused him to be over the limit. They dismissed the charge. The prosecutor appealed.

Question(s) for the Court: (1) Whether a reasonable bench, properly directing itself, could have concluded that the defendant had discharged the burden of proof in section 15(3) of the Road Traffic Offenders Act 1988 (consumption of alcohol after ceasing to drive which took him over the limit) in the light of the evidence, and in particular the lack of scientific evidence. (2) Whether magistrates have a discretion to find the statutory assumption in section 15(2) of the Road Traffic Offenders Act 1988 (assumption that the proportion of alcohol in the breath, blood or urine at the time of an alleged offence not less than in the specimen) discharged as per section 15(3) without the benefit of scientific evidence?

Held: [On (1)] "… except in rare cases where it is unnecessary, it has been the standard practice for many years for defendants to call medical or scientific evidence when running [the defence under section 15(3)] if they are to stand any real chance of success.

"… there was a real issue whether the defendant was a credible witness, not least because what he said in court contradicted what he said to the police officer at the time of his arrest, at the time of giving the breath test and indeed in interview. In addition, aspects of his account, such as swallowing a mouthful of vodka as the policeman approached, seemed inherently unlikely. This is … precisely the kind of case where expert evidence is important. Expert evidence would, or certainly may have, enabled the justices to test whether the readings given were consistent with the defendant's account, and may very well have led to the conclusion that they were not. Furthermore, even if they accepted his story of having a mouthful of vodka, it is not at all obvious to me that a lay person would have found that that mouthful explained or even could have explained the excess. For these reasons … in the absence of medical or scientific evidence called to support his version, the magistrates were wrong to find that the defendant had discharged the burden of proof.

[The answer to question (2) was] yes, but but only in the comparatively rare case where a layman can reliably and confidently say that the alcohol taken after the driving must explain the excess which was not the position here.

The case was remitted to the magistrates with a direction to convict.

CPS v Chalupa

[2009] EWHC 3082 (Admin), unreported, 30 October 2009, QBD (DC)

On the facts (twenty minute delay in contacting duty solicitor, duty solicitor replying within two minutes), the rule that the provision of breath specimens may not be delayed pending legal advice applied; the exception where a solicitor is immediately available did not arise. Despite the breach of s 58, PACE, there was no arguable basis for excluding the evidence of the refusal to provide.

A motorist was charged with failing without reasonable excuse to provide two specimens of breath for analysis, contrary to s 7(6), Road Traffic Act 1988. He had been arrested and, at the police station, confirmed that he required legal advice. The police called the duty solicitor twenty minutes later. Meantime, they started the breath analysis procedure. The motorist would not provide specimens even though he was told he could not delay for legal advice. He was charged with the offence under section 7(6). When the duty solicitor was called, he returned the call within two minutes, but was told, in error, that the motorist was then undergoing the breath analysis procedure.

The Crown Court found a breach of s 58 PACE (person held at a police station entitled to consult a solicitor as soon as practicable), but that this did not justify excluding the evidence under s 78 (discretion to exclude evidence which would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it). The defendant was convicted. He appealed.

Question(s) for the Court [as reformulated in the judgment]: Whether, notwithstanding the breach of section 58, the court was entitled to exercise its discretion so as to refuse to exclude the evidence of the breath test procedure.

Held: [After reviewing the authorities] "… this is not … one of those exceptional cases where a solicitor was immediately available, such that it could be said that any delay would necessarily have been minimal. I do not

accept that the exception identified in *Kennedy* [*Kennedy v DPP* [2002] EWHC 2297, [2004] RTR 4, where the court said that if there happens to be a solicitor in the charge office whom the suspect wishes to consult for a couple of minutes before deciding whether or not to provide specimens, he must be allowed to do so] applies here. The appellant submits that it does on the basis that … the duty solicitor did respond within two minutes of being contacted. That may be true in this case, but there is plainly no guarantee … that there will always be such a speedy response. Moreover, he would not necessarily have been in a position to respond so promptly had he been contacted earlier. …

It follows that we are not in the territory where Section 78 is properly engaged in the sense that there is no arguable basis at all for excluding the evidence. The authorities establish that the right to prompt legal advice and any breach of that right will, in general, have no bearing whatsoever upon the obligation to provide a specimen of breath. It is not a reasonable excuse to refuse to provide a specimen until advice has been received. … Accordingly, there is nothing unfair or improper with the police insisting on a specimen being provided before advice is obtained. To use the language of Section 78, there is nothing about the particular circumstance in which the evidence is obtained which might even arguably render it unfair to admit the evidence. …

The second reason for rejecting the appeal is that even if Section 78 was potentially engaged on the grounds that the response was in fact very speedy from the duty solicitor, then the court below is, in any event, plainly entitled to refuse to exclude the evidence. There was, in truth, no prejudice resulting from the breach of Section 58."

The answer to the question was yes. Appeal dismissed.

Goldsmith v DPP

[2009] EWHC 3010 (Admin), unreported, 4 November 2009, QBD (DC)

A person guilty of driving with excess alcohol who drank after driving, but who cannot establish that it was that drink which took him over the limit, is nevertheless entitled to adduce evidence that the reading at the time of driving was lower than that shown on the printout.

A motorist had been charged with driving with excess alcohol, contrary to s 5(1)(a), Road Traffic Act 1988. He had been drinking in a pub. He then drove his car, but drove it into a ditch. He abandoned it, was collected by friends and went back to the pub where he resumed drinking. Police later arrested him and breath analysis showed 71 μg alcohol in 100 ml breath. The police made enquiries to establish how much he had drunk after the accident, and then sought expert evidence of the likely level at the time of driving. The expert's opinion was that that would have been 46 μg. The defendant was charged on the basis of 46 μg, but the CPS later amended the charge to 71 μg, as shown in the printout.

The defendant then appointed his own expert, who said that, on the basis of what the defendant had told him about how much he had drunk, the likely reading at the time of driving would have been no more than 57μg. The defendant pleaded guilty, but on the basis that the reading was no more than 57. He argued that he should be sentenced on that basis, so that penalty would

be lower than for a reading of 71. The court found that the assumption in s 15(2), Road Traffic Offenders Act 1988 (evidence of the proportion of alcohol in a specimen of breath to be taken into account) applied and could be rebutted only under section 15(3) (consumption of alcohol after ceasing to drive which took driver over the limit). The defendant was accordingly sentenced on the basis of the reading of 71µg. He appealed.

Question(s) for the Court: Whether it was correct to find that the assumption in s 15(2) prevented the court from sentencing on the basis of a reading lower than that provided by the evidential test, where there had been post-driving consumption of alcohol.

Held: "… The appellant … has argued … that the assumption in section 15(2) applies … only to trials, and has no relevance once guilt is established … when … the court can, and indeed should, come to its own conclusions on the evidence available, taking account of, even giving weight to, the readings, but ready to come to some other conclusion if the evidence plainly establishes that the reading must have been wrong. …

Let us take an example. Let us say that there is clear evidence that someone left work without having had a drink. He then goes to the pub and has one and a half pints of beer before driving off, sufficient, perhaps, just to put him over the limit, but not by very far. Then, like the appellant, he has an accident. Like the appellant, he leaves his car and goes back to the pub with his friends, where he has, say, four or five pints, or even more, before the police arrive.

The reading on the certificate … would be very high indeed. The appellant would have to plead guilty because he could not establish that he was not over the limit when he was driving. To put it another way, he could not displace the assumption under section 15(2) because he could not prove the exception in section 15(3) applied. If the prosecution are right, he must be sentenced on the basis that he was driving with that very high reading, rather than the modest excess which the evidence establishes must have been the position.

This is not just. It is not fair. I do not accept that it is the law. The court should not be compelled to sentence upon a factual basis which is demonstrably false.

Furthermore, … there are certain linguistic signposts within section 15 which make clear that the presumption applies only to contested trials. Section 15(1): this section applies 'in respect of proceedings for an offence' under section 5. This is apt to describe a trial, but not apt to describe a hearing after a plea to determine sentence.

Furthermore, the assumption in subsection (2), although it says it applies 'in all cases', is subject to the exception in subsection (3) which allows the defendant to set aside the assumption if he proves that he consumed alcohol after he ceased to drive and it was the alcohol taken after he ceased to drive which pushed him over the limit. The exception in subsection (3) is plainly relevant to trials, and only to trials, which strongly suggests that the presumption in subsection (2) also applies only to trials.

The answer to the question was no; the case was remitted to the justices for a *Newton* hearing.