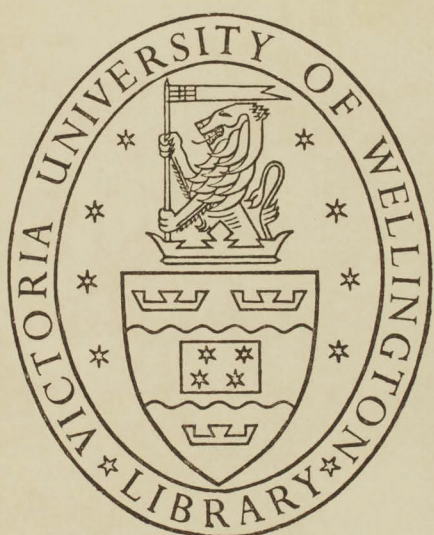


LL.B.(Hons) Legal Writing Requirement.



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Miss Phyllis R. STRACHAN

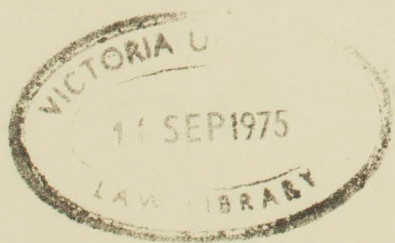
PROGRESS OR REGRESS -

Blood Alcohol Testing

Legal Writing Requirement
for LL.B. (Hons.)

Victoria University of Wellington,
Wellington, New Zealand, 1974.

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Introduction:

The 1960's have seen a dramatic change in the Law dealing with driving offences involving alcohol. Prior to 1968 a person committed an offence when, while under the influence of drink or a drug to such an extent as to be incapable of having proper control of a motor vehicle, he drove or attempted to dirve a motor vehicle on any road.⁽¹⁾

Due to public concern at the ever rising road toll research was carried out to investigate the relationship between alcohol consumption, driving and road accidents. Research reports demonstrated that drivers who had been drinking were disproportionately represented in road accident figures. The likelihood that a driver would be involved in a road accident was seen to rise sharply with increasing blood alcohol levels.⁽²⁾

Ultimately the Transport Amendment Act 1968 introduced a new strict liability offence; a driver now commits an offence if he drives a motor vehicle when his blood alcohol concentration is above the statutory prescribed level regardless of the way in which he is driving.

This amendment rested on a large body of world wide scientific data, the implementation of which required the use of new highly sophisticated and analytical techniques.⁽³⁾

To understand the position of the law in this area as it is now and as it might develop, a discussion of the early legislation and its development is necessary.

The Development of Blood Alcohol Legislation

Section 58⁽⁴⁾ made it an offence to drive a motor vehicle when the driver was incapable of having proper control due to an excess of alcohol in his blood. Yet it was up to the traffic officer to decide whether a driver had had too much or not. General practice showed that if a suspected drunken driver could walk a straight line

(1) 1962 Transport Act s.58

(2) "Effect of small doses of alcohol on a skill resembling driving"
Professor G.C. Drew, Privy Council Medical Research Council
Memorandum No. 38 (1939)- R.R. Ladd; 1972 N.Z.L.J. pp.328-329

(3) H.J. Walls & A.R. Brownlie "Drink, Drugs and Driving" chapters 2 & 3
H.J. Walls "Forensic Science" chapter 9 pp.69-83

(4) 1962 Transport Act.

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to the satisfaction of a traffic officer, a prosecution was not initiated. The subjective nature of this section was inquired into by Parliament.⁽⁵⁾

As a result, the first change came with the Transport Amendment Act 1966 which amended sections 55(2), 58 & 59 of the 1962 Act, to provide that a person who was apprehended under the latter sections, would be presumed to be incapable of having proper control of a motor vehicle if his blood alcohol concentration was above a certain level. This was a rebuttable presumption.

Section 62A(1) of the amended act was dependent upon the "voluntary" taking of a blood sample, and s.62A(7) did not allow as evidence the refusal of consent to a blood test. Thus this legislation was robbed of its effect. Drivers who believed their blood alcohol concentrations to be in excess of the statutory limit, naturally refused their consent to allow blood samples to be taken.

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categorized as stated

A further parliamentary committee was appointed in November 1967 to inquire into the adequacy of the existing law on blood alcohol testing. It was also asked to advise on the efficiency of breath testing and the application of it to New Zealand.

The Committee found from the results of breath test experiments in New Zealand and overseas that breath analysis is an indirect method of assessing the amount of alcohol in the blood. It was felt that it was inadequate as a final determinant of a person's blood alcohol concentration. Scientific evidence demonstrated that the breath in the lungs equilibrates with the alcohol in the pulmonary capillary blood, and in the first litre of air which is expelled there is a proportion of alveolar air which varies between individuals from approximately 55% to above 93%. Breath testing devices are thus calibrated by their manufacturers on an average proportion of alveolar air. It is this factor which may produce 'quasi positive' or 'quasi negative' results in certain persons.⁽⁶⁾

(5) The 1966 Parliamentary Road Safety Committee devised parliament to set a limit above which a motorist would be presumed to be intoxicated subject to such presumption being rebutted by other evidence.

(6) "The Drinking Driver-Overseas Situation and Experience" R.R. Ladd, 1972, N.Z.L.J. pp.356,357.

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The 1967 Parliamentary Committee advised that breath test analyser tubes could be used as a preliminary test as to whether a blood sample should be taken or not. Later, the 1968 Parliamentary Committee on Road Safety considered that the act of drunken driving was an offence worthy of a heavy penalty. It was therefore felt that the chemical tests necessarily involved in the determination of guilt or innocence, should be of the highest standard possible. Also it was recommended that the method to be used for final determination of a person's blood alcohol concentration should be the blood test.⁽⁷⁾

The judiciary have looked favourably on the new law. In Beattie v Ministry of Transport ⁽⁸⁾ Haslam J. stated that the excessive consumption of alcohol was a social evil. The Act showed the broad purpose of controlling motor transport in the interest of the community. Section 58A ⁽⁹⁾ with allied provisions is aimed at the particular mischief commonly known as drunken driving. The breath alyser is the legislature's weapon to combat this problem.

There have been substantial amendments to the newly introduced blood alcohol provisions introduced in the Transport Amendment Act 1968.⁽¹⁰⁾ The amendments were principally introduced to remove "loopholes" in the existing law and also to give effect to the recommendations of the various parliamentary road safety committees.

"Loopholes" - Overcome

There was a 'suspicion' amongst enforcement officers of the Transport Act that suspect drivers were avoiding conviction under the Act on the basis of a technicality. If an officer inadvertantly had not strictly followed the procedure set out in the act, the accused could bring this to the Court's attention and possibly have the case discharged.⁽¹¹⁾

An amendment to the Act was passed in 1970.⁽¹²⁾ It provides that it is not a defence to s58 1 (a) if ss. 58A and 58B are not strictly complied with, provided that there has been reasonable compliance with the provisions of these sections.

(7) The 1968 Amendment introduced the compulsory taking of breath tests, from suspected drunken drivers, (ss.58 & 59 of the Amendment 1962 Transport Act.)

(8) [1973] 1. N.Z.L.R. 20, 23 line 12.

(9) s. 58A was introduced in the 1970 amendment to the act.

(10) The following amendments were; 1970 Transport Amendment Act ss. 1971 Transport Amendment Act ss.9,10; 1971 Transport Amendment Act (No.2) ss. 2,3,4,5; 1972 Transport Amendment Act ss.6, 7 & 8.

(11) Borrows v Police [1969] N.Z.L.R. 647; Hope v Transport Department [1971] N.Z.L.R. 449; also see Police v Thompson [1969] N.Z.L.R. 513 and McCombe v Transport Department [1972] N.Z.L.R. p157.

(12) Transport Amendment Act 1970 s.5

Under a previous amendment to s. 58A(3) there was no requirement that when a person was taken to a place he had to remain at that place. The 1971 Transport Amendment Act s.9 introduced into s. 58A(5) the direction that a person is required to give a specimen of his breath. Refusal or failure to comply with this, means that the traffic officer or constable may then arrest without a warrant.

Section 58A(6) provides that every breath testing device used must be of a kind approved by the Minister of Transport by notice in the Gazette. In Beattie's case ⁽¹³⁾ the appellant contended that ss.(6) provides for approval, and the Gazette notice being one and indivisible, and that as the Gazette notice made no reference to Ministerial approval the Transport Breath Notice 1971 was invalid. The Court held that where a defect appears in a statute, the traditional approach of disallowing the Court from reference to material other than the statute itself, does not apply. The full Court held that the Court may also look at social considerations which gave rise to the statute and also to look at the mischief that was aimed at, in order to find the intention of parliament.

Although the report of this judgment makes no reference to s.5(3) ² ⁹ the Acts Interpretation Act, it could be argued that the Court did look at the Transport Act "fair large and liberally" to arrive at this conclusion, as s. 58A(6) is part of a penal statute. Penal statutes have traditionally been strictly interpreted as the welfare and interests of an individual are at stake. The Court has been seen in blood alcohol cases to be more concerned for the public welfare rather than the rights of the individual. ⁽¹⁴⁾

The 1968 amendment provided that if the first breath test was negative, no legal proceedings could be taken against that person, of which being incapable of having proper control was an element of the charge. ⁽¹⁵⁾ Some drivers were thought to have avoided convictions in this way. The 1970 Transport Amendment Act omitted these provisions, thus a negative breath test is no longer a bar to a careless driving charge.

(13) [1973] 1. N.Z.L.R. pp 20-24

(14) Beattie's Case [1973] 1. N.Z.L.R. p.20 contributes to this argument, also Police v Ward [1973] 2. N.Z.L.R. p.418.

(15) ss. S9B(7), 59 C (10), (16) S 58 D.

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The 1968 amendment did not completely cover the situation where a suspected drunken driver is taken to a hospital. A traffic officer or constable could only obtain a blood sample from a person who was in hospital or under medical care, if the attendant doctor had first been notified of the officer's request and if he was satisfied that the taking of a specimen would not be prejudicial to the patient's treatment or care. (16)

The legislation was ineffective against drivers who feigned injury in order to be taken to the possible sanctuary of a hospital.

The 1971 Parliamentary Road Safety Committee recommended that; a blood sample should be taken from all road accident cases admitted to hospital, the sample should be made available on request from a traffic officer or constable - provided that the enforcement officer had a good cause to suspect an offence under ss.55, or 58 had been committed, that hospitals be entitled to take blood samples from all road accident cases for their own research purposes. The Transport Amendment Act 1971 ss.4 embodies the findings of this Committee. (17)

good is the point.

Elements of the Offence of 'Drunken Driving'

Good Cause to Suspect

Under s. 58 A (1) Transport Amendment Act 1968 if a traffic officer has good cause to suspect that any person has committed an offence against ss 55 or 58 he may require that person to provide forthwith (18) a specimen of his breath for a breath test.

Good cause to suspect was discussed in Fletcher v Police. (19) The Court held that whether good cause to suspect an offence specified in s. 58 (1) does or does not exist is to be determined on the whole of the facts of the case, and evidence of a driving offence is not essential for a finding of good cause. The case of Ministry of Transport v Van Hartitzcl (20) found that good cause to suspect means no more than a reasonable ground of suspicion upon which a reasonable man might act.

(16) S. 58.D.

(17) As incorporated into s. 58.D (2), (3), (4), (7), (9), (11).

(18) The word 'forthwith' in s.58 A means "as soon as reasonably practical" Chesam v Wright [1970] N.Z.L.R. p.247.

(19) [1970] N.Z.L.R. p.702

(20) [1972] N.Z.L.R. p.928.

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At the present time though, good cause to suspect on the part of the officer is a statutory condition precedent without the fulfillment of which the subsequent use of the statutory procedures will be in vain.⁽²¹⁾

However it is reported that steps are being taken by Parliament to bring down more legislation on the above point. The amendment planned is to provide that officers need simply suspect a driver of drinking, not as is presently the case do they have to suspect him of having committed an offence.⁽²²⁾

Time of the Offence

relevant to

Section 59 C (8) of the 1968 amendment provided no indication as to whether the presumption that the concentration of blood alcohol at the time of the test was the same at the time of the offence; was capable of being rebutted by evidence to the contrary.

Plain

A full court in Stewart v Police⁽²³⁾ held the intention of the legislature in s. 59 C (8) was for the presumption to be irrebuttable. The Court held the quantity of alcohol in a person's blood is irrelevant, so long as the proportion exceeded the prescribed limit at the time of the blood test.

Following this decision Parliament amended s.59 C (8).⁽²⁴⁾ The Canadian Courts in considering this question have found that the moment the driver's intention was germane was when he entered the car and he himself so long as he remained in the drivers seat can not by a later decision to stop the car rebut the presumption that he had the care and control of the vehicle.⁽²⁵⁾

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P. 7
driving*

A recent decision of the Court of Appeal⁽²⁶⁾ reviewed the question of whether a traffic officer may acquire good cause to suspect an offence against s. 58 (1) and require a breath test after the suspected person has ceased driving a motor vehicle. The Court held that the section allows an officer with good cause to suspect to require a breath specimen

*but
better in
P. 5*

(21) Police v Anderson [1972] N.Z.L.R. p. 233,247 at line 3

(22) 'Evening Post' Wednesday 31st July 1974, page 1.

(23) [1970] N.Z.L.R. p.560

(24) S.58B(1)"it shall conclusively be presumed that the proportion of alcohol in the blood at the time of the alledged offence was the same as the proportion of alcohol in the specimen of blood provided by the person so accused."

(25) The Queen v Sample [1963] 40 C.R.p.245, 42 W.W.R.p.501

(26) Police v Bradley [1974] 1 N.Z.L.R. 113-116 line 20 - However, the Court don't wish to be too dogmatic in this approach. If more than a reasonable lapse of time has passed between driving & having a good cause to suspect an offence, no charge can be brought. However, what is reasonable?

not withstanding that the driving has ceased completely before either of these two steps.

Driving

In the case of Hawkins v Transport Department⁽²⁷⁾ it was held that a person who is only steering or attempting to steer a motor vehicle being towed by another motor vehicle by means of a rope is 'driving' the towed vehicle for the purposes of this section.

Yet in comparison to the New Zealand law, the Australian case of Caughay v Spacek⁽²⁸⁾ held that a motorist who was merely steering his car while being towed by another car was not driving the car within the meaning of the Australian Act.

Pursuit of Suspect onto Private Property

Possibly the final word on pursuit of a person on to private property was said in Police v Ward.⁽²⁹⁾ Generally Parliament and the Courts continue to look upon the New Zealanders home as his castle, yet here too a traditional concept has had to yield to the dictates of the road toll. In this case a motorist was followed by a traffic officer onto the property of the motorist's parent. The officer had good cause to suspect the motorist as he was travelling at excess speed. The Court decided that an occupier of private property is bound to allow a traffic officer or constable to enter on to his property to carry out a breath test if the breath test is carried out without reasonable delay after the driving in question, of a person whom the constable or traffic officer has good cause to suspect of having committed an offence under s.58 A (1)

'Loopholes' Resisting the Law

The defence of a technical error, is the accused's sole means of avoiding a conviction generally speaking.

In Auckland City Council v Fraser⁽³⁰⁾ the Court held that the requirement to deliver a blood sample to a Dominion Analyst or a Government Analyst or

(27) [1971] N.Z.L.R. p.1013

(28) [1968] V.R. p.600

(29) [1973] 2 N.Z.L.R. p.418

(30) [1973] 2 N.Z.L.R. p. 430

an officer of the Department of Scientific and Industrial Research by a traffic officer or constable, is mandatory. This is one of the facts that the informant has to prove to secure a conviction.⁽³¹⁾ This delivery of the blood sample must be independently proved. It is not sufficient to state on the Analyst's Certificate that a named traffic officer had delivered the sample.

It was held in the case of White v Auckland City Council that when an accused requests one part of the blood sample to be sent to an analyst of his choice,⁽³³⁾ the prosecution must show that the one part of the blood specimen was sent to an analyst, if it wishes to tender and rely on a certificate of the blood alcohol concentration of the accused under s. 58 B(9) as evidence.

Under Police v Fisher⁽³⁴⁾ the Court decided that one constable having good cause to suspect does not enable another constable to request a blood sample from a hospital.⁽³⁵⁾

Objections to the Blood Alcohol Legislation

There are two general objections to blood alcohol legislation;

- (i) that it is an invasion of the rights and privacy of the individual's freedom as to amount to an assault, and
- (ii) that it is contrary to the basic doctrine of immunity from being compelled to give evidence likely to incriminate oneself.

The general replies to these objects are; there are so many statutes authorising invasions into an individuals private affairs by the state that one more makes little difference.⁽³⁶⁾ Also, that blood alcohol legislation gives one as much opportunity of proving one's innocence as it does to scientifically concluding ones guilt.

A Canadian Court has found that the compulsory taking of breath and blood samples does not offend against the rights of due process of law or self incrimination in the Bill of Rights.⁽³⁷⁾

(31) s. 58B(6) Transport Amendment Act 1968.

(32) [1973] 2 N.Z.L.R. p.27

(33) s. 58B(7)

(34) [1974] 1 N.Z.L.R. p. 579

(35) s.58D(5)

(36) The Narcotics Act which permits searches of homes without warrants. Tuberculosis Act 1948 s16 authorising the detention of those suffering from the complaint.

(37) [1972] 7. C.C.C.(2d)p.181, 20 D.L.R.(3d) p. 603, s.c.c.

Summary

The present position in the blood alcohol field does not bode well for the individual. The Courts are looking more toward social consideration rather than the rights of the individual.⁽³⁸⁾ The legislature is assessing the need to protect the public rather than the individual. The present Minister of Transport, Sir Basil Arthur has stated he supports the notion of 'random' testing: "I've dropped random testing because of the thoughts it conjures up in the public mind of road blocks on Sunday afternoon. But I think it will come eventually, specially if the number of offences and accidents involving alcohol does not drop."⁽³⁹⁾

Indeed one could interpret this statement as meaning that the legislature will continue to tighten the blood alcohol laws as the road accident figures rise. Perhaps this is not the answer to the problem.

Social drinking plays an important role in the rising numbers of road accidents. A campaign to better educate the masses as to the consequences of drunken driving may be the best deterrent, rather than harsher penalties being enacted for those convicted of drunken driving.

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(38) Beattie's Case op.cit

(39) 'Evening Post' 31 July 1974 page 1.

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