



Drinking and Driving: The Law and Procedure

The Offences

Section 5 of the Road Traffic Act 1988 makes it an offence for a person:

1. to drive or attempt to drive a motor vehicle on a road or other public place, or
2. to be in charge of a motor vehicle on a road or other public place,

after consuming so much alcohol that the proportion of it in their breath, blood or urine exceeds the prescribed limit.

These prescribed limits are 35 micrograms of alcohol in 100 millilitres of breath, 80 milligrams of alcohol in 100 millilitres of blood, and 107 milligrams of alcohol in 100 millilitres of urine. The Home Secretary can alter these proportions by issuing amended regulations.

Under the law, someone charged with drink driving has a defence if they can prove that, at the time in question, there was no likelihood of their driving the vehicle while they were over the limit. Where a driver is over the limit when tested, but can show that he consumed alcohol after he stopped driving (so that the excess over the limit is accounted for), he may escape conviction. Some other defences of necessity or emergency are also available. Service personnel are subject to sections of the 1988 Act even while they are serving abroad.

Special Definitions in Drink Driving Offences

The words used in the Road Traffic Act 1988 have been marked out for special attention in the courts.

1: 'Driver'

The question of whether anyone is 'driving' or not at the relevant time of an offence is essentially one of fact and degree. The reported cases in this context have concentrated on three particular questions: whether a person was driving or not in the special circumstances of the case; whether they were 'driving' as opposed to 'being in charge'; and whether a driver was in the circumstances to be regarded as still driving, or whether his driving was to be considered as having come to an end. With regards to this last point, it is now no longer a defence to a prosecution for drunk driving for the driver to say that the requirement to provide a specimen of breath for a breath test was made after his journey had been concluded. Where a driver is found at the wheel of a stopped vehicle, it is still possible that he will be regarded as driving as opposed to being in charge.

2: 'In charge'

There have been a large number of Scottish cases dealing with the question of whether a person is 'in charge' of a vehicle. The general approach of the Scottish cases has been significantly broader than in England, with the result that in a number of identical situations a driver has been held not to be 'in charge' in Scotland, while the opposite view has been taken in England. It has been established that a person is to be described as being in charge of a vehicle only if he has in fact some degree of control over it. However, this may be sufficient to convict, if the accused acts in a manner which showed that he intended to assume control of the vehicle with a view to driving it. Thus, the following have been held to be in charge of a vehicle: the supervisor of a learner driver; a driver in a broken-down car waiting to be towed away; and a person in the driver's seat of a car holding a bunch of keys, one of which could be inserted into the ignition, although there was no evidence that it was capable of starting the engine. However, in the following circumstances a person has been held not to be in charge of a vehicle: a motor mechanic called to a roadside repair; the owner of a car standing beside it with the key waiting to be driven by an employee; the owner of a car in the front passenger seat with his wife, who had no licence, in the driving seat; and a person who fell asleep in his car after a party

but who had no intention of driving the car until the following morning. The supervisor of a learner driver was held to be in charge of a vehicle, but was able to establish that there was no likelihood of him driving.

3: 'Road or other place'

The description 'road or other public place' includes, but is wider than, the definition of the term 'road' in general legislation. 'Road' may include a place where there is not a public right of way, but where there is access for the public. A public place is in general a place which is not a road but to which the public has access, such as a field used for parking at an agricultural show, or a car park for an inn, or a driveway from a public road to a hotel even although the proprietors had a right to exclude certain members of the public. A car park next to a public house may be a public place as well as a road, but one marked 'private' at a block of flats is not, while a garage forecourt is probably a public place. One of the principal issues in this topic is whether the public have access. Thus an isolated farmyard is not a public place, but a private road used by members of the public is likely to be.

Blood Alcohol: Preliminary Tests

The procedure for determining the proportion of alcohol in the blood using a specimen of breath, blood or urine is set out in the Road Traffic Act 1988 and the Road Traffic Offenders Act 1988.

Police constables have a general power to administer certain 'preliminary tests' in a number of circumstances, and one of these tests looks for alcohol in a driver's blood. This is the 'preliminary breath test'. The other tests are the 'preliminary impairment test', which allows the constable to make observations about a person's physical state and ability to carry out certain tasks, and the 'preliminary drugs test', which allows the constable to establish, by way of sweat or saliva swabs, whether a person has a drug in his body. A person commits an offence if, without reasonable excuse, he fails to co-operate with a preliminary test.

A constable in uniform may administer a preliminary test in various circumstances:

- First, such a test may be required when a constable reasonably suspects 'that a person driving or attempting to drive or in charge of a motor vehicle on a road or other public place has alcohol in his body or has committed a traffic offence whilst the vehicle was in motion'.
- Secondly, a breath test may be required if a constable reasonably suspects 'that a person has been driving or attempting to drive or been in charge of a motor vehicle on a road or other public place and that person still has alcohol or a drug in his body or is unfit to drive because of a drug'.
- Thirdly, the requirement may be made if a constable reasonably suspects 'that a person has been driving or attempting to drive or been in charge of a motor vehicle on a road or other public place and has committed a traffic offence whilst the vehicle was in motion'.
- Finally, if an accident occurs owing to the presence of a motor vehicle on a road or other public place, a constable may require any person who he reasonably believes was driving or attempting to drive or in charge of the vehicle at the time of the accident to co-operate with a preliminary test.

Requiring a person to take a test is known as a 'requirement'. There is no provision that means preliminary tests must be required as soon as reasonably practicable after the commission of an offence or after the cause of suspicion has arisen. There is actually no time limit specified in any of these requirements, other than that the constable must suspect at the time of requiring the test that the person still has alcohol in his body. Nor is it an objection to the requirement that it is made after driving has ceased. The person required to provide the specimen, however, has still available to him the defence that between the conclusion of driving and the requirement to provide the breath specimen, he has consumed enough alcohol that, but for such consumption, he would not have exceeded the prescribed limit.

Each kind of preliminary test must be provided at or near the place where the requirement is made, or at a police station specified by the constable. Failure to provide a specimen, without reasonable excuse, is an offence. It is only a reasonable excuse here if the person concerned is physically or mentally unable to provide it, or if doing so would involve a substantial risk to their health. It is not a reasonable excuse that alcohol has been consumed since driving, or that the person required to give the test was not in fact the driver. A constable is then entitled to arrest a person without warrant if, as a result of the breath test, he has reasonable cause to suspect that the proportion of alcohol in that

person's breath or blood exceeds the limit (in other words, if the breathalyser test is positive), or if that person has refused to provide a breath specimen, and the constable has reasonable cause to suspect he has alcohol in his body. In neither case, however, may the arrest be made if the person is a patient at a hospital. The arresting officer does not need to be the same officer who made the requirement of the driver to provide the specimen, so long as he was in a position to observe the result of the test or the failure to provide it. Not being asked to provide a preliminary breathalyser test does not preclude any further investigations or arrests.

Procedure

A constable requiring a person to co-operate with a preliminary test must be in uniform, except where the test is administered following a road accident. Whether or not a constable is in uniform will depend on the circumstances of each case; the test is whether the constable (which includes an officer of any rank) is easily identifiable as a police officer. The need to be in uniform relates to both the time when the suspicion arises and when the requirement is made. The reasonable grounds for a constable's suspicion may arise from a variety of circumstances. They may occur when a vehicle has been stopped for any other reason, such as a spot check, or when the constable has been given information from another source. If a constable has two grounds for requiring a breath test, then either may be relied on at any subsequent trial to justify the requirement. The requirement does not have to be made in any particular form of words so long as the meaning of the requirement is made clear. Even if the information on which a police officer bases his suspicions is subsequently proved to be unfounded, the requirement is still legitimate if their suspicions were genuine. The reasonable cause for suspicion therefore has to be assessed on the personal and subjective opinion formed by the constable at the material time. However, the constable must be satisfied, or must reasonably believe, that the requirement is properly understood by the person asked to undertake the test.

Under the Act, a traffic offence must have been committed while the vehicle was in motion to apply to this matter of suspicion. The question of what is an 'accident' will be a matter of facts and circumstances in each case. It is not necessary for another vehicle to be involved. Indeed, as the subsection requires only that an accident occurs owing to the presence of a vehicle on the road, it is not necessary that the vehicle itself must be involved in a collision. 'Accident' should not be interpreted too literally; it means any unintended physical act with a negative physical result. It is also a matter of fact and circumstance in each case as to whether the belief of a constable that a person was driving at the time of the accident was reasonable. The constable need not have been an eyewitness to the accident, but he must be in possession of some information which justifies such a belief, rather than a mere suspicion. Even if the grounds on which the police officer formed his reasonable belief that a person was driving prove to be unfounded, the requirement to provide a specimen is still valid. A constable may therefore stop a motorist to see if he has been drinking; he can then require the motorist to provide a specimen if he thereafter forms a reasonable suspicion that he has been drinking. The reasonable cause of suspicion may therefore arise before or after the driving has stopped.

The device used for the administration of a breath test is commonly known as a 'breathalyser'. The breath test device must be assembled and used according to the manufacturer's instructions, and within the time limit indicated by the date marked on the device. A driver who provides a breath test on a device which proves defective cannot thereafter refuse to provide a further specimen. The fact that an accused driver failed to provide a satisfactory breath test does not prevent a second requirement to provide a breath test prior to arrest. Any challenge to the validity of the formal requirements of breath testing must be made at the trial. A specimen of breath must be given in such a way as to be sufficient to allow the test and the analysis to be carried out.

Blood Alcohol: Specimens for Analysis

Note that there is an important difference between breath samples given for a 'preliminary test' above, and those later given for analysis.

Introduction

Section 7 of the Road Traffic Act 1988 deals with the provision of specimens for analysis. In the course of an investigation as to whether a person has committed an offence under the Act, a constable may require that person to provide specimens for analysis. Accordingly, it is not necessary that a driver has been arrested following a preliminary breath test, or from failure to undergo such a

test – although such an arrest will normally take place. However, on making the requirement, the constable must give a warning that failure to provide a specimen may result in prosecution. The requirement to provide a specimen for analysis may in the first place be satisfied by the provision of two specimens of breath for analysis, given into a device which has been approved by the Secretary of State. This requirement may only be made at a police station. Alternatively, the requirement can be met in certain circumstances by the provision of blood or urine for laboratory analysis; this requirement may be made at a police station or hospital.

Breath Specimens

It is clear from the Act that in normal circumstances the procedure requiring two specimens of breath is to take priority where possible over the other procedures. Therefore, a specimen of blood or urine cannot be required unless the constable making the requirement has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required; or there is not available at the police station, at the time the requirement is made, an appropriate device; or it is for some reason not practical to use such a device there. If the constable has reasonable cause to believe that the device has not produced a reliable indication of the proportion of alcohol in the breath of the person concerned, he may resort to the alternative procedure. A blood or urine sample may also be taken where, as a result of a preliminary drug test, the constable reasonably believes that the person concerned has a drug in his body. Thus, if a blood or urine sample is taken, the prosecution will need to demonstrate satisfactorily why a specimen of breath was not taken.

In providing a breath specimen in practice, a driver is required to blow twice into an approved device in a police station, and thus provide two specimens which are immediately analysed by the device. The device then automatically produces a statement of the analysis, which is certified by the police officer in charge of the procedure.

Specimens of Blood or Urine

There is an important qualification to the priority of the breath specimens for analysis. In all cases of the provision of breath specimens then the lower of the two analysis readings is the one to be used, and the other is to be disregarded. However, if the specimen relating to the lower reading yields a result of less than 50 micrograms of alcohol in 100 millilitres of breath, the person providing the specimen has the right to claim that the specimen should be replaced by a specimen of blood or urine. Further, a constable may require the provision of blood or urine if the proceedings are in respect of an alleged breach of section 4 of the Road Traffic Act 1988 and, either as a result of a preliminary drug test, or due to the opinion of a doctor, the constable reasonably believes that the person concerned has a drug in his body. The requirement of a specimen of blood or urine may be made in these circumstances notwithstanding that there has been a requirement or provision of two specimens of breath, unless the right to prosecute has been renounced.

Where an alternative specimen of blood or urine is to be taken, which of these two sorts of specimen is to be provided, and (in the case of a specimen of blood) who is to be asked to take it, are at the option of the constable making the requirement, unless there is medical evidence to the effect that a blood sample should not be taken. A specimen of blood may be taken only if the person giving the specimen consents to its being taken by a medical practitioner or, if it is taken at a police station, either by a medical practitioner or by a registered health care professional, and this is in fact done. Should a motorist have a reasonable excuse for failing to provide a specimen of breath, he may still be required to provide a specimen of blood or urine.

A specimen of urine must be given within one hour of the requirement being made and after the provision of a previous urine specimen. Failure to provide the second specimen within the hour constitutes the offence of failing to provide a specimen. In addition, any specimen provided in terms of this provision must be of such a quantity that a proper analysis can be made. If the prosecution wishes to demonstrate that the specimen is insufficient for analysis, this will normally be done by the evidence of suitable experts. However, the question of whether a specimen can be divided into two parts may appropriately be decided by the police officers taking the sample.

Specimens of Blood Taken From Persons Incapable of Consenting

A constable may make a request to a medical practitioner to take a specimen of blood from a person irrespective of whether that person consents, if:

1. that person is someone from whom the constable would (in the absence of any incapacity of that person and of any objection by a medical practitioner) be entitled to require the provision of a specimen of blood for a laboratory test;
2. it appears to that constable that that person has been involved in an accident that is relevant to the matter under investigation, or the circumstances of that matter;
3. it appears to that constable that the person is or may be incapable (whether or not he has purported to do so) of giving valid consent to the taking of a specimen of blood; and
4. it appears to that constable that that person's incapacity is attributable to medical reasons.

Such a request may not be made to a medical practitioner who for the time being has any responsibility for the clinical care of the person concerned, and may not be made to a medical practitioner other than a police medical practitioner – unless it is not reasonably practicable for the request to be made to a police medical practitioner or it is not reasonable for such a medical practitioner (assuming they are willing to do so) to take the specimen.

It is lawful for a medical practitioner to whom such a request is made, if they think fit, to take a specimen of blood from the person concerned, and to provide the sample to a constable. If a specimen is taken in these circumstances then the specimen should not be subjected to a laboratory test unless the person from whom it was taken has been informed that it was taken, and has been required by a constable to give his permission for a laboratory test of the specimen, and has given his permission. On requiring a person to give such permission, a constable must warn that person that a failure to do so may render him liable to prosecution. If a person without reasonable excuse fails to give permission, then he is guilty of an offence.

Defence of 'Reasonable Excuse'

It is an offence to fail to provide any specimen, when lawfully required to do so, without 'reasonable excuse'. As in the case of failure to take a breath test, for the excuse to be reasonable the test is whether there is some physical or mental incapacity which precludes the provision of the sample, or that to provide it would involve some material risk to health. For example, an overwhelming repugnance to the giving of a sample of blood, due to a fear of the hypodermic needle, or to the sight of the person's own blood, may amount to a reasonable excuse. Mere dislike of the procedures, or embarrassment, would not be sufficient. Physical difficulties or mental problems may amount to reasonable excuse.

Compliance must also be active; a driver who told the police officers making a requirement for a specimen of blood or urine that they could please themselves as to which they took was held to have refused to provide the necessary specimens. The driver must co-operate reasonably with all requirements properly made of him and comply with, for example, reasonable requests by the doctor taking the sample of blood. A conditional acceptance to provide a specimen is not enough. Nor is it a reasonable excuse that any part of the preceding procedure has been wrongly carried out, or that any reasonable belief on the part of the constable making the requirement is unjustified. A person who fails to provide a specimen does not need to be given a second chance to do so. Where a second specimen of urine cannot be given, a blood specimen may be required.

Evidence

Proportion of Alcohol in Specimen

There are a number of important rules in the 1988 Act which apply to evidence used during proceedings under the Act.

The first of these is that evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by or taken from the accused is *in all cases* to be taken into account. This means that the evidence shown by such a specimen may be considered by a court and used to support a conviction, even if the specimen was improperly, unfairly, or even unlawfully obtained. Defects in procedure, or a failure to give an appropriate warning, will not necessarily constitute a defence under the Act. However, there remains at common law the ability of any judge to use their discretion not to admit any evidence to a trial which has been unfairly or improperly obtained.

Secondly, the proportion of alcohol in the accused's breath, blood or urine while driving, or in charge of, the vehicle is to be assumed to be *not less* than that shown by the specimen. The only defence provided is that this assumption is not to be made if the accused proves:

1. that he has in fact consumed alcohol after committing the offence but before providing the specimen or having it taken from him, and
2. that, had he not done so, the proportion of alcohol in his breath, blood or urine would not have exceeded the permitted maximum and, if it is alleged that he was unfit to drive through drink, would not have been such as to impair his ability to drive properly.

In particular, the accused must show that the particular amount of alcohol which he consumed following the act of driving, attempting to drive or being in charge would inevitably and specifically, in all the circumstances of the case, indicate that apart from the subsequent consumption of alcohol the concentration of alcohol in his breath, blood or urine would not have exceeded the permitted maximum. This defence can be established by a single witness; corroboration is not required.

Documentary Evidence

Evidence of the proportion of alcohol or drug in any specimen of breath, blood or urine may be given in court by production of documentation. In particular, evidence of the proportion of alcohol in a breath specimen may be provided by a statement automatically produced by the device into which the specimen was given, together with a certificate signed by a constable that the statement relates to a specimen provided by the accused at the date and time referred to in the statement. The constable who signs the certificate need not be the same officer who made the requirement to take the test. The court may employ its own knowledge and understanding of the device and use the evidence of the statements automatically produced by the device in assessing whether the accused driver is shown to have exceeded the permitted levels of alcohol.

The documents must be served on the accused either by handing a copy to him at the time the document is produced, or by serving it on him not later than seven days before the hearing (or trial). A document becomes inadmissible if the accused has served notice on the prosecutor, not later than three days before the hearing (or within such further time as the court may in special circumstances allow), requiring the attendance of the person by whom the document purports to be signed.

If the device appears to be doing what it is supposed to do, expert evidence of its operation is not required. Whether defects in the print-outs will indicate that the device is reliable will depend on the circumstances. The test of reliability is subjective to the police operating the device. If the prosecution evidence is that the device is reliable, the onus is on the defence to show that it is not, on the balance of probabilities.

With regards to a blood or urine sample, evidence of alcohol content may be given by a certificate signed by an authorised analyst. The specimen of blood or urine must be identified sufficiently on the certificate. As above, a specimen of blood is normally to be taken from an accused only if he consents to it, and evidence that this was done can be given by production of a document which purports to certify that the sample was taken with consent and by a medical practitioner or a registered health care professional and which is signed by the medical practitioner or the registered health care professional. If an accused asks to be supplied with a specimen of blood or urine provided by him, the specimen must be divided and one part given to him, otherwise the specimen will not be admissible in evidence.

Detention

After the provision of a specimen of breath, blood or urine, the police have a discretionary power to detain the accused at the police station until such time as the accused, were he to be driving, or attempting to drive, a vehicle, would not be committing an offence under sections 4 or 5 of the Road Traffic Act 1988. However, a driver is not to be detained if there is no likelihood of him driving or attempting to drive a vehicle while in such a condition. A person liable to be charged under the drink driving provisions of the Act may not also be charged under the Licensing Act 1872 with the offence of being drunk while in charge of a carriage in a street or other public place.

Source: Stair Memorial Encyclopaedia